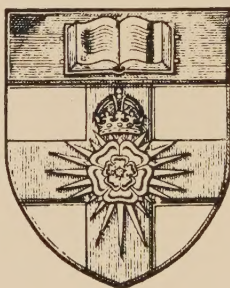


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SORRELL *v.* SMITH AND OTHERS

[HOUSE OF LORDS (Viscount Cave, L.C., Lord Dunedin, Lord Atkinson, Lord Sumner and Lord Buckmaster), February 10, 12, 13, 16, 17, May 15, 1925]

[Reported [1925] A.C. 700; 94 L.J.Ch. 347; 133 L.T. 370;
41 T.L.R. 529; 69 Sol. Jo. 641]

Trade—Combination to injure trader—Legality—Object of combination to forward or defend trade of members—No procurement of breach of contract—No use of threats or other unlawful means.

A combination of two or more persons wilfully to injure a man in his trade is unlawful, and, if it results in damage to him, is actionable, and malice in the sense of personal enmity, spite, or other evil motive need not be proved, but if the real purpose of the combination is, not to injure another, but to forward or defend the trade of those who enter into it, and no means in themselves unlawful, such as violence, the threat of violence, fraud, or other illegal action, are used, then no wrong is committed and no action will lie although damage to another ensues. The distinction between the two classes of case is sometimes expressed by saying that in cases of the former class there is not, while in cases of the latter class there is, just cause or excuse for the action taken. Cases where the defendants have procured a breach of contract stand on a special footing.

A federation, of which the plaintiff, a retail newsagent, was a member, advocated a policy (known as the distance limit policy) of preventing newcomers from opening shops for the retail sale of newspapers in any area where the supply of newspapers to the public was, in the opinion of the federation, already sufficiently provided for. Certain newcomers who, in the view of the retail federation, came within the district limit policy obtained supplies of newspapers from R. Bros., who were wholesale newsagents. As that firm could not be prevailed upon to stop supplies to the newcomers, the federation, in pursuance of a scheme for bringing pressure upon them to do so, induced the plaintiff to discontinue obtaining his supplies from R. Bros., and he transferred his orders to W. & Son. R. Bros. then wrote to the secretary of a committee of which the defendants were members and which was composed of the

circulation managers of London daily newspapers requesting him to take the matter up, and the committee then informed W. & Son that if they continued to supply the plaintiff, their own supplies from the newspaper offices would be stopped. W. & Son having ceased to supply the plaintiff with newspapers, he sued the members of the committee for "an injunction restraining the defendants or any or some of them in combination or otherwise from procuring or attempting to procure a breach of contract between the plaintiff and W. & Son, or from interfering or attempting to interfere with the right of the plaintiff to enter into or continue such contracts or contractual relations with W. & Son as he would or generally with his right to carry on his business as he would."

Held: the defendants had taken action for the sole purpose of protecting their own trade; they had not procured any breach of contract; and, therefore, they had not committed any wrong, and the plaintiff was not entitled to the injunction claimed.

The effect of combinations of two or more persons so acting as to lead to damage to another person, discussed.

Decision of the Court of Appeal, [1924] 1 Ch. 506, affirmed.

Mogul Steamship Co. v. McGregor Gow & Co. (1), [1892] A.C. 25, and *Allen v. Flood* (2), [1898] A.C. 1, applied.

Quinn v. Leathem (3), [1901] A.C. 495, distinguished.

Notes. Considered: *Crofter Hand Woven Harris Tweed Co., Ltd. v. Veitch*, [1942] 1 All E.R. 142. Referred to: *Farr v. Butters Bros. & Co.*, [1932] All E.R. Rep. 339; *De Jetley Marks v. Greenwood*, [1936] 1 All E.R. 863; *Thorne v. Motor Trade Association*, [1937] 3 All E.R. 157; *British Industrial Plastics, Ltd. v. Ferguson*, [1938] 4 All E.R. 504; *D. C. Thomson & Co. v. Deakin*, [1952] 2 All E.R. 361; *Huntley v. Thornton*, [1957] 1 All E.R. 234.

As to acts by a person or combination resulting in damage to a trader's business see 32 HALSBURY'S LAWS (2nd Edn.) 516 et seq., and for cases see 43 DIGEST 110 et seq.

Cases referred to:

- (1) *Mogul Steamship Co. v. McGregor Gow & Co.*, [1892] A.C. 25; 61 L.J.Q.B. 295; 66 L.T. 1; 56 J.P. 101; 40 W.R. 337, 8 T.L.R. 182; 7 Asp. M.L.C. 120, H.L.; 43 Digest 10, 51.
- (2) *Allen v. Flood*, [1898] A.C. 1; 67 L.J.Q.B. 119; 77 L.T. 717; 62 J.P. 595; 46 W.R. 258; 14 T.L.R. 125; 42 Sol. Jo. 149, H.L.; 43 Digest 111, 1164.
- (3) *Quinn v. Leathem*, [1901] A.C. 495; 70 L.J.P.C. 76; 85 L.T. 289; 65 J.P. 708; 50 W.R. 139; 17 T.L.R. 749, H.L.; 43 Digest 112, 1179.
- (4) *Ware and de Freville, Ltd. v. Motor Trade Association*, [1921] 3 K.B. 40; 90 L.J.K.B. 949; 125 L.T. 265; 37 T.L.R. 213; 65 Sol. Jo. 239, C.A.; 43 Digest 124, 1264.
- (5) *Garret v. Taylor* (1620), Cro. Jac. 567.
- (6) *Gregory v. Duke of Brunswick* (1843), 6 Man. & G. 205; 13 L.J.C.P. 34.
- (7) *Temperton v. Russell*, [1893] 1 Q.B. 715; 62 L.J.Q.B. 412; 69 L.T. 78; 57 J.P. 676; 41 W.R. 565; 9 T.L.R. 393; 37 Sol. Jo. 423; 4 R. 376, C.A.; 43 Digest 114, 1185.
- (8) *Giblan v. National Amalgamated Labourers' Union of Great Britain and Ireland*, [1903] 2 K.B. 600; 72 L.J.K.B. 907; 89 L.T. 386; 19 T.L.R. 708, C.A.; 43 Digest 118, 1226.
- (9) *Scottish Co-operative Wholesale Society v. Glasgow Fleshers' Trade Defence Association* (1898), 35 Sc. L.R. 645; 5 S.L.T. 263; 43 Digest 114, 1184v.
- (10) *Mackenzie v. Iron Trades Employers' Insurance Association*, 1910 S.C. 79; 34 Digest 189, 1553ii.
- (11) *Reynolds v. Shipping Federation, Ltd.*, [1924] 1 Ch. 28; 93 L.J.Ch. 70; 130 L.T. 341; 39 T.L.R. 710; 68 Sol. Jo. 61; 43 Digest 118, 1223.
- (12) *A.-G. of Commonwealth of Australia v. Adelaide Steamship Co., Ltd.*, [1913]

- A** A.C. 781; 83 L.J.P.C. 84; 109 L.T. 258; 12 Asp. M.L.C. 361; 29 T.L.R. 743, P.C.; 43 Digest 12, 68.
- (13) *Lumley v. Gye* (1853), 2 E. & B. 216; 22 L.J.Q.B. 463; 17 Jur. 827; 1 W.R. 432; 118 E.R. 749; 42 Digest 987, 169.
- (14) *South Wales Miners' Federation v. Glamorgan Coal Co.*, [1905] A.C. 239; 74 L.J.K.B. 525; 92 L.T. 710; 53 W.R. 593; 21 T.L.R. 441, H.L.; 43 Digest 114, 1186.
- B** (15) *Conway v. Wade*, [1909] A.C. 506; 78 L.J.K.B. 1025; 101 L.T. 248; 25 T.L.R. 779; 53 Sol. Jo. 754, H.L.; 43 Digest 120, 1237.
- (16) *Larkin v. Long*, [1915] A.C. 814; 84 L.J.P.C. 201; 113 L.T. 337; 31 T.L.R. 405; 59 Sol. Jo. 455, H.L.; 43 Digest 121, 1241.
- (17) *Kearney v. Lloyd* (1889), 26 L.R. Ir. 268; 42 Digest 986, e.
- C** (18) *Huttley v. Simmons*, [1898] 1 Q.B. 181; 67 L.J.Q.B. 213; 14 T.L.R. 150; 43 Digest 115, 1188.
- (19) *Hodges v. Webb*, [1920] 2 Ch. 70; 89 L.J.Ch. 273; 123 L.T. 80; 36 T.L.R. 311; 43 Digest 121, 1240.
- (20) *White v. Riley*, [1921] 1 Ch. 1; 89 L.J.Ch. 628; 124 L.T. 168; 36 T.L.R. 849; 64 Sol. Jo. 725, C.A.; 43 Digest 122, 1242.
- D** (21) *Vegelahn v. Guntner* (1896), 167 Mass. 92.
- (22) *Pratt v. British Medical Association*, [1919] 1 K.B. 244; 88 L.J.K.B. 628; 120 L.T. 41; 35 T.L.R. 14; 63 Sol. Jo. 84; 43 Digest 113, 1180.
- (23) *Bowen v. Hall* (1881), 6 Q.B.D. 333; 50 L.J.Q.B. 305; 44 L.T. 75; 45 J.P. 373; 29 W.R. 367, C.A.; 42 Digest 988, 174.
- E** (24) *R. v. Druitt, Lawrence and Adamson* (1867), 16 L.T. 855; 10 Cox, C.C. 592; 43 Digest 112, 1175.
- (25) *Stevenson v. Newnham* (1853), 13 C.B. 285; 22 L.J.C.P. 110; 20 L.T.O.S. 279; 17 Jur. 600; 138 E.R. 1208, Ex. Ch.; 42 Digest 972, 33.
- (26) *Leatham v. Craig*, [1899] 2 I.R. 667.

Appeal by the plaintiff from an order of the Court of Appeal (BANKES, WARRINGTON, and SCRUTTON, L.JJ.), reported [1924] 1 Ch. 506.

F The appellant, a retail newsagent, commenced this action against the defendants, who were members of a committee of circulation managers of the London daily newspapers, for an injunction restraining them or any or some of them from procuring, or attempting to procure, a breach of contract between him and a firm from whom he obtained supplies of newspapers, and restraining them from interfering or attempting to interfere with his right to enter into or continue such contracts or contractual relations with that firm as he willed, or generally with his right to carry on his business as he willed. The Court of Appeal held that the appellant had failed to prove that the defendants had committed any actionable wrong. The action taken by the defendants was legitimate, and was taken for the purpose of defending what was, in their opinion, the policy which it was necessary for them to maintain in order to sell their papers. The appellant appealed.

H *Sir John Simon, K.C., Maugham, K.C. (Arthur Henderson with them)* for the appellant.

Clauson, K.C., Wilfrid Greene, K.C. (Dighton Pollock with them) for the respondents.

The House took time for consideration.

I May 15. The following opinions were read.

VISCOUNT CAVE, L.C.—The facts of this case for present purposes may be very briefly summarised. The publishers of London daily newspapers supply their papers to wholesale newsagents, who in their turn supply them to retail newsagents for sale to the public. The retail newsagents have a trade union known as the National Federation of Retail Newsagents, Booksellers, and Stationers; and that federation has for some time advocated a policy which they call the "distance limit policy," and which is described by RUSSELL, J., [who

tried the case: see [1923] 2 Ch. 32] as a policy for preventing newcomers from opening shops for the retail sale of newspapers in any area where the supply of newspapers is, in the opinion of the federation, already sufficiently provided for. The interests of the publishers as regards the circulation of their newspapers are looked after by the respondents, who are a committee of the circulation managers of the London dailies; and the "distance limit policy" of the retail federation does not commend itself to the respondents, who probably look to free competition among newsagents as tending to increase sales. A B

Early in the year 1922 some newcomers commenced selling papers in a London area which, in the opinion of the London District Council of the retail federation, was already sufficiently equipped with retail newsagents; and these newcomers obtained their supplies of papers from a firm of wholesale newsagents called Ritchie Bros., of Shoe Lane, London. Thereupon the London District Council took action in support of their policy. Having failed to persuade Messrs. Ritchie to stop supplies to the newcomers, they, on Feb. 15, 1922, held a special meeting of the branch presidents and secretaries of their London district, at which a resolution was passed in the following terms: C

"That we ask one member from each branch to volunteer to withdraw his supply from Ritchie on any of the ground he covers, and further action be taken to draw him into line with other wholesalers on the distance limit policy." D

On the same day a meeting of the Shoreditch branch of the federation was held; and the secretary of that branch, who had attended the meeting of presidents and secretaries held by the district council, explained what had occurred at that meeting and asked for volunteers to take action against Ritchie Bros. in the manner described in the above resolution. The appellant, Mr. Sorrell, who was a retail newsagent at Hoxton and was obtaining his supplies from Ritchie Bros., was a member of the Shoreditch branch, and was present at the branch meeting; and after a number of speeches had been delivered he volunteered to take the action desired. Accordingly, on Feb. 20 the appellant gave notice to Ritchie Bros., that he would not require papers from them after Feb. 27, and on the latter date he transferred his custom to other wholesale newsagents—Messrs. Watson & Son, of Dalston Lane. None of the newcomers who had been supplied by Ritchie was within the area of the appellant's trade. On receiving the appellant's notice, Ritchie Bros., who were apparently aware of the purpose of the move, asked the respondent committee to take the matter up; and thereupon the committee (to put it shortly) told Watson's that, unless they ceased to supply the appellant with newspapers, the supply of papers to them would be stopped. They also communicated with Messrs. W. H. Smith & Son, through whom some of the papers were being supplied to Watson's, and requested them to stop the supply to Watson's unless Watson's ceased to supply the appellant. This pressure proved effective, and on March 24 Watson's wrote to the committee stating that they would discontinue the appellant's supplies of daily newspapers after March 25. A question arose as to the appellant being entitled to a longer notice of discontinuance, and on March 25 Watson's gave to the appellant a notice of discontinuance, expiring on April 1. On March 28 the appellant issued the writ in this action, claiming an injunction restraining the respondents in combination or otherwise from procuring or attempting to procure a breach of contract between the appellant and Watson's, or from interfering or attempting to interfere with the right of the appellant to enter into or continue such contracts or contractual relations with Watson's as he willed or generally with his right to carry on his business as he willed and claiming damages. E F G H I

The action was heard by RUSSELL, J., who, after reciting the above events, summed up his conclusion of facts as follows:

"(i) The plaintiff at the request of his branch ceased to deal with Ritchie's, because Ritchie's were supplying newcomers who, in the opinion of the retail

A federation, were cases to whom the distance limit policy should be applied ; (ii) The defendants, at the request of Ritchie's and in combination intervened, and for the purpose of securing that the plaintiff should return to Ritchie's as a customer brought pressure to bear on Watson's to discontinue their supplies to the plaintiff. (iii) This pressure was exerted on Watson's in part directly, by threatening to discontinue supplies to Watson's, and in part indirectly, through W. H. Smith & Son, by threatening to discontinue supplies to W. H. Smith & Son, if they did not discontinue supplies to Watson's so long as Watson's continued to supply the plaintiff. In other words, the defendants combined to bring it about by threats that Watson's should refuse to deal with the plaintiff—that is, they combined to interfere, by coercion of Watson's, with the trade of the plaintiff, with his right to carry on his business as he would, and to deal with such people as he thought fit. I will add this additional fact, of which I am upon the evidence satisfied, that in acting as they did the defendants were not actuated by any spite against the plaintiff, or by any intention or desire to injure him. They desired that he should take back his custom to Ritchie's ; they were quite unaware of the fact, if it be the fact, that it was to the plaintiff's advantage, pecuniary and otherwise, to deal with Watson's rather than with Ritchie's."

He added that in his view of the evidence no case arose of the defendants combining to procure a breach of any contract between the plaintiff and Watson's, and that no breach of contract had in fact taken place. Under an undertaking given to the court, Messrs. Watson had continued to supply the plaintiff, and accordingly no question of damages arose at the trial and the application was for an injunction only. RUSSELL, J., in a careful judgment, expressed the opinion that *Quinn v. Leathem* (3) had decided that a combination of two or more to induce by threats a man's customers not to deal with him was, if damage resulted, actionable, unless justification existed, and that the decision did not, in his opinion, depend upon the existence in the combination of an intent to injure ; and, holding that there was no sufficient justification for the action of the defendants, which he attributed solely to their desire to have the final voice in each case as to the application of the "distance limit policy" of the retail federation, he granted an injunction. On appeal from this judgment the Court of Appeal (BANKES, WARRINGTON, and SCRUTTON, L.JJ.), following the decision of the same court in *Ware and de Freville, Ltd. v. Motor Trade Association* (4), held that an intent to injure was an essential part of the offence charged ; and, being of opinion that the defendants had taken action, not for the mere purpose of obtaining control of the "distance limit policy," but in order to protect their trade interests by securing a free sale of newspapers, they held this to be a sufficient justification for the defendants' action. They, accordingly, reversed the judgment given for the plaintiff, and ordered judgment to be entered for the defendants with costs.

H The plaintiff thereupon appealed to this House.

The argument on this appeal ranged over a wide field and involved the examination of a large number of authorities, including the famous trilogy of cases in your Lordships' House, *Mogul Steamship Co. v. McGregor Gow & Co.* (1), *Allen v. Flood* (2), and *Quinn v. Leathem* (3). Such examination is of no value unless it yields some general principle or test which may be of service in deciding other cases ; and from these authorities, which I have carefully read and considered, I deduce as material for the decision of the present case two propositions of law, which may be stated as follows : (i) A combination of two or more persons wilfully to injure a man in his trade is unlawful, and, if it results in damage to him, is actionable. (ii) If the real purpose of the combination is, not to injure another, but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie although damage to another ensues. The distinction between the two classes of case is sometimes expressed by saying

that in cases of the former class there is not, while in cases of the latter class there is, just cause or excuse for the action taken. A

To quote the material parts of the long series of judgments upon which the above conclusions are based would be an endless task, but an attempt to classify the more important of them may be of service. The first proposition is at least as old as *Garret v. Taylor* (5), and appears in many later cases ; and, although it seemed for a moment to be obscured by some observations made in the judgments in *Allen v. Flood* (2), it was, I think, fully re-established in *Quinn v. Leathem* (3), where LORD HALSBURY said that if upon the facts there found (which fell within the above definition) the plaintiff could have no remedy against those who had thus injured him, it could hardly be said that our jurisprudence was that of a civilised community. The first proposition is further illustrated by *Gregory v. Duke of Brunswick* (6), *Temperton v. Russell* (7) and *Giblan v. National Amalgamated Labourers' Union of Great Britain and Ireland* (8). The second proposition was fully established in the *Mogul Case* (1), and in *Allen v. Flood* (2), and effect was given to it in *Scottish Co-operative Wholesale Society v. Glasgow Fishers Trade Defence Association* (9), *Mackenzie v. Iron Trades Employers' Insurance Association* (10), *Ware and de Freville, Ltd. v. Motor Trade Association* (4), and *Reynolds v. Shipping Federation* (11). Both propositions were stated by BOWEN, L.J., with characteristic lucidity in the *Mogul Steamship Case* (1) (23 Q.B.D., at p. 611, ff.), and were summarised by LORD PARKER in *A.-G. of the Commonwealth of Australia v. Adelaide Steamship Co.* (12) ([1913] A.C. at p. 793). In enumerating these authorities I have not included cases where the defendants had procured a breach of contract, as those cases stand on a special footing and in the present case no such breach was procured. Among these cases are *Lumley v. Gye* (13), *South Wales Miners' Federation v. Glamorgan Coal Co.* (14), *Conway v. Wade* (15), and *Larkin v. Long* (16). B C D E

To the text of the above general propositions I would add the following footnotes. (a) Although the first proposition is confined to a combination of two or more, it does not necessarily follow that the existence of a combination is essential to the commission of the offence. There is some authority for the view that what is unlawful in two is not lawful in one, and that the circumstance that two or more persons combine to cause the injury, while it may be very relevant as evidence of the purpose and as an aggravation of the damage, is not itself an essential element in the cause of action: see the opinions expressed by PALLES, C.B., in *Kearney v. Lloyd* (17) (26 L.R. Ir. at p. 280) and by ROMER, L.J., in the *Giblan Case* (8) ([1903] 2 K.B. at p. 619); and see also *Huttley v. Simmons* (18). But in the present case, where a combination clearly existed, this question does not arise ; and, accordingly, I express no opinion upon it. (b) In some cases "malice" is postulated as an element in the tort which I am considering. If the word means only that the act complained of is wilfully and knowingly done, or that it is done for the purpose of injuring another, then it is rightly used in this connection. But there is a tendency to interpret "malice" as connoting personal enmity or spite or some other evil motive ; and as such a motive is neither an essential element in the offence nor conclusive of the offence having been committed, it seems better to forego the use of the word. (c) The second proposition, of course, assumes the absence of means which are in themselves unlawful, such as violence or the threat of violence or fraud. Your Lordships were asked to say that a threat to withdraw custom or supplies falls within this category, and of itself introduces an element of illegality ; but although there are passages in the books which appear to support that contention, it did not appear to me that the contention was made good. If a trader may withdraw his custom without breaking any law, he may with equal legality express his intention of withdrawing it unless his wishes are met, subject always to the condition that the purpose of the threat is to forward his trade interests and not wilfully and ultroneously to injure the trade of another: see, on this point, *Hodges v. Webb* (19) and *White v. Riley* F G H I

A (20), and the observations of HOLMES, J., in the American case of *Vegeahn v. Guntner* (21). (d) There is here no question of a "trade dispute" within the meaning of the Trade Disputes Act, 1906. The quarrel here is not between employer and workman or between workman and workman, but between trader and trader. The above observations, therefore, are not directed to such a case.

B If these conclusions are applied to the present case, it is not difficult to arrive at a decision upon this appeal. That the defendants combined in a proceeding, the necessary effect of which would have been to injure the plaintiff in his trade unless he submitted to their conditions, may be assumed; but did they do so for the purpose of injuring the plaintiff in his trade, or was it their purpose and object to forward or defend their own trade? I am satisfied that the latter is the true view. The learned trial judge found as a fact that the defendants were not actuated by any spite against the plaintiff or by any intention or desire to injure him. Their purpose was to defeat the "distance limit policy" of the retail federation, which they considered injurious to the free sale of their newspapers; and because the plaintiff, at the instance of the retail federation and in concert with them, was endeavouring to forward that policy by withdrawing his custom from Ritchie's the defendants, as a counter move, declined to supply Watson's with papers which Watson's could hand on to the plaintiff. Both moves were episodes in a trade war which was being waged between the retailers of newspapers, on the one hand, and the producers and wholesalers, on the other, and were adopted in the supposed interests of one or the other side. Stroke and counter stroke, whether wise or not, was equally prompted by a desire to forward or protect trade interests. The plaintiff struck the first blow, and when it was countered by a similar blow struck by the defendants ran to the court for protection. His attitude recalls the saying of a French author: "*Cet animal est très méchant; quand on l'attaque, il se défend.*" Apparently, he forgot that if the defendants were acting illegally then so was he, and that if he was acting illegally a court of equity would hardly be disposed to help him. I think that in this case it was proved that the defendants took action for the sole purpose of protecting their own trade, and, accordingly, that they have not committed or threatened to commit any wrong and are not liable to any proceedings. For these reasons, which substantially agree with those given by the learned lords justices in the Court of Appeal, I am of opinion that this appeal fails, and I move your Lordships that it be dismissed with costs. My noble and learned friend, LORD ATKINSON, desires me to say that he concurs in this judgment.

G LORD DUNEDIN.—This is a case of great importance not only to the parties themselves but for the effect which your Lordships' judgment may have on future cases. Indeed, RUSSELL, J., and BANKES and SCRUTTON, L.JJ., embodied in their judgments an appeal for guidance so touching as to recall the prayer of Ajax—*Ἐν θε φάει καὶ ὀλεσσον*: "Reverse our judgment an it please you, but at least say something clear to help in the future." In the state of the authorities this is, I think, a reasonable request. It may not be easy to comply with, but for my own part I shall do my best. The case was admirably argued on both sides, which makes the task an easier one.

I The question at the root of such cases is in what kind of concerted action which brings injury to an individual as its result can the proceedings be restrained at law or damages given for the injury done? The case is necessarily different from that of injury effected by the action of an individual. When A. by his action causes loss to B., the sole question is, was A.'s action a tort, and the law as to what is and what is not a tort may be said to be well settled. With any law, however well settled, difficulties may and do still arise in its application to the ever-varying kaleidoscope of circumstances. But except for that there cannot be said to be much difficulty in the law of tort. One noticeable attempt for its extension was put an end to by *Allen v. Flood* (2). I shall have to revert to that

case, but in its application to action by an individual, and that was all that as a decision it dealt with ; it settled that the only question was : Was there a tort?, and that in the solution of that question the motive of the doer of the act had no significance. A

Passing, therefore, to the case of concerted action, the first and obvious observation is that, if a combination of persons do what, if done by one would be a tort, an averment of conspiracy so far as founding a civil action is mere surplusage. But when there is nothing done which per se would be a tort, then one is at once faced by the consideration that a particular thing done, not in itself a tort, may, if done by an individual, be supportable though unpleasant, but may, if done by many in concert, become insupportable and create a real injury. This truism has been recognised by many learned judges. As examples may be given the words of LORD HALSBURY in *Allen v. Flood* (2), and many other passages might be quoted. I am tempted to consider what, in face of that fact, one would feel inclined to lay down as the law if there were a clean slate and the books held no authority on the subject. I think I should say to a jury : You must consider whether the act or acts complained of which caused loss and hurt to the plaintiff were done with the purpose of injuring the plaintiff. Was such a purpose the real root of the acts that grew from it, or was the true motive of the acts something else, such, as for instance, the furtherance of the defendant's own business? I have avoided the use of the words "legitimate" and "wrongful," which are so often used. When used by way of legal definition I say, with the utmost respect for all the learned judges who have so frequently used them, that they seem to me really to beg the question ; but if used in giving directions to a jury I do not think they would be hurtful, for, in truth, in asking a jury to decide between the two alternatives you are not able to give strict legal definition, you are really appealing to that inner standard of right and wrong, that something which is not exactly conscience, but which, I think, is best expressed by the French term "for intérieur" [tribunal of the conscience], and it is by the arbitrament of that standard that a jury will decide between the two alternatives. I believe the question as I have put it would elicit a satisfactory answer, and that that answer would, in accordance with the law, allow a verdict to be entered for the plaintiff or the defendant. Alas, however, the slate is not clean ; on the contrary, the books are full of decisions, so many and so various that it would be an impossible task to reconcile either the decisions or the dicta. Sitting in your Lordships' House, I am not bound by much that has been said and decided, but I am bound by the decisions of this House, and I, therefore, propose to see whether the question I have put can be reconciled with authority. The difficulty is enhanced by the fact that not only are there the authorities themselves, but there is a mass of commentary on what the authorities really come to, and many of the commentaries do not agree. B C D E F G

While in the Court of Session I had occasion to deal partly with this subject in *Mackenzie v. Iron Trades Employers' Insurance Association* (10). That case was not brought before the notice of the Court of Appeal either in this case or in *Ware and de Freville, Ltd. v. Motor Association* (4), on which this case has proceeded, but before your Lordships it was quoted as an authority in their favour by each of the opposing counsel. At first I was afraid I must have expressed myself with the studied ambiguity of the Delphic oracle, but on further reflection I came to see that the learned counsel really agreed that it rightly stated the law, as far as it went, and as after reconsideration I adhered to what I then said, and as the passage is not long, I shall venture to repeat it here : H I

"There is a great deal of authority in law upon this subject ; I cannot say that the subject can be called an easy one and when the subject is not an easy one the application of the law to the particular circumstances is always difficult. But I think the three leading cases upon the subject, without any doubt, are the well-known cases of the *Mogul Steamship Co. v. McGregor Gow*

A & Co. (1), of *Allen v. Flood* (2), and of *Quinn v. Leathem* (3). Now the result of those cases in my mind is this. In the first place, everyone has the right to conduct his own business on his own lines and as pleases him best, even although the result may be that he interferes with other people's business in so doing. That, I think, may be gathered from the *Mogul Case* (1). Secondly, an act that is legal in itself will not be made illegal because the motive of the act may be bad. That is the result, I think, of *Allen v. Flood* (2). Thirdly, even although the dominating motive in a certain course of action may be the furtherance of your own business or your own interests, as you conceive those interests to lie, you are not entitled to interfere with another man's method of gaining his living by illegal means, and illegal means may either be means that are illegal in themselves or that may become illegal because of conspiracy, where they would not have been illegal if done by a single individual. I think that is the result of *Quinn v. Leathem* (3)."

I said "as far as it went," for in that case I next proceeded to point out that conspiracy was not alleged. The case, therefore, stopped short of throwing light on what we have now to decide, but I think it correctly sums up, in a very short way, the import of the three decisions—the *Mogul Case* (1), *Allen v. Flood* (2), and *Quinn v. Leathem* (3).

That brings me to what I consider the leading heresy which is to be found in some judgments and text writers, viz., to use, e.g., the words of McCARDIE, J., in *Pratt v. British Medical Association* (22) ([1919] 1 K.B. at p. 260), when, in speaking of *Quinn v. Leathem* (3) he says: "The element of conspiracy seems to have been a merely incidental feature of that case." Practically the same was said in this case by RUSSELL, J. In rejecting such a view, I entirely concur with ATKIN, L.J., in the *Ware and de Freville Case* (4), when he said:

"It appears to me to be beyond dispute that the effect of the two decisions in *Allen v. Flood* (2) and *Quinn v. Leathem* (3) is this, that on the one hand a lawful act done by one does not become unlawful if done with an intent to injure another, whereas an otherwise lawful act done by two or more in combination does become unlawful if done by two or more in combination with intent to injure another."

I have read and re-read the judgments in *Quinn v. Leathem* (3) and I confess I found it very hard to understand how anyone could come to the conclusion that conspiracy was only a side issue instead of being, as I think it clearly was, the very gist and essence of the decision. But, as the view has not only been stated but has gained many adherents, I think it better to give the reason for my opinion. In the first place, the question technically before the House was whether to reverse or affirm a judgment of the Court of Appeal in Ireland which had affirmed a judgment of a Divisional Court which had refused a motion "to set aside the verdict and judgment and to enter a verdict for the defendants; or, in the alternative, for a new trial on the ground of misdirection" and then follow the various ways in which it was said the learned judge had misdirected the jury. This sends us back to the verdict and the charge. Specific questions were put by the judge, of which (i) and (ii) were as follows (the other questions as to the black list may be disregarded):

"(i) Did the defendants, or any of them, wrongfully and maliciously induce the customers and servants of the plaintiff, mentioned in the evidence, to refuse to deal with the plaintiff? Answer: Yes. (ii) Did the defendants, or any two or more of them maliciously conspire to induce the plaintiff's customers' servants, mentioned in the evidence, or any of them, not to deal with the plaintiff and not to continue in his employment and were such persons so induced not to do so? Answer: Yes."

I have little doubt that it is to the existence of this finding No. (i) that the opinion has been formed that the final judgment was independent of conspiracy. Now

the trial took place in 1896 and *Allen v. Flood* (2) was not decided in this House until December, 1897. At the date of the trial, there was ample authority for the proposition that if anything is done for the direct purpose of injuring the plaintiff or to benefit the defendants at the expense of the plaintiff, it is a malicious act which is in law and in fact a wrong, and, therefore, a wrongful act, and, therefore, an actionable act if injury ensues from it and that apart from conspiring: *Bowen v. Hall* (23) by BRETT, L.J., 6 Q.B.D. at p. 338; and *Temperton v. Russell* (7), [1893] 1 Q.B. at p. 728. But the learned judge, after discussing the words "wrongful" and "malicious," went on to charge the jury as follows:

"Finally I told the jury that acts done with the object of increasing the profits or raising the wages of any combination of persons, such as the society to which the defendants belonged, whether employers or employed, by reasonable and legitimate means, were perfectly lawful, and were not actionable so long as no wrongful act was maliciously, that is to say, intentionally, done to injure a third party. To constitute such a wrongful act for the purposes of this case, I told the jury that they must be satisfied that there had been a conspiracy, a common intention, and a combination on the part of the defendants to injure the plaintiff in his business, and that acts must be proved to have been done in furtherance of that intention which had inflicted actual money loss upon the plaintiff in his trade."

The verdict as applied was supported by both the findings, but by the time the motion to set aside the verdict came before the Divisional Court and afterwards the Court of Appeal, *Allen v. Flood* (2) had been decided, and consequently it will be found that the whole argument turns on whether *Allen v. Flood* (2) really applies to actions of conspiracy. ANDREWS, J., and ASHBORNE, L.C., point out that there was no question of conspiracy in *Allen v. Flood* (2). HOLMES, L.J., also characterised what had been done as a criminal conspiracy. I do not mention PORTER, J., because I think, as his reference to *R. v. Druitt* (24) shows, his judgment turned rather on the use of illegal means. When the case came to this House the counsel for the appellant clearly saw that in order to apply the judgment of *Allen v. Flood* (2) to his case, it was necessary to make out that conspiracy made no difference. *Allen v. Flood* (2) had carried them through the difficulties of the first finding, if that finding is read as I have read it, independent of conspiracy, but it did not carry them through the second, unless conspiracy made no difference, and accordingly in their argument I find this: "An act which is not in itself actionable, does not become so because the motive is malicious or bad (*Allen v. Flood* (2)) nor because it is done in combination by two or more, or by the conspiracy of several, unless the conspiracy be criminal. There is no question of criminality here." Again: "It is an old fallacy to argue that though one man may legally injure another, the same act in several combined is illegal because several can do more mischief than one. It is not true: some men are a host in their individual selves; are lions; some multitudes are asses—for example, Napoleon, Bismarck, and the nations whom they crushed."

When it comes to judgment, LORD HALSBURY, L.C., in his very opening sentences puts it as a case of conspiracy. LORD HALSBURY had been in the minority in *Allen v. Flood* (2), and he protests against *Allen v. Flood* (2) being carried beyond its own facts. LORD MACNAGHTEN explained with great clearness the import of *Allen v. Flood* (2). It had, he explained, laid down no new law, but said the headnote might have been taken from the words of PARKE, B., in *Stevenson v. Newnham* (25) (13 C.B. at p. 297):

"An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent."

Then he explains that what *Allen v. Flood* (2) had done was to sweep away the erroneous proposition laid down by BRETT, L.J., in *Bowen v. Hall* (23) and *Temperton v. Russell* (7), the very proposition on which, as I have above remarked, the

A first question and finding viewed as not being a conspiracy could be founded. That view, therefore, really leaves the conspiracy finding No. (ii) as the only finding remaining. Speaking of LORD WATSON's judgment in *Allen v. Flood* (2), he says :

B "Obviously LORD WATSON was convinced in his own mind that a conspiracy to injure might give rise to civil liability even although the end were brought about by conduct and acts which by themselves and apart from the element of combination or concerted action could not be regarded as a legal wrong."

Applying this to the facts of *Quinn v. Leathem* (3) it is obvious that as a mere question of an act by itself Munce might at any moment have refused to take Leathem's beef and no wrong would have been perpetrated. Further on LORD MACNAGHTEN says,

C "that a conspiracy to injure—an oppressive combination—differs widely from an invasion of civil rights by a single individual cannot be doubted. I agree in substance with the remarks of BOWEN, L.J., and LORD BRAMWELL and LORD HALSBURY in the *Mogul Case* (1). A man may resist, without much difficulty, the wrongful act of an individual . . . but it is a very different thing (as LORD FITZGERALD observes) when one man has to defend himself against many combined to do him wrong."

All this is right in the teeth of the argument for the appellant quoted above. I need not multiply citations. LORD SHAND goes on combination and conspiracy alone, so does LORD BRAMPTON. I cite only one sentence,

E "I note, in confirmation of this, that the lord justice pointedly told the jury that proof of a conspiracy was essential to the support of the action."

To sum up. There are some observations in LORD LINDLEY's judgment which might seem to point to another ground of action and LORD HALSBURY proceeds on the ground of threats, which in that case he regarded as illegal means, or in other words, tortious acts, as well as a conspiracy to injure. But as regards the others, LORD MACNAGHTEN demolished in terms every finding as the basis of the verdict except the finding of the conspiracy, and in the judgments of all the others, all, save conspiracy, has passed out of sight. In fact, I endorse what was said by F ATKIN, L.J., in *Ware and de Freville, Ltd. v. Motor Trade Association* (4) :

G "The case seems to me not to turn in any degree on the evidence as to threats ; the foundation of the decision was the principle expressly reserved in the decision *Allen v. Flood* (2) that a combination to injure may be unlawful where the intention by one is not."

H It may seem self-confident to be positive when so many learned persons have expressed other views, but candidly I never held a clearer opinion than the one I now express, that the effect of *Allen v. Flood* (2) and *Quinn v. Leathem* (3) is to settle beyond dispute that in an action against an individual for injury he has caused to the plaintiff by his action, the whole question is whether the act complained of was legal, and motive or intent is immaterial ; but that in an action against a set of persons in combination, a conspiracy to injure, followed by actual injury, will give a good cause for action, and motive or intent when the act itself is not illegal is of the essence of the conspiracy. If that be so, the form of question which at first I indicated as what I should put to a jury is justified by the authorities. Before finally leaving the subject, it may be well to point out that all through the *Mogul Case* (1) it was clearly indicated that if the facts had raised conspiracy to injure, the result would have been different. Thus LORD WATSON says :

"If the respondents' combination had been formed, not with a single view to the extension of their business and the increase of its profits, but with the main or ulterior design of effecting an unlawful object, a very different question would have arisen for the consideration of your Lordships."

But no such thing is pointed out by the acts disclosed in that case, and LORD BRAMWELL, speaking of what might have been urged if the acts had been different, speaks of it then as an indictable conspiracy. A

It is a very natural question to ask why should motive be immaterial in the case of an act done by one and yet go to make the whole difference when the act is done by a combination of persons? Yet I do not think that one is driven to take refuge in the well-known shelter provided by LORD HALSBURY when he pointed out that law was not a logical science. Your Lordships are aware, for it was brought before your notice both by the judgments in the case and by the learned counsel who argued it, that in 1906 I sat as chairman of a Royal Commission on Trade Disputes, and that to the report of that commission there were appended some papers dealing with decided cases which were the joint work of the late Mr. A. Cohen and myself. My Lords, I have very carefully reconsidered what was then said and I do not find it necessary to say that I have changed my opinion. In the report we who were of the majority said this: B C

"Whether there can truly be a civil action of conspiracy on facts which fall short of criminal conspiracy cannot be said to be settled. We have carefully considered the matter and our view is in the negative." D

That view is expounded in a memorandum on the civil action of conspiracy. The only slight change which I would make is that in the comments on *Gregory v. Duke of Brunswick* (6) I am not inclined now to put so much stress on the idea of creating a riot as on the purpose to injure the actor and ruin his career by organised and concerted hissing. I beg leave to refer to that memorandum. I have also quoted from the judgments in the courts below, in *Quinn v. Leatham* (3), some direct pronouncements to the same effect. Now the moment that that is recognised, i.e., that the essence of conspiracy on which civil action is founded is a criminal conspiracy, though of course unless actual damage has followed no civil action will lie, the moment that fact is recognised, you at once bring in the spirit of the criminal law, where motive—the mens rea—is everything. As LORD LINDLEY said in *Quinn v. Leatham* (3): E F

"It would revolutionise criminal law to say that the criminal responsibility for conduct never depends on intention";

and it is just the motive or intention, the mens rea, that makes the difference between a combination which is innocent, even although it inflicts damage e.g., the *Mogul Case* (1), or a combination which as it was based on a mens rea, a desire to injure, becomes conspiracy, e.g., *Quinn v. Leatham* (3). Whether what a man does is, to use the not accurate, as I think, but still convenient, phrase, in the legitimate furtherance of his own business, is really no more than a piece of evidence which enables the jury to answer the question I put at the beginning, one way or the other. I would like to add that to say that a conspiracy to found the civil action must be a criminal, i.e., an indictable conspiracy, is not tantamount to saying that in each and every case you might expect a jury if the case were tried in a criminal court to return a verdict of Guilty. In many cases they might and probably would think that the civil remedy was sufficient. G H

This brings me to a criticism which I would much sooner not make, because in a sense it is hypercritical, but which I must make in order to maintain the logic of this opinion. This criticism is as to the way, in some parts of their opinions, the learned judges in the Court of Appeal (always excepting ATKIN, L.J.) have expressed themselves in this case and in *Ware and de Freville, Ltd. v. Motor Trade Association* (4) on which this case is founded. There are many phrases in their opinions which express the rule exactly as I have done, e.g., BANKES, L.J., in *Ware's Case* (4), says: I

"The decisions in the *Mogul Case* (1), *Allen v. Flood* (2), and *Quinn v. Leatham* (3) are all in agreement to the extent that a combination of persons to do some

A act, the object of which is to injure some third person, is wrongful and actionable. So, too, is a combination of persons to do some act by unlawful means which will have the effect of injuring some third person."

Then he goes on to say that there was no evidence to justify a verdict of conspiracy such as was obtained from the jury in *Quinn v. Leathem* (3). But there are other passages where the question is expressed as being whether the defendants have

B "justified" their action. BANKES, L.J., says:

"The question in the present case is not so much whether the plaintiffs have made out a *prima facie* case as whether the defendants have justified their action."

C He cites LORD BOWEN's expressions in the *Mogul Case*. But it must be noted, as pointed out by Mr. Cohen and myself in the memorandum, that when BOWEN, L.J., penned the sentence quoted, he was bound by *Bowen v. Hall* (23) in the Court of Appeal, for *Allen v. Flood* (2) had not yet been decided in this House, and what he said was right if *Bowen v. Hall* (23) in its major proposition was good law. The same phrase as to justification is used by other learned judges. I again say I am sorry thus to criticise, because I feel that in substance the learned judges are applying the same standard as I am, but my excuse for the criticism lies chiefly in this, that their way of expressing the question formed, if I may use the phrase, the jumping-off place for the very able and clear argument presented by counsel for the appellant in the present case. That argument although developed, and properly so, at considerable length, can really be condensed into a very few sentences. His propositions were these: (i) A man has the right to trade as he pleases. Sorrell could, therefore, go to Watson for his supplies if he wished instead of to Ritchie. (ii) The right of a man to trade as he pleases implies a correlative obligation on all others to let him trade as he pleases. (iii) If others interfere, that is *prima facie* a wrongful act and can be restrained by legal process. (iv) A *prima facie* unlawful act may be justified. (v) Mere anxiety to promote their own interests is not sufficient justification for those who so interfere. But counsel for the appellant was answered by counsel for the respondents with an argument just as clear as his, which was directed to breaking down the third of the propositions, and in that, I think, he was successful.

E In my opinion already, I fear, far too long, I must not multiply citations; but the whole matter will be found discussed at length in LORD HERSCHELL's opinion in *Allen v. Flood* (2). That learned judge says ([1898] A.C. at p. 132).

G "It was contended that the defendant by the course he took had interfered with the plaintiffs in their trade and calling, and that this of itself was an actionable wrong."

H He then goes on to examine the well-known decoy case and the other cases cited, which he holds do not bear out the proposition, and then, discussing it on principle, he says (*ibid.* at p. 138):

I "I do not doubt that everyone has a right to pursue his trade and employment without 'molestation' or 'obstruction' if those terms are used to imply some act in itself wrongful. This is only a branch of a much wider proposition, viz., that everyone has a right to do any lawful act he pleases without molestation or obstruction. If it be intended to assert that an act not otherwise wrongful always becomes so if it interferes with another's trade or employment and needs to be excused or *justified* I say that such a proposition in my opinion has no solid foundation in reason to rest upon."

The italics are mine. The truth is that the affirmant of the third proposition shuts his eyes to the fact that the act which interferes may be *per se* just as lawful an act as the act which is interfered with, and that is the way which LORD MACNAGHTEN expresses it in the same case. He says (*ibid.* at p. 151):

"I do not think that there is any foundation in good sense or in authority for the proposition that a person who suffers loss by reason of another doing or not doing some act which that other is entitled to do or to abstain from doing at his own will and pleasure, whatever his real motive may be, has a remedy against a third person who, by persuasion or some other means not in itself unlawful, has brought about the act or omission from which the loss comes, even although it could be proved that such person was actuated by malice towards the plaintiff, and that his conduct if it could be inquired into was justification or excuse."

I entirely agree with those two noble and learned Lords. A citation which may sound to be to the contrary was made by a judgment by LORD PARKER in the Privy Council in *A.-G. of the Commonwealth of Australia v. Adelaide Steamship Co., Ltd.* (12). No one respects more than I do the dicta of that very learned judge, but, expressed as it is, it is only a dictum. The case really depended on a question of statutory legislation. As the quotation stands in its full breadth it is incompatible with the judgments I have just quoted, and so long as the present practice of the Judicial Committee prevails, it is obvious that not only can the authority of the other noble and learned Lords who heard the case not be invoked—for it is possible that any one of them might, if left to himself, have tendered different advice to His Majesty—but still less can a dictum which is sought to be applied with far-reaching effect be supported as the considered opinion of the other members of the tribunal.

This brings me at last in sight of the actual facts in this case. For the reasons stated I think the third proposition of counsel for the appellant breaks down, and with it that way of stating the argument. But the question of conspiracy still remains. The means were not illegal; all the means used were to tell Watson that if he did not cease supplying Sorrell, the newspaper proprietors would cease to supply him. To cease to supply Watson was just as legal in itself as Sorrell's leaving Ritchie, because he did not carry out the distance resolution. What I have to do is to fancy myself a jurymen, faced with the question with which I began this opinion, and which, I think, still remains: Was there here a conspiracy to injure Sorrell? I hold there was not. I entirely agree with the way that the learned judges of the Court of Appeal have looked at the facts. Sorrell had volunteered to take action as a piece of policy on behalf of the federation. The action of the circulation managers was a defensive action to protect their own trade against being dictated to by the federation; it was in no sense a conspiracy to injure Sorrell, and here I again repeat my apology for my hypercriticism. I agree so thoroughly with what the learned judges of the Court of Appeal said; only I look at the inquiry into the facts, not as a means of arriving at the conclusion whether there was justification of what, without justification, would be an illegal action, but as evidence of whether there was any proof of illegal action, i.e., a conspiracy to injure, and I find, as a jurymen, that there was none. As I am attempting to deal with the whole subject, I should say something as to the meaning of the expression "threats," which, as I have noticed above, LORD HALSBURY in some of his remarks in *Quinn v. Leatham* (3) considered as in that case equivalent to a tortious act. The matter is discussed at some length by SCRUTTON and ATKIN, L.J.J., in the *Ware and de Freville Case* (4), and with their views I generally agree. Expressing the matter in my own words, I would say that a threat is a pre-intimation of proposed action of some sort. That action must be either per se a legal action or an illegal, i.e., a tortious action. If the threat used to effect some purpose is of the first kind, it gives no ground for legal proceeding; if of the second, it falls within the description of illegal means, and the right to sue of the person injured is established.

I must also add one word as to the citation by SCRUTTON, L.J., of BOWEN, L.J.'s words as to a varying standard. I have no fault to find with them as they were

A used in the *Mogul Case* (1) where, there being no illegal means and no conspiracy made out, it was attempted to fix a further standard of what was "reasonable" or "legitimate" to do. But these words must not be pressed too far. When you ask a jury or a judge whether there was a conspiracy to injure or only a set of acts dictated by business interests, you necessarily come in contact with the view that is held by that jury or judge. Take a very simple case, a running-down case by driving in a thoroughfare. However much a jury may have explained to them what is meant by negligence, yet it will always remain that one set of men might return a different verdict from another set of men on the same facts. And this leads me to my last remark. I do not know whether I have truly responded to the invitation of the learned judges in the courts below, to say something clear. I may have failed, but even if I have succeeded, there will still be cases that arise where an application of the law, be it ever so clearly set out, is attended with great difficulty, when the facts are so evenly balanced that it will be possible to fall on one side of the stile or on the other. But in this case I do not personally think that they are difficult; I find no illegal means, I find no conspiracy to injure, and, therefore, I think the judgment is right. I hope it is unnecessary to add that in my long review of authority I have entirely put on one side the law as applied to disputes between employers and workmen and between trades unions and others, the law on such questions being regulated, to a great extent, by special statutory provisions.

E LORD SUMNER.—RUSSELL, J.'s, statement of the facts, as reported in [1923] 2 Ch. at pp. 50–52, deserves very careful study. Put shortly but not, I hope, so as to do him any injustice, his view was that the defendants were well-meaning busybodies, who intimidated third parties and so meddled with the plaintiff's business in a manner which was no business of theirs. That he was right in acquitting them of malice—that is, of malevolence—there can be no doubt. There was no evidence of it. The defendants did not even know Mr. Sorrell. For the rest, I think it is clear that they were minding their masters' business and that there was neither threat used nor intimidation brought about. They were employed to look after the circulation of the papers they represented, and they thought, as well they might, that (in general) the more people try to sell papers the better for the papers. They found the plaintiff's association endeavouring to enforce its "distance limit policy" with the idea that (in general) the fewer shops try to sell papers the better for the shopkeepers. In this conflict of opinion, upon a matter on which I have none, they thought that, in particular cases where the question of enforcing the "distance limit policy" arises, it is better in the interests of their papers that they themselves should decide them. The learned judge fancied that the circulation managers had no objection to the association's policy, but claimed to direct it or at least to exercise a veto over it themselves. He seems to have understood the one witness, who was called by the defence, to have meant that his committee proposed to interfere for the protection of the wholesale distributor who was being victimised in the cause of the distance limit policy, and that in so doing they heard only one side and condemned the other without a hearing, conduct which he took to be inconsistent with anything but fussy and unjustifiable meddling. I am sure that the defendants had no thought of such quixotry. Their purposes were commercial and not judicial. As a matter of business they meant to be the friends of their friends and, so far as they could, to be masters of the situation for the benefit of their papers. The learned judge did not actually disbelieve the witness, but he depreciated and in effect misunderstood him. Some witnesses for the plaintiff had said that they thought the wholesalers' association, rather than the circulation managers, were the parties concerned, but surely, if the latter came to the aid of the former, that would not be inconsistent with both being directly interested. It is impossible to read the circulars and manifestos of the association, which were put in evidence and ought

to be examined, without seeing that any campaign, carried on in the enterprising spirit and for the self-regarding purposes which they disclose, was well calculated and tolerably certain to provoke just the kind of opposition which is the subject-matter of the present action. The plaintiff's "distance limit policy" may imperil the defendants' interests unless they can control it, and if, in doing so, they interfere with his trade, they are none the less safeguarding their own trade, a thing which is legitimate, unless done by illegitimate methods. Were, then, the methods wrong ?

The "threats" employed by the defendants were made to Mrs. Noyes, trading as Watson & Co., and to Messrs. W. H. Smith & Son. Mrs. Noyes gave her own account of them. She did not say, nor was she invited to say, that she felt intimidated or that she thought she was menaced in any way, and being asked: "Will you tell his Lordship in your own words why you gave the notice or any notice to Mr. Sorrell ?" she tranquilly replied: "Because I thought it was better to lose one customer than to lose my supply and ruin my business." I have no doubt she would have preferred to supply Mr. Sorrell and as many more customers as she could, but she knew that in business she could not have everything, and was content to act for the best in each case. As for the other "intimidated" party, I think the idea of intimidating Messrs. W. H. Smith & Son is rather whimsical. Their representative, who was examined, does not suggest it, and indeed the firm seem to have lent their aid to persuade Mrs. Noyes to see reason, which Mrs. Noyes for her part was by no means loath to do. Throughout the transaction both these third parties saw that their interest did not lie on the plaintiff's side and acted accordingly. However inevitable this conclusion might be, it was strictly a case of free choice.

If, then, the facts, truly understood, are that the defendants acted for the purpose of furthering their employers' interests in a matter of trade rivalry and did so without menaces or intimidation and without malice, it appears to me that the decision in the *Mogul Steamship Co. Case* (1) covers them and is sufficient in itself to justify the dismissal of this appeal. In so thinking, I gather that I am in accord with the prevailing opinion of your Lordships.

The reasons to the contrary suggested by the appellant I understand to be these: (i) The finding that there was no malice is immaterial. The defendants acted with the intention of getting their own way. If they got it, the appellant would necessarily be interfered with in his business to his loss. This being the natural consequence of their action, they must be deemed to have intended to injure him, which was a legal wrong. (ii) Every man has at common law a right to carry on his business as he chooses—in this case to buy his newspapers from anyone who is willing to sell them—and it is an actionable wrong to interfere with his doing so, either with the actual intention of injuring him, which would be malicious, or by means of threats and coercion, which are illegal means, or in combination with another person or persons, which is an illegal manner. For my part I cannot see how these propositions, even if made out, distinguish this case on the present facts from the case of the *Mogul Steamship* (1). For the second proposition *Quinn v. Leathem* (3) is said to be a clear authority. As to that case, I gather that your Lordships' opinions are not entirely at one. For this reason, and also out of respect for the appellant's learned and copious argument, I venture to offer some observations of my own. I shall not attempt to collect or compare quotations from the opinions delivered in that and other cases. They are occasionally expressed in varying terms. In this matter I have not found myself qualified to offer an eirenicon or even an anthology.

In the first place all these cases of conflict between trade organisations or trade interests involve that the actor seeks to secure for himself some advantage, which otherwise might accrue to his rival, and intends to get it if he can, which involves the intention of preventing his rival from keeping it or from getting it, so far as

A may be. Hence in every one of them it must be possible to contend that the action is taken maliciously, in the sense of imputed or inferential malice suggested by the appellant. Such a contention is inconsistent with the rule now firmly established in the *Mogul Steamship Case* (1). All well-planned and successful commercial action of this kind must prejudicially affect the rival and is intended to do so. If these factors in themselves involve legal malice and so involve legal liability, B the *Mogul* rule would only protect against liability for prejudice inadvertently caused, for, if the defendants' policy misses its mark altogether, the plaintiff has no prejudice to sue for. Further, action thus taken is almost always, if not necessarily so, combined action. There is no more combination in the present case than there was in the *Mogul Steamship Case* (1), and there is equally little coercion or threat. In both cases the defendants made known what they meant C to do, which in both was something to thwart or disappoint or interfere with the plaintiff and to oblige a third party to choose, whether he would be on the plaintiff's side or on the defendants'. In both, there was a complete absence of menace, unless simply announcing your intention be a menace, which it can only be as a figure of speech, and in both the third party reacted not under coercion but in the intelligent pursuit of his own interests as he saw them. Except for the proposition D that the respondents must be deemed to have intended to injure the appellant, which I venture to call fallacious, I do not think that any attempt was made on behalf of the appellant to distinguish the present case from that of the *Mogul Steamship Co.* (1). In effect your Lordships were asked to treat *Quinn v. Leatham* (3) as conflicting with that decision. Thus you would be free to select the better doctrine of the two, which was said to be that of the latter case.

E I am unable to see the suggested inconsistency. As I understand *Quinn v. Leatham* (3), Quinn and his friends were in fact guilty of malevolence and spite in their action, and so they truly acted with malice. Of this there was evidence. I doubt if the case could have been decided, as it was decided, without this feature. I am clear that the decision cannot be read as treating this feature as immaterial. F This House unanimously decided that, as there was evidence on which the jury, properly directed, could find as they did, their verdict must stand. Many reasons for this were given, and many observations were made, some perhaps not necessary to the decision at all, but there is not such unanimity among these individual reasons as can be said to extend the decision of the House beyond what I have stated. If that is so, the decision does not rule the present case, in which there was clearly no malice at all. In *Quinn's Case* (3) the proof of malice was this. G The workmen, acting together and in accord with their spokesman, told Leatham that his men, including his foreman, must join their union. He assented and offered to pay the subscriptions himself, which would have to be paid for the purpose. His offer was refused with the remark that the men ought to walk the streets in idleness for a long term before being admitted. Violence of words or conduct may always be evidence of malice. The sincerity of this savage sentiment towards the men H was, however, belied by the action actually taken. The workmen induced Leatham's foreman not only to quit him, but to do so without notice in breach of his contract, and then, so far from condemning him to walk the streets, they admitted him to their union forthwith and paid him money for his support ad interim. This was some evidence, that the statements which the workmen made as to their object, were mere professions. Their real object was to punish Leatham for his past I conduct in harbouring non-unionists and was not simply to advance their own interests in the future by bringing those non-unionists into their fold. Their purpose was to dominate his will in the conduct of his business and was malicious. At any rate, if the jury so held, they could do so on this evidence. That the words used by the trial judge—"wrongfully and maliciously" meant and were all along understood to mean two things, viz., "without right and with malevolence," and not one thing only, namely, "so as to be actionable," is, I think, clear from what was said throughout the case, from the summing-up of FITZGIBBON, L.J., down

to the last, or certainly to the last but one, of the opinions delivered in your Lordships' House. Throughout the case the words "combination" and "conspiracy" are used interchangeably, which would not have been done, if actual malice was immaterial, without some warning that "conspiracy" was not being used as connoting the guilty mind which is involved in the indictable offence. Some noble and learned Lords dwell on the evidence of actual evil feelings; some adopt the judgments of ANDREWS, J., and of HOLMES, L.J., which so dealt with the facts. Not one says: "Why waste time in discussing malice? Why even use the word? It only means 'so as to give a cause of action,' and that depends on the use of threats or on the coercive effect of combined action." Either of these features, perhaps, and certainly both together would give a cause of action, even though the workmen had been as polite and as passionless as Messrs. McGregor Gow & Co. and their associates were in the China Conference of 1885. It ought to be observed that in *Quinn's Case* (3), apart from the *Lumley v. Gye* (13) point, what caused the actual injury to Leatham was the loss of Munce's custom and the workmen's malice was directed towards Leatham and not towards Munce. I am not prepared to limit the terms "threats" and "intimidation" in this connection to threats of violence, but it certainly would be going beyond the recent current of judicial opinion to say that there is an actionable menace, whenever workmen intimate to an employer that his employees will withdraw their labour, unless he takes the course, which they desire that he should take. This was, however, all the pressure that was applied to Munce. No violent or vindictive language was used to him. He was not induced or constrained to break any contract. If it could be taken that on the facts Munce really was intimidated, or frightened so as to be deprived of his freedom, the case would be much simplified, but do the facts amount to this? The report of the evidence does not so state nor do the jury so find. In my opinion, the present is not a case in which it is necessary to affirm or deny the right of workmen in their own interests to call on an employer to choose between the alternatives which they present to him, and I certainly cannot for myself see that *Quinn's Case* (3), at any rate, decides that they have not such a right. The injuria is to be found in the workmen's general damnifying conduct, maliciously pursued, and their action upon Munce was merely that part of their conduct which produced the actual damnum to Leatham. Hence it was their malice that made them liable. Just as defamatory words uttered on a privileged occasion cease to be words which the speaker is entitled to utter if he is actuated by express malice, so the pursuit of one's own interests at a rival's expense, which pure commercial selfishness would justify, passes the limit of legal right and enters the field of actionable wrongdoing, if for that purity there is substituted independent malevolence towards others.

Disputes as to the meaning and place of the words "malice" and "maliciously" in the law of tort are now old and have not yet been wholly settled. Perhaps they never will be. Between ethics and law on these subjects no sharp line has yet been drawn. Between the man who exercises his legal rights with hatred in his heart and the man who means well but fails to keep his action on the windy side of the law, there is a large field not yet altogether covered by legal decisions. Upon the view that "malice," as connoting personal enmity or spite or some other evil motive, plays no material part in the decision in *Quinn v. Leatham* (3), and is neither an essential element in the tort now in suit nor conclusive of the question whether it has or has not been committed, I wish, with all possible respect, to make this submission. It is a view which involves the further proposition that a combination, wilfully and without just cause to injure a man in his trade, is in principle the essence of the wrong. "Wilfully" must here connote a determination of the actor's choice. It is more than saying that the actors so did the act that it became their act. It is more than saying that, whatever (if anything in particular) they in fact may or may not have intended, the law will hold that their intention was to produce the results naturally flowing from their acts. If this legal

A or imputed malice is put aside, the proposition must refer to some actual mental operation of choice, isolated from passion, independent of feeling towards others : an operation purely self-regarding and self-contained ; voluntary and not under duress ; conscious and not inadvertent ; deliberate, as it is sometimes called, and not automatic or impulsive. So understood, I think the proposition is somewhat tautologous, for everything that the word "wilfully" can thus cover is
B already implied in action taken in furtherance of selfish business interests. These business manœuvres may be short-sighted or not ; their effects may be fully apprehended or not ; their victims may be specially aimed at or merged in a crowd, but I do not suppose that the question of the existence or non-existence of just cause is effected one way or the other by the mental ability of the actors, so that the stupid and shortsighted, who injure without knowing on whom their blow will fall, will
C escape, while those who have the ability to aim at their mark and to hit it will for that reason be held liable.

Now if "wilfulness" is really tautologous, the question comes simply to be : How and by how far and under what conditions is the *Mogul Steamship Case* (1) an exception out of *Quinn v. Leathem* (3), and the answer, as I think, is essentially a matter of motive. Where the plaintiff has been injured in his business by the aggressive enterprise or the business competition of the defendants, there will be "just cause," exonerating the actors, if their motive has been coldly selfish, but if they really acted from some other motive they will be liable. How, then, can actual malice be excluded from the category of other motives, or indeed what other motive can there be in such a matter, beyond selfishness and malice except, indeed, mere irresponsible wantonness ? If the motive generally is the test, what
E if the motives for the action are mixed ? "Wilfulness" will in any case afford no answer. The decision must depend on the principle of the *Mogul* rule. Again, if the actors are exonerated by the character of their motive, purpose, or object, the question is one of their state of mind, a question of fact only, and there will be no room for enquiring, whether their scheme was reasonable or whether their view of their interests was intelligent. They themselves will be the judges, for
F their mental state will determine the judgment. Apart from overt illegalities, the selfishness of their end will justify their actions and their means. Such a conclusion, to my mind, presents greater difficulties than I can resolve on this occasion. After all, it is enough to conclude that the absence of actual malice in this case takes it out of the decision in *Quinn v. Leathem* (3).

As to the part which combination or concerted action plays in an alleged tort of this kind I think that this is not the occasion for expressing any decided opinion. One view is that the civil right of action for damage by conspiracy is the counterpart of criminal responsibility for conspiracy as a crime. Thus, according to HOLMES, L.J., in *Leathem v. Craig* (26) ([1899] 2 I.R., at p. 775), it is the offence against the public that stamps on an act done in furtherance of a conspiracy an actionable character at the suit of the individual damnified. Another opinion
H is that acts done in combination may be actionable, because they are more difficult to resist than acts done severally and without combination. The person against whom they are directed may give way to two opponents, when he would have treated one with indifference. I think a good many questions arise here. Whether these opinions point to the existence of two separate species of tort, viz., acts which
I are the outcome of conspiracy, and acts which are merely done in combination, or to only one species, at any rate they do not touch combinations as mere aggravation of damages, or refer merely to such combinations as would make joint tortfeasors of persons, who might at the plaintiff's option be sued severally for the same conduct. If conspiracy be relied on in the strict sense, plainly there are differences between conspiracy as an element in tort and conspiracy as a crime. In the latter at any rate mens rea is necessary. The grounds for resting *Quinn v. Leathem* (3) on conspiracy are also grounds for saying that actual malice was essential to that decision, whatever the precise proof of malice may be deemed to have been in that

case. Combination as constituting a separate species of tort, without any further feature, certainly presents difficulties. Does action which would be wholly legal if done by a sole trader, become unlawful, if taken by him after giving a trivial share in his business to a junior partner? Surely the *Mogul* rule, whatever it exactly is, protects a combination of defendants equally with an individual. Furthermore, if in accordance with the second view this kind of tort really depends on the difference between standing up to one person and giving way to two, it seems to be only a special illustration of torts arising from intimidation. I do not understand the proposition to be that acts, which are not actionable when done by one person must necessarily be actionable when done by two, but only that they may be so. Now in modern trade it is perfectly possible that the whole of a particular business in a given locality may be divided between one predominant trader and a number of very minor persons. The latter, singly and collectively, tremble at the former's nod, while he from native obstinacy or the magnitude of his resources, regards even their collective action with contempt. What if the latter class, greatly daring, all combine to advance their interests at the expense of the single trader, and, strange to say, succeed? Is their conduct actionable at his suit, because they combined, though he was completely unmoved by their combination? It seems clear that he, acting alone, could take any ordinary competitive course, however incapable the others might be of resisting him? Is not there a good deal to be said for thinking that combination in such a connection is really only a particular form of intimidation, and that, where no one is or ought to be frightened, the combined traders are not tortfeasors, unless they would also have been tortfeasors if they had acted simultaneously but spontaneously, in identical ways, but without concert or combination. Whatever part combination may really play in the decision of *Quinn v. Leatthem* (3) I hesitate to say that this element alone would have sustained the verdict in the absence of evidence of actual ill will.

For practical purposes I think it is more important to draw the line between conduct which the *Mogul Steamship Co.'s Case* (1) will protect, and conduct which lies outside that case, and the more difficult this task is the more necessary does it seem to me to wait till concrete cases arises for decision before venturing upon any positive opinion. I do not at present accept the *Mogul Steamship Co.'s Case* (1) as limited to those engaged in the struggle of competitive trade, nor am I prepared to say that it affords no protection to persons who combine with the object of protecting or promoting their own business or interest and so take action directed against a person outside their combination, which results in damage to him. I incline to agree that the object or purpose of the aggressive action of a combination is the principal thing to be considered, but both object and purpose are words standing in need of strict definition, and the tests by which the definition is to be applied seem to me not to have been as yet sufficiently examined. It is said that trade competition is not objectionable, provided, inter alia, that the competitors are acting "solely" with the object of advancing their trade interests: Professor Dicey, *LAW QUARTERLY REVIEW*, vol. lxi, pp. 1-5. If this means that a member of a competitive combination, otherwise justifiable, is liable to find his share in the competition "illegal," if it is proved that he adds to his desire to make money a personal animosity against the rival, against whom he acts, and a personal glee in seeing him overtaken by defeat, I am not prepared to say that this proposition is yet established. How any definite line is to be drawn between acts whose real purpose is to advance the defendants' interests, and acts whose real purpose is to injure the plaintiff in his trade, is a thing which I feel at present beyond my power. When the whole object of the defendants' action is to capture the plaintiff's business, their gain must be his loss. How stands the matter then? The difference disappears. The defendants' success is the plaintiff's extinction, and they cannot seek the one without ensuing the other.

I trust that what has been said on this occasion will not be taken as conclusive of these questions should they ever arise. Furthermore, *Conway v. Wade* (15) treats

A as unsettled the question whether an action will lie for inducing one person not to serve another, but without violence or threat or breach of contract. I think the present case does not afford an opportunity for settling this open question. There are also conflicting opinions on the question whether in these cases a plaintiff has to show that the defendants' action was not within the *Mogul* rule, or whether, on proof of an interference with his business, he shifts to the defendants

B the burden of excusing their action by praying that rule in aid. I refrain from expressing any decided opinion about this. If the plaintiff's right to pursue his business is not absolute, like the right to enjoy his own freehold, but is one to be enjoyed alongside the similar rights of the defendants, as is certainly the case, I think further consideration, on proved facts which raise the issue, is required

C before deciding whether the plaintiff's case may not be incomplete till he has shown that the defendants were doing something more than push their own business within the limits (whatever they may be) allowed by law. I should, accordingly, be content to dismiss this appeal on the ground that the case is covered by the *Mogul Case* (1) without expressing any decided opinion on any further question. No "guidance" is more misleading, no "kindly light" is more of a will-o'-the-wisp than an obiter dictum sometimes contrives to be, a consideration which the cases cited in the course of this discussion have only too plentifully illustrated.

D

LORD BUCKMASTER (read by (LORD DUNEDIN).—The appellant's counsel rest their contention upon the decision of this House in *Quinn v. Leathem* (3). They assert this authority to have determined that concerted action to interfere by threats, coercion or intimidation with a man's liberty to trade constitutes an actionable wrong and that this doctrine cannot be qualified by consideration of the purpose of the acts done. It is obvious that the phrase "threats, coercion or intimidation" must in any circumstances be explained before this claim can be adequately examined. So far as it relates to acts unlawful in themselves, the proposition is self-evident ; it is only when the meaning includes action that would or might be lawful that the question becomes intricate. The facts of the present case afford an excellent illustration of this distinction. For the defendants to withhold supply of their newspapers from Watson or Messrs. W. H. Smith is in itself a perfectly lawful act, but the appellants say that when the threat of this exclusion is used to prevent Watson or W. H. Smith supplying newspapers to the plaintiff, it becomes, if done in combination, an illegal act and *Quinn v. Leathem* (3) has so decided. *Quinn v. Leathem* (3) is a case of great importance and its authority

E cannot be impeached, but, as **LORD HALSBURY** said :

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"Every judgment must be used as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found."

G *Quinn v. Leathem* (3) established the following propositions : (i) That *Lumley v. Gye* (13) was correctly decided ; (ii) that of *Allen v. Flood* (2) depended upon the fact that the defendant there acted alone and neither uttered nor carried into effect any threat at all ; and (iii) that acts done in pursuance of a conspiracy having for its real purpose the injury of a man in his trade or calling is an actionable wrong. The last of these three propositions is the most important for the present purpose ; it did undoubtedly decide that—did it decide more?

H For the purpose of examining that question it is essential to see how the case came before the House. The jury had held that the defendants had "wrongfully and maliciously" induced customers or servants of the plaintiff to cease dealing with him, and this finding following a careful summing-up, in which it was pointed out that by "wrongfully" was meant not only with intent to injure the plaintiff but also not in furtherance of any trade dispute. **LORD HALSBURY** says that he regarded the charge to the jury as "absolutely accurate." And though he uses

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that phrase in connection with an argument relating to the questions actually put, yet with the whole summing-up before him I cannot but think his words were intended to have a wider significance. LORD SHAND refers to this particular passage with obvious approval, and LORD BRAMPTON quotes it in detail without any suggestion that it is wrong, and yet, if the appellant's argument be sound, it was useless or misleading. To my mind, it was the essence of the case, and in spite of some general observations of wider import, it was the judgment upon the verdict given with that meaning attached that this House decided to support. In other words, the expanded finding of the jury was this. The acts done have for their purpose the plaintiff's injury as distinguished from acts done for advancing the defendants' own interests and were, therefore, wrongful and malicious. This view is summarised by LORD HALSBURY in these words—that all the acts done were done “with malice in order to injure the plaintiff,” and upon this statement his judgment rests. LORD MACNAGHTEN says the question is: “Does a conspiracy to injure give rise to civil liability?” and though this might include an injury done in furtherance of legal and ulterior purposes, the case he quotes in support of the view that it does (*Gregory v. Duke of Brunswick* (6)) is a case of designed and deliberate injury to an individual. LORD SHAND's judgment proceeds throughout upon this view, and is summed up in these words:

“These acts [i.e., the defendants'] were wrongful and malicious in the sense found by the jury that is to say, they acted by conspiracy, not for any purpose of advancing their own interests as workmen, but for the sole purpose of injuring the plaintiff in his trade.”

I regard LORD BRAMPTON as holding the same view. LORD LINDLEY does indeed say:

“That [the defendants] acted as they did in furtherance of what they considered the interests of union men may probably be fairly assumed in their favour . . . but that is all that can be said for them. No one can, I think, say that the verdict was not amply warranted by the evidence.”

This view is in its expression hypothetical and could not be regarded as an assumption of fact, except in disregard of the jury's verdict, which was expressly approved.

As an exposition of the law which must be followed, *Quinn v. Leathem* (3) decided no more than I have stated. It still remains to see whether, apart from this authority, the defendants are entitled to succeed. For this purpose it is essential to state exactly what I regard them as having done. They have threatened to withhold supplies of their papers from Watson and any firm who supplies Watson, if Watson continues to supply Sorrell, the reason being that Sorrell, at the invitation of the National Federation of Retail Newsagents, Booksellers, and Stationers, has withdrawn his custom from Ritchie to Watson because Ritchie has supplied and intends to continue supplying certain news-vendors whom the federation believed to be in excess of the fair trade requirements of a particular area. The federation think the best interests of the retail trade are secured by limiting in each area the number of the retail dealers. The defendants regard their interests as best promoted by unrestricted competition. Of the merits of this controversy we are not called upon to judge. It is sufficient to say that it is a perfectly open trade quarrel and does not appear to be envenomed on one side or the other by spite or malice. In other words, the defendants, in order, as they believe, to advance their sales, combine in refusing to supply Watson who, they think, is assisting in a course detrimental to their interests, and have informed Watson that they will take this step unless he ceases to supply papers to the plaintiff. So stated I cannot see how this case differs in principle from the *Mogul Steamship Case* (1) or the *Glasgow Fleshers Case* (9), a case which was certainly not disapproved in *Quinn v. Leathem* (3). Just as in the *Mogul Case* (1) the defendants were held entitled so to arrange their freights and agencies as to shut out competing traders, and in the *Glasgow Fleshers Case* (9) the attempt was made to shut out the co-operative

A societies from the only market where United States and Canadian cattle could be sold, so here the defendants seek to arrange their distribution so as to prevent a limitation on the channels through which their wares circulate to the public. I think, therefore, that as the law stands the defendants have done no wrong.

B Having regard to the careful investigation of the authorities made by the noble Lords who have preceded me, I will not subject them to re-examination, but as the appellant has relied on the statement of LORD LOREBURN in *Conway v. Wade* (15), that if an inducement to act in a certain way be "accompanied by violence or threats" there is a good ground of action, I think it right to say that I regard that statement as meaning "threats" either of violence or some other unlawful action. Threats to do or abstain from doing a perfectly lawful act cannot, as I regard the law, be wrongful. I also desire to state that in my opinion *Ware and de Freville, Ltd. v. Motor Trade Association* (4), was rightly decided, and the judgment of ATKIN, L.J., may be accepted as a clear and authoritative statement of the law, and his comment on *Conway v. Wade* (15) is a sufficient explanation of that authority. A threat to do an act which is lawful cannot, in my opinion, create a cause of action whether the act threatened is to be done by many or by one. I am not, however, satisfied with the view expressed by BANKES, L.J., that in such cases as the present the question "is not so much whether the plaintiffs have made out a *prima facie* case as whether the defendants have justified their action." This doctrine is again enunciated by the learned judge in the present case in these words :

E "RUSSELL, J., has held that the plaintiff had established as a matter of law that the defendants had committed an actionable wrong ; and I understand him to have held that on a view of the law which rendered it unnecessary to consider whether the defendants had established that there was any lawful excuse for what they had done. I am not sure that I am accurate in that ; but that is how I read his judgment. As this case is going to the House of Lords, I say nothing about the law, because I have already expressed my view upon it ; but as this is a question for the defendants, if it was necessary for them, and the onus was upon them, to establish what BOWEN, L.J., called 'just cause or excuse,' it is necessary, I think, that this court should express its opinion upon that particular matter."

F WARRINGTON, L.J., takes the same view. These opinions are expressly attributable to the statement of BOWEN, L.J., in the *Mogul Case* (1), where he says (23 Q.B.D. at p. 618) :

G "Then comes the question: Was it [the act complained of] done with or without 'just cause or excuse'? If it was *bonâ fide* done in the use of a man's own property, in the exercise of a man's own trade, such legal justification would, I think, exist not the less because what was done might seem to others to be selfish or unreasonable."

H This appears to depend upon the view that a combination deliberately interfering with a man's trade was illegal *per se*, but could be justified if the purpose of the interference was to promote the trade interest of the combination. Personally, I should prefer in reaching the same goal to tread another path and to say that a combination having such a purpose was not illegal without malice, and that the onus is not on the defendant to justify, but on the plaintiff to prove that the act was spiteful and malicious. It is true that an act lawfully done by one may be illegal when two or more combine for its execution, but it does not follow that all acts done in combination which inflict injury on third parties are unlawful even though that injury is the means contemplated to achieve the purpose of the combination. Nor because an act done by an individual, if lawful, cannot become unlawful when done for the express purpose of injury, does it result that the same rule applies to acts done in combination, for the actual combination to injure lies at the root of the illegality. In the *Glasgow Fleshers Case* (9), and in *Ware and*

de Freville, Ltd. v. Motor Trade Association (4), the acts were, in my opinion, *prima facie* lawful, but they would have been unlawful had the purpose of the combination been the deliberate injury of a third person and not the promotion of legitimate trade interests. This view has been fully expressed by LORD DUNEDIN, whose opinion I have had the opportunity of reading. His careful exposition of the law I accept, and to it I have nothing to add. Each case must depend upon its special facts; it is sufficient to say that in this case, in my opinion, the act complained of was not illegal and the action must fail.

I desire to add that if your Lordships had taken a different view it would, in my opinion, have been necessary that the competence of the plaintiff to maintain these proceedings should have been closely investigated. His action in withdrawing custom from Ritchie was to induce Ritchie to cease supplying another trader; it would have needed argument to show that in these circumstances he was entitled to equitable relief. No argument was in fact forthcoming. The appellant said the point had not been previously raised, and the respondents ignored it. This could not, however, close the eyes of this House to the importance of the fact, for no combination of two or more persons can exclude from the cognisance of a Court of Equity facts and circumstances relevant to the exercise of its jurisdiction.

Appeal dismissed.

Solicitors: *Shaen, Roscoe, Massey & Co.; Lewis & Lewis.*

[*Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.*]

ROBERTS v. HOPWOOD AND OTHERS

[HOUSE OF LORDS (Lord Buckmaster, Lord Atkinson, Lord Sumner, Lord Wrenbury and Lord Carson), February 24, 27, March 2, April 3, 1925]

[Reported [1925] A.C. 578; 94 L.J.K.B. 542; 133 L.T. 289; 89 J.P. 105; 41 T.L.R. 436; 69 Sol. Jo. 475; 23 L.G.R. 337]

Local Authority—Wages—Amount—Discretion of authority—Reasonable exercise—Matters to be considered—Metropolis Management Act, 1855 (18 & 19 Vict., c. 120), s. 62—Public Health Act, 1875 (38 & 39 Vict., c. 55), s. 247 (7).

When a discretion, e.g., regarding the amount of wages to be paid to employees, is conferred on a local authority the court ought to show great reluctance before they attempt to determine how, in their opinion, the discretion ought to be exercised, but persons who hold public office have a legal responsibility towards those whom they represent—not merely towards those who vote for them—to the discharge of which they must honestly apply their minds, and, therefore the discretion must be exercised on reasonable grounds. A body charged with the administration for definite purposes of funds contributed in whole or in part by persons other than the members of that body owes a duty to the latter persons to conduct that administration in a business-like manner, with reasonable care, skill, and caution, and with a due and alert regard to the interest of those contributors who are not members of the body.

Under s. 62 of the Metropolis Management Act, 1855, a metropolitan borough must employ such servants as may be necessary and might allow to them

such wages as the council "shall think fit." A metropolitan borough employed persons at wages which were found to be in excess of those necessary for obtaining the services required and maintaining a high degree of efficiency and to have been arbitrarily fixed without reference to the value of the work to be done, the purchasing power of the sums paid, current trade union wage rates, or the scale of payments adopted by other local or national authorities.

Held: the council had wrongly exercised the discretion conferred on them by s. 62, and its members were liable to be surcharged with the amount overpaid.

Decision of the Court of Appeal, [1924] 2 K.B. 695, reversed.

Held further: the power of an auditor acting under s. 247 (7) of the Public Health Act, 1875, was not confined to striking out an item of expenditure if, from the nature of its object, it was outside the power of the council and so illegal; it extended to disallowing part of the expenditure under any heading of expense, for while the object of the expenditure might be lawful the amount expended might be so excessive as to be unlawful.

Notes. Section 62 of the Metropolis Management Act, 1855, was repealed by the London Government Act, 1939; s. 247 of the Public Health Act, 1875, has been replaced by s. 228 (1) of the Local Government Act, 1933, which was applied to London by s. 243 of the Act of 1933. As to power to pay wages see now, as to London, s. 75 and s. 76 (2) of the London Government Act, 1939 (see 15 HALSBURY'S STATUTES (2nd Edn.) 1073), and, generally, the Local Government Act, 1933, ss. 99 (1), 102 (1), 103 (1), 104 (1), 105 (2), 106 (2), 107 (2) (see 14 HALSBURY'S STATUTES (2nd Edn.) 353). The words "think fit" in s. 62 of the Act of 1855 have been replaced by "determine" in the later Acts, but it is submitted that the present case applies equally to the discretion implied by that word.

Applied: *Roberts v. Cunningham* (1925), 134 L.T. 421; *Woolwich Borough Council v. Roberts* (1927), 96 L.J.K.B. 757. Considered: *Brown v. Dagenham U.D.C.*, [1929] 1 K.B. 737. Distinguished: *Field v. Poplar Corpn.*, [1929] 1 K.B. 750. Applied: *A.-G. v. Tynemouth Union*, [1930] 1 Ch. 616. Considered: *Lee v. Mcgrath*, [1934] All E.R. Rep. 440; *Re Hurle-Hobbs, Surridge's Application, Re Mills*, [1944] 1 All E.R. 249; *Prescott v. Birmingham Corpn.*, [1954] 3 All E.R. 698. Referred to: *Short v. Poole Corpn.*, post, p. 74; *Howard-Flanders v. Malden Corpn.*, [1926] All E.R. Rep. 110; *R. v. Grain, Ex parte Wandsworth Gardens* (1927), 96 L.J.K.B. 563; *R. v. Minister of Health, Ex parte Dore*, [1927] 1 K.B. 765; *A.-G. v. Smethwick Corpn.*, [1932] All E.R. Rep. 304; *National Association of Local Government Offices v. Bolton Corpn.*, [1942] 2 All E.R. 425; *Lewis v. Walker* (1944), 113 L.J.K.B. 481; *Re Walkers Decision*, [1944] 1 All E.R. 144; *Associated Provincial Picture House v. Wednesbury Corpn.*, [1947] 2 All E.R. 680; *Re Dickson*, [1948] 1 All E.R. 713; *Carr v. District Auditor for No. 1 Audit District* (1952), 50 L.G.R. 538.

As to the employment of local government officers see (London) 25 HALSBURY'S LAWS (3rd Edn.) 45 et seq., and (generally) *ibid.*, vol. 24, p. 471 et seq. For cases see 33 DIGEST 14-17, 19-21; 34 DIGEST 579-580.

Cases referred to:

- (1) *Kruse v. Johnson*, [1898] 2 Q.B. 91; 67 L.J.Q.B. 782; 79 L.T. 647; 62 J.P. 469; 46 W.R. 630; 14 T.L.R. 416; 42 Sol. Jo. 509; 19 Cox, C.C. 103, D.C.; 13 Digest (Repl.) 239, 639.
- (2) *R. (King-Kerr) v. Newell*, [1903] 2 I.R. 335.
- (3) *R. (Inglis) v. Drury*, [1898] 2 I.R. 527.
- (4) *R. (Duckett) v. Calvert*, [1898] 2 I.R. 511.
- (5) *R. (Bridgeman) v. Drury*, [1894] 2 I.R. 489.
- (6) *R. v. Adamson* (1875), 1 Q.B.D. 201; 45 L.J.M.C. 46; 24 W.R. 250; sub nom. *R. v. Tynemouth Justices*, 33 L.T. 840; 40 J.P. 182; 33 Digest 425, 1377.

- (7) *R. v. St. Pancras Vestry* (1890), 24 Q.B.D. 371; 59 L.J.Q.B. 244; 62 L.T. 440; 54 J.P. 389; 38 W.R. 311; 6 T.L.R. 175, C.A.; 34 Digest 579, 27. A
- (8) *R. v. Board of Education*, [1910] 2 K.B. 165; 79 L.J.K.B. 692; 102 L.T. 578; 74 J.P. 259; 26 T.L.R. 422; 8 L.G.R. 549, C.A.; affirmed sub nom. *Board of Education v. Rice*, [1911] A.C. 179; 80 L.J.K.B. 796; 104 L.T. 689; 75 J.P. 393; 27 T.L.R. 378; 55 Sol. Jo. 440; 9 L.G.R. 652, H.L.; 19 Digest 602, 290. B
- (9) *Thomas v. Devonport Corpn.*, [1900] 1 Q.B. 16; 69 L.J.Q.B. 51; 81 L.T. 427; 63 J.P. 740; 48 W.R. 89; 16 T.L.R. 9, C.A.; 33 Digest 90, 597.
- (10) *R. v. Roberts*, [1908] 1 K.B. 407; 77 L.J.K.B. 281; 98 L.T. 154; 72 J.P. 81; 24 T.L.R. 226; 52 Sol. Jo. 171; 6 L.G.R. 268, C.A.; 33 Digest 40, 217.
- (11) *Biddulph v. St. George's Hanover Square, Vestry* (1863), 3 De G.J. & Sm. 493; 2 New Rep. 212; 33 L.J.Ch. 411; 8 L.T. 558; 27 J.P. 579; 9 Jur. N.S. 953; 11 W.R. 739; 46 E.R. 726, L.J.J.; 39 Digest 233, 625. C
- (12) *Mason v. Wallasey Local Board* (1876), 58 J.P. 477; 42 W.R. 246, n; 38 Digest 232, 618.
- (13) *Vernon v. St. James, Westminster, Vestry* (1880), 16 Ch.D. 449; 50 L.J.Ch. 81; 44 L.T. 229; 29 W.R. 222, C.A.; 38 Digest 232, 620. D
- (14) *Lewis v. Weston-Super-Mare Local Board* (1888), 40 Ch.D. 55; 58 L.J.Ch. 39; 59 L.T. 769; 37 W.R. 121; 5 T.L.R. 1; 33 Digest 39, 213.
- (15) *Stockton and Darlington Rail. Co. v. Brown* (1860), 9 H.L. Cas. 246; 3 L.T. 131; 24 J.P. 803; 6 Jur. N.S. 1168; 8 W.R. 708; 11 E.R. 724, H.L.; 38 Digest 280, 181.

Appeal from an order of the Court of Appeal, reported [1924] 2 K.B. 695, sub nom. *R. v. Roberts, Ex parte Scurr*, reversing the decision of the Divisional Court, [1924] 1 K.B. 514, upon a rule nisi calling upon A. Carson Roberts, the district auditor of the metropolitan borough of Poplar, to show cause why a writ should not issue directed to him to remove into the High Court a certain certificate of disallowance and surcharge made by him (together with his reasons and grounds for the same), and bearing date on or about June 6, 1923, of a sum of £5,000 disallowed and surcharged upon the borough council. E

The eight grounds upon which the mayor, aldermen, and a large number of councillors of the borough of Poplar applied for the rule were as follows: (i) That the said surcharge was an improper limitation of the discretion vested in the council under s. 62 of the Metropolitan Management Act, 1855; (ii) that there was no evidence on which the district auditor could properly find that the council or any member thereof had been guilty of any negligence or misconduct; (iii) that the said surcharge was not on the face of it or in fact an ascertained amount of the deficiency or loss incurred by such negligence or misconduct, if any, but a penalty; (iv) that the negligence or misconduct complained of, if any, was in the nature of an omission, and the district auditor had not found on whom the responsibility for such omission lay and had abstained from surcharging the council and had not made it clear as to which, if any, of the members of the council were responsible, and, if responsible, to what extent, for such omission; (v) that the said district auditor had failed to show whether the surcharge purported to be joint or several; (vi) that the district auditor was not entitled in law to surcharge for alternative reasons on two different classes of councillors, and that the surcharge was bad for uncertainty; (vii) that, while the notice of surcharge stated as the sole ground of surcharge the payment of wages in excess of wages scales agreed by the representatives of the respective grades or sections of employees, the reason for such surcharge as disclosed in the report of the said auditor to the council was the disregard of subsequent variations in the cost of living; and (viii) that in any event the person accounting liable to surcharge was the council and not the councillors. F

The affidavit filed in support of the rule was sworn by Messrs. John Scurr, G

- A** Charles William Key, Edgar Isaac Lansbury and Charles Edwin Sumner, on behalf of themselves and the other surcharged members of the council (except four councillors, a minority which disapproved of the payments made, but had, nevertheless, been surcharged), and set out (inter alia) that during the year 1920-1921 the payments of the council to employees, both male and female, were below those which would have been made if they had followed the awards applicable. They stated
- B** that the council had always paid such minimum wages as they considered reasonable, without being bound by any external considerations such as awards. They had stabilised the minimum weekly wage at 80s. after consultation with the workmen concerned, though in some cases the trade union wage would have been above that figure. The council did not consider that the wages should have been fixed having regard only to the cost of living, but thought that a municipal authority
- C** should be a model employer, and they considered £4 as a fair minimum wage for an adult. Their main allegation was that the sum of £5,000 was not a calculation of excess, but a penalty.

By the Metropolis Management Act, 1855 :

- D** Section 62 : The Metropolitan Board of Works, and (subject to the provisions herein contained) the Board of Works for every district under this Act and the vestry of every parish mentioned in Sched. A to this Act shall respectively appoint or employ, or continue for the purposes of this Act, and may remove at pleasure, such clerks, treasurers, and surveyors, and such other officers and servants as may be necessary, and may allow to such clerks, treasurers, surveyors, officers, and servants respectively such salaries and wages as the
- E** board or vestry may think fit.

By the Public Health Act, 1875 :

- F** Section 247 (7) : Any auditor acting in pursuance of this section shall disallow every item of account contrary to law, and surcharge the same on the person making or authorising the making of the illegal payment, and shall charge against any person accounting the amount of any deficiency or loss incurred by the negligence or misconduct of that person, or of any sum which ought to have been but is not brought into account by that person, and shall in every such case certify the amount due from such person, and on application by any party aggrieved shall state in writing the reasons for his decision in respect of such disallowance or surcharge, and also of any allowance which he may have made.

- G** This section was applied by s. 14 of the London Government Act, 1899, to the auditing of the accounts of the council of every metropolitan borough.

- H** In the Court of Appeal it was held by SCRUTTON and ATKIN, L.JJ. (BANKES, L.J., dissenting) that, as the councillors had acted in good faith, and as the rate of wages was not so excessive as to be above what in reason a representative body could fix and ultra vires the council, the rule must be made absolute. ATKIN, L.J., expressed the opinion that s. 62 of the Metropolis Management Act, 1855, gave the local authority unfettered discretion as to the amount of wages which they paid, provided that they acted in good faith. The district auditor appealed.

H. P. Macmillan, K.C., and Sir John Lithiby for the appellant.

- I** *Sir John Simon, K.C., R. P. Croom-Johnson, and A. Henderson* for the respondents.

The House took time for consideration.

April 3. The following opinions were read.

LORD BUCKMASTER.—The appellant in this case is the district auditor originally appointed by the Local Government Board (now represented by the Minister of Health) for the purpose of auditing year by year the accounts of the metropolitan borough councils. In the performance of this duty he surcharged the respondents, who are certain aldermen and councillors of Poplar Borough

Council, with the sum of £5,000 for the year between April 1, 1921, and April 1, 1922. The question on this appeal is whether that surcharge has been lawfully made. A

Before considering the facts it would be well to examine the powers with which the district auditor is invested. These are to be found in s. 247 of the Public Health Act, 1875, a section rendered applicable to the accounts of metropolitan borough councils by s. 14 of the London Government Act, 1899, and s. 71 of the Local Government Act, 1888. Sub-section (7) of s. 247 (ante, p. 27) contains the directions imposing upon the auditor the duty of making disallowances and surcharges. It is to be observed that this sub-section consists of two branches. B
The first deals with the disallowance of every item contrary to law and surcharging the same as therein provided, and the second with the deficiency or loss incurred by negligence or misconduct which is to be charged against the person who is accounting. It is suggested that this latter provision is really applicable to the officers or assistants of any local authority whose accounts, by s. 250 of the Public Health Act, 1875, are also to be audited by the auditors. It is quite possible C
that this is the true explanation of the different branches of the sub-section, but its determination is unnecessary in the present case because it is not alleged that there has been negligence or misconduct in any person. It is said that the amounts disallowed are contrary to law and that the making of them constituted the making of an illegal payment, so that it is the first branch of the section alone with which this appeal is concerned. As it was at one time contended that the power to disallow an item by the auditor did not include the power of disallowing part of the expenditure in respect of any heading of expense, but merely a striking out of the item if, from the nature of the object, it was outside the powers of the council and consequently illegal, it is well to state that, in my opinion, there is no foundation for such an argument. An item in an account is not merely a heading; it includes both the object and the payment, and, while the object may be lawful, the expenditure in respect of it may be so excessive as to be unlawful, and to the extent by which the amount exceeds legality it is the duty of the district auditor to disallow it and surcharge the sum on the person responsible for its being made. D
It is that which the district auditor contends he has done in the present case. The power of revising the decision of the auditor is to be found in sub-s. (8), which enables a person aggrieved to apply for a writ of certiorari to remove the disallowance to the King's Bench Division, where the whole matter is subject to revision. E
This is the course which has been adopted. An order nisi was obtained on June 26, 1923, calling upon the district auditor to show cause why a writ should not issue against him, and upon the rule being heard, the Divisional Court, on Nov. 21, 1923, dismissed the order calling upon the district auditor to show cause, and this decision was reversed by the Court of Appeal, Bankes, L.J., dissenting from the other members of the court. F
G

The relevant facts which induced the district auditor to make the surcharges in question are as follows. During the years 1920 and 1921 the ordinary rates of wages, whether measured by taking as a standard wages for the same work paid immediately before the war [of 1914-1918] and adding thereto the percentage representing the increased cost of living, or by taking the amounts fixed by the Joint Industrial Councils' award as the proper sum to be added to the pre-war wage, showed violent oscillations. Nor did these two standards always vary together. Towards the end of 1920, when the cost of living was falling, the Joint Industrial Council's award was at its maximum, but subject to this qualification the two lines did on the whole rise and fall in harmony. The three classes of wages in respect of which the surcharges have been made were women (Grade A), general labourers, and men to whom the trade union scale for masons and paviors applied. I
So far as the women were concerned, they were paid throughout from April 1, 1920, to April 1, 1923, at a level weekly wage of 80s., the pre-war wage being 23s. 6d., brought up by considering the added increased cost of living to 54s. 6d. on April 1,

A 1921, and descending to 43s. on April 1, 1922. The Joint Industrial Councils' award gave for the month of April, 1921, 69s. 6d.; for May, June, and July, 62s. 6d.; for August, September, and October, 57s. 6d. from which level it descended by steps to 51s. 6d. on April 1, 1922, and continued to descend to April, 1923.

B I do not propose to examine in similar detail the wages for the general labourers, the masons and paviors, for the reason that, if those wages stood alone, the amount of the surcharge in respect of them would not be very great and would be almost wholly applicable to the last two months. The district auditor, in determining the line above which he regards the payments as illegal, has taken the pre-war rate, increased it by the cost of living, and added to that a sum of 20s. a week by way of margin. It is, of course, easy to find fault with any definite standard so ascertained; why it should not be a little lower or a little higher, and by what means it was fixed at the exact sum assessed can always give rise to controversy; but regarding, as I do, the duty of the auditor to declare unjustifiable payments to be illegal and to surcharge the excess, it follows that some line must be drawn, as the extent of the illegality can only be measured by taking it at above a particular standard. If the powers of the district council are limited to the payment of fair and even full wages, measured not actually in, but by reference to, the terms of standard rates fixed either by trade unions or by joint councils, there could, I think, be little objection to what the auditor has done, but the real difficulty in the present case lies in determining what is the limit of discretionary power given to the district council with regard to payment of wages. Those powers are to be found in s. 62 of the Metropolitan Management Act, 1855, which runs as follows:

E Section 62: The Metropolitan Board of Works, and (subject to the provisions herein contained) the board of works for every district under this Act, and the vestry of every parish mentioned in Sched. A to this Act, shall respectively appoint or employ, or continue for the purposes of this Act, and may remove at pleasure, such clerks, treasurers, and surveyors, and such other officers and servants as may be necessary, and may allow to such clerks, treasurers, surveyors, officers and servants respectively such salaries and wages as the board or vestry may think fit.

G The power there conferred is to appoint for the purposes of the Act such servants as may be necessary and to pay these servants such wages as the council may think fit. It is to be noticed that there is not in this section a qualification often found in other sections conferring upon local authorities power to pay wages such as to pay reasonable wages, which is found in the Baths and Washhouses Act, 1846, and again in the Metropolitan Burial Act, 1852. I mention these two Acts for this reason, that the powers that they confer are capable of being adopted by any borough council though they are not, until adopted, expressly conferred by the Local Government Act, 1899. The confusion that these different definitions of the powers created is made obvious when it is considered that were the Acts once adopted, servants might be appointed to perform in respect of the powers thereby conferred services identical with those performed under the powers that are expressly conferred by the Act of 1899 itself, and unless the word "reasonable" be introduced into the operative section of 62 or struck out from the sections of the adopted Acts two different standards of payments would apply to the same work. It is impossible to accept a conclusion so fantastic, and it follows that either the two phrases mean the same thing or that one must give way to the other. In my opinion, the right way to construe it is to take s. 62 as the dominant section and to assume that if the other Acts are adopted under the Act of 1899 the general powers of s. 62 apply, and servants appointed to discharge these new duties are really appointed for the purpose of the Act within the meaning of s. 62, and that, consequently, the general rule applicable is that the council shall pay such wages as they may think fit, the discretion as to the reasonable nature of the wages

being with them. The discretion thus imposed is a very wide one, and I agree with the principle enunciated by LORD RUSSELL in *Kruse v. Johnson* (1) ([1898] 2 Q.B. at p. 99), that when such a discretion is conferred upon a local authority the court ought to show great reluctance before they attempt to determine how, in their opinion, the discretion ought to be exercised. A

Turning now to what the borough council has done, the reason for their action is to be found in the affidavit sworn by Mr. Scurr, Mr. Key, Mr. Lansbury, and Mr. Sumner. In that affidavit they make the following statement: B

6. The council and its predecessors the district board of works have always paid such a minimum wage to its employees as they have believed to be fair and reasonable without being bound by any particular external method of fixing wages, whether ascertainable by trade union rates, cost of living, payments by other local or national authorities, or otherwise. C

If the matter ended there it would be my opinion that a decision so reached could not be impeached until it was shown that it was not *bonâ fide*, and absence of *bonâ fides* is not alleged in the present proceedings. Paragraph 9, however, of the same affidavit puts the matter in a different form. It is there said: D

"The council did not and does not take the view that wages paid should be exclusively related to the cost of living. They have from time to time carefully considered the question of the wages and are of the opinion, as a matter of policy, that a public authority should be a model employer and that a minimum rate of £4 is the least wage which ought to be paid to an adult having regard to the efficiency of their workpeople, the duty of a public authority both to the ratepayers and to its employees, the purchasing power of the wages, and other considerations which are relevant to their decisions as to wages." E

It appears that on Aug. 31, 1921, a resolution was passed by the borough council to the effect that no reduction of wages or bonus should be made during the ensuing four months, and this was acted upon for the following twelve months. It was, I think, well within their power to fix wages for a reasonable time in advance and there are cogent reasons why this should be done, but that decision should be made in relation to existing facts which they appear to have ignored. In August, 1921, the cost of living had been continuously falling since November of the previous year, and it continued to fall, so that it is difficult to understand how, if the cost of living was taken into account in fixing the wages for adult workers at a minimum basis of £4, the sharp decline in this important factor should have been wholly disregarded by the borough council. But the affidavit contains another statement which I think is most serious for the council's case. It states that £4 a week was to be the minimum wage for adult labour—that is, without the least regard to what that labour might be. It standardised men and women, not according to the duties they performed, but according to the fact that they were adults. It is this that leads me to think that their action cannot be supported, and that in fact they have not determined the payment as wages, for they have eliminated the consideration both of the work to be done and of the purchasing power of the sums paid which they themselves appear to regard as relevant though not the dominant factor. Had they stated that they determined as a borough council to pay the same wage for the same work without regard to the sex or condition of the person who performed it, I should have found it difficult to say that that was not a proper exercise of their discretion. It was, indeed, argued that that is what they did, but I find it impossible to extract that from the statement contained in the affidavit. It appears to me, for the reasons I have given, that they cannot have brought into account the considerations which they say influenced them and that they did not base their decision upon the ground that the reward for work is the value of the work reasonably and even generously measured, but that they F G H I

A took an arbitrary principle and fixed an arbitrary sum which was not a real exercise of the discretion imposed upon them by the statute. It is for these reasons that I think the appeal should succeed.

LORD ATKINSON.—The questions to be determined in this appeal are, first, whether certain payments of sums of money, purporting to be payments of wages, made by the council of the metropolitan borough of Poplar, called for convenience “the council,” to its workpeople during the year ending Mar. 31, 1922, were, upon the evidence in the case, contrary to law within the meaning of s. 247 (7) of the Public Health Act, 1875, and, secondly, whether the appellant, the district auditor, whose district includes the metropolitan borough of Poplar, was entitled to disallow and surcharge upon the respondents aldermen and councillors of the council, hereinafter called the respondents, the sum of £5,000 in respect of these payments. The decision of these questions involves the consideration of, first, whether it is the duty of a district auditor to consider the reasonableness of the charges and payments appearing in the accounts of local authorities, and also whether he has power to disallow unreasonable charges and payments, or whether his duty in dealing with any payment purporting *ex facie* to have been made for an authorised purpose, is confined to merely vouching the payment of the sum appearing to have been expended, without questioning the reasonableness of the amount; and, second, the question as to the scope of the discretion vested by Parliament in the metropolitan borough councils in connection with the payment of salaries and wages. One must start upon these inquiries with a clear appreciation of the fact that in this case the servants to whom these challenged payments were made were of the lowest grade of labour. This is not disputed.

In the year 1914, i.e., before the war, the auditor states in his affidavit, there was not in that year any striking variation in the scale of wages adopted by the councils of the several metropolitan boroughs for the several grades of their employees; the scales of wages paid in 1914 by this council were not the highest, but compared with those of other councils were somewhat above the average; the minimum wage for the lowest grade of labour in Poplar borough in that year was 30s. weekly for men and 22s. 6d. weekly for women. These facts were not disputed. The answer the respondents give to them will be found in para. 8 of their affidavit. It runs thus:

“For a long time prior to the war, the council had maintained a minimum wage limit of 30s. per week. Payments to these amounts were, prior to 1914, treated at the audit as involving a proper exercise by the council of the discretion vested in them.”

The vanity of appearing as model employers of labour had not then, apparently, taken possession of the council, nor had the council become such ardent feminists as to bring about, at the expense of the ratepayers whose money they administer, sex equality in the labour market. The auditor states in his affidavit that various increases were made by the council in the years between 1914 and 1920, that on April 30, 1920, the minimum wage for the lowest grade of labour was 64s. weekly for men and 49s. 9d. weekly for women. According to the statements contained in this same paragraph, a resolution was then passed fixing the minimum rate of wages at 80s. per week for both men and women, or an increase of 16s. per week in the case of men and 30s. 3d. in that of women. Thus suddenly did the female labour of the lowest grade appear to have increased in value. The auditor, in the sixth paragraph of his affidavit, states that he uses the words “cost of living” as meaning the cost of living determined by the Ministry of Labour and published weekly in the “Labour Gazette” of that Ministry; that in the year 1920–21 this cost of living had risen to 176 per cent. beyond what it was in the year 1914; and that, though in the year 1921–22 the cost of living had decreased to only 82 per cent. over what it was in 1914, the minimum rate of wages for men and women at 80s. remained unchanged. It is but right and natural that the rate of wages

should rise if the cost of living rises, because this tends directly to keep the purchasing power of the labourer's wage at what it was before the cost of living increased. The principle apparently adopted by the council, however, is that wages should rise if the cost of living rises, but should never go down if the cost of living goes down. As I understood counsel for the respondents, he did not contend ultimately that the council could properly or legally fix the salaries or wages of their employees at an excessively high rate. He apparently thought that this would be an unjust and unlawful exercise of their discretion, and from the last few lines of the judgment of SCRUTTON, L.J., he was apparently of the same opinion. Moreover, SCRUTTON, L.J., thought that the sums fixed by the council in this case, while near the line of excess, did not actually reach it. In order, however, to determine, in such a case as this, what is the line of excess, one must first determine what is the line of moderation in such matters, the datum line—as it may be styled—beyond which excess begins. SCRUTTON, L.J., apparently took the Whitley Council or cost of living rates as this datum line. That is the meaning, it would appear to me, of the following passage in his judgment running thus ([1924] 2 K.B. at p. 721):

"I then ask myself whether the wages paid in the year April, 1921—April, 1922, are so far in excess of Whitley Council or cost of living rates that I can find that there is an excess over any reasonable amount that could be fixed by the discretion of a representative assembly."

I entirely concur with the conclusion expressed by BANKES, L.J., in the following passage of his able and well-reasoned judgment. After referring to the speech of Mr. George Lansbury and the affidavits of the mayor of Poplar and others filed in support of the rule he said:

"The arguments there set out are of such a general and vague character that the question which the court has to decide cannot be disposed of without a closer investigation of the facts. In the absence of precise and detailed information as to the grounds on which the council acted, their action must, in my opinion, be judged mainly by its results. The results according to the finding of the district auditor are that the payments made in many instances were far in excess of those necessary to obtain the services required and to maintain a high standard of efficiency and were thus in reality gifts to their employees in addition to remuneration for their services. If this finding is justified upon the evidence it establishes, in my opinion, the making of payments contrary to law. It must be borne in mind what the payments are for. They are payments for wages; that is to say, the price which the employer pays the employee for his or her services. Of recent years the tendency has everywhere been to standardise wages by either fixing the actual rate to be paid or by fixing minimum rates. In some cases the legislature has stepped in to bring about this result. In most cases it has been due to the action of organised labour or associations consisting of employers and employed. The result has been to create in relation to labour what, in relation to commodities, is recognised as a market price."

He then proceeds to show that the market price may vary according to local conditions, but that for any well-recognised form of labour it is ascertainable and can be ascertained. But the council, according to the affidavit of Mr. John Scurr, disregarded all external matters such as these aids to arrive at a conclusion as to what was the so-called market wage for which the services required by the council could be procured, and what excess beyond that, if any, was reasonable.

In the sixth paragraph of the respondents' affidavit they state that

"The council . . . have always paid such a minimum wage to its employees as they have believed to be fair and reasonable without being bound by any particular external method of fixing wages, whether ascertainable by trade

A union rates, cost of living, payments by other local or national authorities, or otherwise."

Nobody has contended that the council should be bound by any of these things, but it is only what justice and common sense demand that, when dealing with funds contributed by the whole body of the ratepayers, they should take each and every one of these enumerated things into consideration in order to help them to determine what was a fair, just and reasonable wage to pay their employees for the services the latter rendered. The council would, in my view, fail in their duty if, in administering funds which did not belong to their members alone, they put aside all these aids to the ascertainment of what was just and reasonable remuneration to give for the services rendered to them, and allowed themselves to be guided in preference by some eccentric principles of socialistic philanthropy, or by a feminist ambition to secure the equality of the sexes in the matter of wages in the world of labour.

In para. 9 of the respondents' affidavit they are good enough to disclose what the council did take into consideration in fixing the minimum rate of wages to be paid to their employees. It is said that they had from time to time considered the question of wages, and were of opinion that

D "a public authority should be a model employer, and that a minimum rate of £4 per week (i.e., £208 per annum) is the least wage which ought to be paid to an adult, having regard to the efficiency of their work-people, the duty of a public authority both to the ratepayers and to its employees, the purchasing power of the wages and other considerations which are relevant to their decisions as to wages."

E They are not good enough to mention what are those other considerations. There is no provision relative to the nature of the work to be done by the women, or their fitness for it. The minimum wage was to be the same as that of men, however different the nature of the work.

F This system of procedure might possibly be admirably philanthropic, if the funds of the council at the time they were thus administered belonged to the existing members of that body. These members would then be generous at their own expense. The evidence does not disclose what sum the rates of the district amounted to, or what portion of that gross sum was paid by the persons who were members of the council since, say, the month of March, 1920 ; but it may safely be assumed, I think, that these members did not, at any time, pay the whole of the rates then collected. The council, then, at all times since the year 1914 may safely be assumed to have been dealing with funds a portion of which—possibly the larger portion of which—was contributed by ratepayers who were not and are not members of the council. The indulgence of philanthropic enthusiasm at the expense of persons other than the philanthropists is an entirely different thing from the indulgence of it at the expense of the philanthropists themselves. The former wears quite a different aspect from the latter, and may bear a different legal as well as a moral character. A body charged with the administration for definite purposes of funds contributed in whole or in part by persons other than the members of that body owes, in my view, a duty to those latter persons to conduct that administration in a fairly businesslike manner, with reasonable care, skill, and caution, and with a due and alert regard to the interest of those contributors who are not members of the body. Towards these latter persons the body stands somewhat in the position of trustees or managers of the property of others. This duty is, I think, a legal duty as well as a moral one, and acts done in flagrant violation of it should, in my view, be properly held to have been done "contrary to law" within the meaning of s. 247 (7) of the Public Health Act, 1875. To make an act contrary to law it is not necessary that it should be prohibited by some legal enactment such as a statute or a by-law or the like. Many things are contrary to law, though not prohibited by any statute, such for instance

as the purchase by a trustee from his cestui que trust of part of the trust property, A
or the purchase by an agent from his principal of the latter's property without
full disclosure of who the purchaser really is and what are the particulars of the
purchase. The torts which are at law covered by the legal maxim sic utere tuo
ut alienum non laedas, are in many instances not prohibited by statutes, yet they
are illegal and actionable at law.

At the meeting on May 31, 1923, at which a large number of ratepayers attended B
and objected to the allowance of such large sums for wages, it was apparently put
forward that the council was only responsible to their constituents ; that the
scale of wages had been before the electors at the election in the previous November,
and also at two recent bye-elections, and had been approved of by them ; that the
council should do their duty towards these electors, and not their duty towards C
the large ratepayers who lived outside the district and were not "in" (i.e., parties
to, I presume) this matter at all. A gentleman named C. W. Key, one of the
applicants in the present suit, appears from the auditors' affidavit to have put the
council's case pithily and plainly in the following words : "We do not say we have no
discretion, but we say a mandate for the electorate was not to be despised." D
These observations do not appear to have been disapproved of by any of the
members of the council present. I assume, of course, that the gentleman expressed
honestly what he felt and believed. It was strongly pressed in argument that
the auditor believed the council acted *bonâ fide* ; but what in this connection
do the words *bonâ fide* mean ? Do they mean, as apparently this gentleman
thought, that no matter how excessive or illegal their scale of wages might be, they
were bound to put it into force because their constituents gave them a mandate
so to do, or, again, do the words mean that as the payment of wages was a subject E
with which they had legally power to deal, the amount of their funds which they
devoted to that purpose was their own concern which no auditor had jurisdiction
to revise, or in reference to which he could surcharge anything ? The whole
system of audit to which the legislature has subjected every municipal corporation
or council is a most emphatic protest against such opinions as these. The words
of s. 247 (7) of the Public Health Act, 1875, rationally construed, show that the
auditor, in order to perform his task, has necessarily jurisdiction to inquire into
the legality of every payment, and to disallow and surcharge payments of money
on every item of account. He may disallow, if it be excessive, and, therefore,
illegal, contrary to law, or if the excess be severable from the remainder of the pay-
ment, he may disallow and surcharge this excess and allow the remainder of the
payment. All these points have been decided by that able and distinguished judge, F
PALLES, C.B., in *R. (King-Kerr) v. Newell* (2), and see *R. (Inglis) v. Drury* (3),
approved of by him in *R. (King-Kerr) v. Newell* (2), see also *R. (Duckett) v. Calvert*
(4), and by O'BRIEN, C.J., in his judgment in *R. (Bridgeman) v. Drury* (5). If
the business of the auditor was merely to vouch the payment of the money paid
in discharge of items *ex facie legal*, the audit would afford no protection what-
ever against the squandering of public funds. G H

The Local Government Act, 1899, by s. 4 (1), transfers to the borough councils
all the powers and duties theretofore belonging to the elective vestries and district
boards situated within the districts of the newly created councils. It is under
this provision that s. 62 of the Metropolis Management Act, 1855, becomes
applicable to metropolitan district councils. This sub-section enacts that the
board of works for every district under the Act, and the vestry of every parish
mentioned in Sched. A to the Act, are empowered to appoint or employ, or
continue for the purposes of the Act, or remove at pleasure, such clerks, treasurers
or surveyors, or other officers and servants, as may be necessary, and may allow
to such clerks, treasurers, surveyors, and such other officers and servants
respectively such salaries and wages as the board or vestry may *think fit*. Upon
these words "think fit" much argument has turned. By s. 247 of the same
Act of 1855 all the Acts of Parliament in force in any parish or place, so far as I

A they are inconsistent with this Act, are repealed as regards such parish or place notwithstanding any provision of the Act continuing, and transferring respectively to vestries of parishes, and transferring to district boards any duties, powers, or authorities now vested in vestries, commissioners, or other bodies. The section is not very clearly worded, but I assume it was intended by it to delete, and did in effect delete, from the first five of the statutes mentioned in the

B appellant's case, the controlling word "reasonable" wherever it occurs in the sections providing for the appointment of employees, or the grant or payment of salaries, wages, or allowances, on the ground that these statutes are earlier in date than the Act of 1855, are inconsistent with this latter Act, and are therefore repealed. The question remains, however: How are the several statutes of a later date than 1855 containing provisions as to the reasonableness of the payment

C of salaries, wages and allowances similar to those of the repealed statutes to be construed? Section 247 of the Act of 1855 cannot affect them, and, unless the words "may think fit" used in s. 62 are equivalent to the words "may think reasonably fitting," the most absurd results must follow. For instance, if one takes the Baths and Washhouses Act, 1846, the paying body must now only pay such salaries as they may *think fit*, but the authority under the Baths and Washhouses

D Act, 1878, the duties of their employees being somewhat similar, must pay to these latter *reasonable* salaries, wages and allowances. These statutes later in date than the Act of 1855 are eight in number, and cover almost the entire field of local administration. Three, or at most four, of them dispense with the controlling word "reasonable," namely, the Elementary Education Act, 1870, the Public Health Act, 1875, which apparently substitutes in reference to the remuneration of clerks and treasurers the control of the Local Government Board for the word

E "reasonable," and the Public Libraries Act, 1892, which, by s. 15 (2), provides that the governing body may appoint salaried officers and servants, but does not impose any control or suggest any measure. In such a case I think it would have to be taken in law that the remuneration should be reasonable. The Local Government Act, 1894, by s. 17 enacts that their clerk, where there is no assistant

F overseer, is to receive such remuneration as the parish council may think fit.

But as wages are remuneration for services, the words "think fit" must, I think, be construed to mean "as the employer shall think fitting and proper" for the services rendered. It cannot, in my view, mean that the employer, especially an employer dealing with moneys not entirely his own, may pay to his employee wages of any amount he pleases. Still less does it mean that he can pay gratuities or gifts to his employers disguised under the name of wages. The only rational way by which harmony of administration can be introduced into the various departments of local government covered by s. 62 of the Act of 1885, and by the several aforesaid more recent statutes, is by holding that in each and every case the payment of all salaries and wages must be "reasonable." I see no difficulty in so construing the words of s. 62. I entirely concur with BANKES, L.J., and think his judgment sound and convincing. I do not think it necessary to comment on those maps or grades which show the rise of women's wages. It is enough to say that their wages having been raised from 23s. 6d. to 80s. per week, are kept at that figure through the years 1921, 1922, and 1923, though the bonus corresponding to the extra cost of living, and the bonus of the Joint Industrial Council's award after April 1, 1921, rapidly declined. What is a reasonable wage at any time must depend, of course, on the circumstances which then exist in the labour market. I do not say there must be any cheese-paring or that the datum line, as I have called it, must never be exceeded to any extent, and that employees may not be generously treated. But it does not appear to me that there is any rational proportion between the rate of wages at which the labour of these women is paid and the rates at which they would be reasonably remunerated for their services to the council. I concur with the auditor in thinking that what has been given to the women as wages are really to a great extent gifts and gratuities disguised as

wages, and are, therefore, illegal. The council have evidently been betrayed into the course they have followed by taking into consideration the several matters mentioned in Mr. Scurr's affidavit which they ought not properly to have taken into consideration at all, and consequently did not properly exercise the discretion placed in them, but acted contrary to law : see *R. v. Adamson* (6), *R. v. St. Pancras Vestry* (7), *R. v. Board of Education* (8). I think the appeal succeeds.

LORD SUMNER.—The legal problem, which this appeal raises, is how to adjust the relation between s. 247, and especially its sub-s. (7), of the Public Health Act, 1875, and s. 62 of the Metropolis Management Act. 1855. Under the former section, by sub-s. (1), "the accounts of the receipts and expenditure" of such a borough council as that of Poplar "shall be audited . . . once in every year . . . by the auditor of accounts relating to the relief of the poor"—who in this case is the appellant—and, by sub-s. (7), the auditor "shall disallow every item of account contrary to law, and surcharge the same on the person making or authorising the making of the illegal payment." Pausing here, I point out that both sub-sections are unqualified and are imperative. The accounts, that is all of them, shall be examined and audited, and the auditor shall disallow every item of account contrary to law. I reject the suggestion that the only accounting party liable to be surcharged is either some borough official or the borough council itself. Furthermore, I put aside as absurd the contention that "item" means only the name of the object of the expenditure and is exclusive of its amount. The effect would be that the auditor could not examine at all into the prices paid for goods purchased. Extravagant expenditure on permitted objects would receive an absolute charter of immunity, and a statutory body, strictly tied up in one dimension, would be free to move to infinity in another. At this point therefore, we find an enactment, which binds the council to submit to the auditor's examination all their expenditure and binds him to examine the whole and every part of it in order to test its legality, and to disallow any and every expenditure found to be contrary to law.

Passing now to s. 62 of the Metropolis Management Act, 1855, the respondents found themselves upon its final words, "such salaries and wages as the board or vestry may think fit," and contend that, in effect, they remove the amount of wages paid beyond the scope of effective criticism. The council may pay in good faith what wages they please. It is not said that they can pay, if they please, unreasonable wages, but that, for all purposes, what they please is what is reasonable. Their reason is substituted as the test of reasonableness for that of the auditor or of the courts of law. All the same the result is that expenditure, which is in fact wholly unreasonable, is on this view not contrary to law, if the council *bonâ fide* choose to incur it. This is a pure paradox. The section is mandatory ; it imposes an obligation to employ, and by implication that involves a power to do what employment involves, viz., to pay wages. If this had been left to implication, the wages would have to be reasonable in amount and their amount would be examinable. Do the express words of the power to pay negative this ? If they do, it is only as to the rates of wages. All the other terms of the employment must be examinable, such as hours worked and holidays enjoyed on full pay, for these in part measure the *quid pro quo* which the servant gives for his wages. Nothing is expressed which can leave these matters absolutely to the council, and if they are improvidently agreed to, the council may be involved in examinable and disallowable expenditure. With the wages themselves it is said to be a different matter. This may be so. It depends on the sound construction of the section ; but, if so, the result would be a legislative oddity. The section imposes a duty coupled with a power. In the case of an actor who is the creation of the law, it is from some provision of that law, express or implied, statutory or otherwise, that each and every power lawfully used must somehow be derived. In the case of a section conferring a statutory power on one person, there is no necessity to

A read into it an intention to limit a statutory power conferred on some other person, nor is there any need to imply an exemption of the exercise of the power which the section itself gives from subsequent review under powers to that effect given by another and, in this case, a later Act. Language may, of course, have been employed of a scope so wide as to lead to this result, but *prima facie* empowering words have had their due effect and are spent when the power has been effectually

B conferred.

The two sections of these two separate Acts have to be read together, and I fail to see what difficulty there is in doing so as follows. Section 62 of the Act of 1855 tells the council that they must employ servants, who will have to receive wages, and it tells them that they need not seek further authority for the amount to be paid, but by virtue of the section itself may pay the wages on their own

C authority to such amount as they think fit. The effect is that such payments will not be *ultra vires*. The employee may receive them without being under any liability to refund, if their amount should afterwards be challenged, and the council's treasurer may pay on the council's instructions without fear of being personally liable for applying the council's funds in excess of its power to direct him to pay. Such a provision is in place in s. 62, but there its operation ceases.

D Another Act then begins to operate. At the end of the year all the council's accounts have by law to be examined by the auditor. They have settled with their employees, but they are accountable employers still, for they administer public funds which have been raised by levying rates, and they must give an account of their stewardship. It is because the money paid is now beyond recall that the councillors themselves may be surcharged. This is for practical purposes

E the crux of the situation. If the statutory consequences had been merely that the councillors would be told not to do it again, very little would ever have been heard of this kind of argument, but extravagant disbursements would go unchecked. I see no antinomy between a present statutory power to pay an amount fixed by the employer, since immediate action is necessary, and a future statutory liability to be brought to account afterwards for any error in paying that amount in breach

F of law.

The respondents conceded that for wages fixed *malâ fide* no exemption from review could be claimed and that the mere magnitude of the wage paid, relatively to the wages for which the same service was procurable might be enough in itself to establish bad faith. This admission, I am sure, was rightly made, but it leads

G to two conclusions. Firstly, the final words of the section are not absolute but are subject to an implied qualification of good faith—"as the board may *bonâ fide* think fit." Is the implication of good faith all? That is a qualification drawn from the general legal doctrine that persons who hold public office have a legal responsibility towards those whom they represent—not merely towards those who vote for them—to the discharge of which they must honestly apply their minds.

H *Bonâ fide* here cannot simply mean that they are not making a profit out of their office or acting in it from private spite, nor is the *bonâ fide* a short way of saying that the council has acted within the ambit of its powers, and, therefore, not contrary to law. It must mean that they are giving their minds to the comprehension and their will to the discharge of their duty towards that public, whose money and local business they administer.

I The purpose, however, of the whole audit is to ensure wise and prudent administration and to recover for the council's funds money that should not have been taken out of them. If, having examined the expenditure and found clear proof of bad faith, which admittedly would open the account, the auditor further found that the councillors' evil minds had missed their mark, and the expenditure itself was right, then the expenditure itself would not be "contrary to law," and could not be disallowed. Bad faith admittedly vitiates the council's purported exercise of its discretion, but the auditor is not confined to asking if the discretion, such as it may be, has been honestly exercised. He has to restrain

expenditure within proper limits. His mission is to find if there is any excess over what is reasonable. I do not find any words limiting his functions merely to the case of bad faith or obliging him to leave the ratepayers unprotected from the effects on their pockets of honest stupidity or unpractical realism. The breach in the words "as [they] may think fit," which the admitted implication as to bad faith makes, is wide enough to make the necessary implication one both of honesty and of reasonableness. It might be otherwise, if the express words were to be read as absolute and unqualified, but if they are to be read as subject to some qualification, I think that qualification must be derived from the purpose of the statutory audit, which is the protection of the ratepayers' pockets and not the immunity of spendthrift administration. Secondly, in the case and for the purpose assumed, the auditor, when he reviews the accounts, is entitled and bound to use his own judgment as to the wages that would be reasonable in the circumstances. He must do so in order to measure from that datum the excess of the wages paid, and to decide if the excess is so great as to evidence *malâ fides*. So it will be also with the courts of law on appeal. If in the case of bad faith the auditor is capable of finding a reasonable amount and is bound to proceed to do so, I find no words in the section which, on a sound construction, preclude him from doing the same thing when good faith is present and I think that in both cases the reasonableness of the amounts is a subject for his review.

Though there is not much direct authority on this question I find none that does not bear out this view of the legislation. As to the duties of an auditor LORD RUSSELL, C.J., says in *Thomas v. Devonport Corpn.* (9) ([1900] 1 Q.B. at p. 21),

"an auditor is not only entitled, but . . . bound . . . to see that there are not among the payments . . . payments which are not authorised by the duty of the authority, or contrary to the duty of the authority, or in any other way illegal or improper."

This is under the Municipal Corporations Act, and FARWELL, L.J., cites it as equally applicable to an auditor under the Public Health Act, and he observes (*R. v. Roberts* (10) [1908] 1 K.B. at p. 435):

"The auditor does not claim, nor could he (in my opinion) properly claim, to exercise any control over questions of policy; but he does claim the right to check and challenge all items of administration. It is not easy to draw the line between policy and administration, or to give a definition except by way of example, but in my opinion the establishment of a works committee would be a question of policy into which the auditor could not go, but the payment of abnormally high wages to the workmen employed by such committee would be a matter of administration."

I think these passages excellently illustrate the distinction that must be drawn in such administrative matters. One of the ways in which a payment may be illegal is, as LORD RUSSELL, C.J., says, that it is not within the authority or not in accordance with the duty of the council. By question of policy I understand FARWELL, L.J., to mean such matters as the necessity for a urinal and the choice of its position, provided no public or private nuisance is created: *Biddulph v. St. George's, Hanover Square, Vestry* (11), *Mason v. Wallasey Local Board* (12), and *Vernon v. St. James, Westminster, Vestry* (13) and similar questions of policy. The word, however, is policy, not politics, and I can find nothing in the Acts empowering bodies, to which the Metropolis Management Act, 1855, applies, which authorises them to be guided by their personal opinions on political, economic or social questions in administering the funds which they derive from levying rates. STIRLING, J., in *Lewis v. Weston-super-Mare Local Board* (14) (40 Ch.D. at p. 62), quotes as applicable to the case before him LORD CRANWORTH's observations in *Stockton and Darlington Rail. Co. v. Brown* (15) (9 H.L. Cas. at p. 256):

A "When the legislature authorises railway directors to take, for the purposes of their undertaking, any lands specially described in their Act, it constitutes them the sole judges as to whether they will or will not take those lands: provided only that they take them *bonâ fide* with the object of using them for the purposes authorised by the legislature, and not for any sinister or collateral purpose."

B STIRLING, J., adds

"the principle stated . . . may even more readily be applied where the powers are vested in a public corporation charged with the performance of important public duties and acting for the benefit of the whole community."

C To my mind, a council acts for a collateral purpose, if it fixes by standards of its own on social grounds a minimum wage for all adults, and is not in so doing acting for the benefit of the whole community.

D Much was said at the Bar about the wide discretion conferred by the Local Governments Acts on local authorities. In a sense this is true, but the meaning of the term needs careful examination. What has been said in cases which lie outside the provisions as to audit altogether is not necessarily applicable to matters which are concerned with the expenditure of public money. There are many matters which the courts are indisposed to question. Though they are the ultimate judges of what is lawful and what is unlawful to borough councils, they often accept the decisions of the local authority simply because they are themselves ill-equipped to weigh the merits of one solution of a practical question as against another. This, however, is not recognition of the absolute character of the local authority's discretion, but of the limits within which it is practicable to question it. There is nothing about a borough council that corresponds to autonomy. It has great responsibilities, but the limits of its powers and of its independence are such as the law, mostly statutory, may have laid down, and there is no presumption against the accountability of the authority. Everything depends on the construction of the sections applicable. In the present case, I think that the auditor was entitled to inquire into all the items of expenditure in question, to ask whether in incurring them the council had been guided by aims and objects not open to them or had disregarded considerations by which they should have been guided, and to the extent to which they had in consequence exceeded a reasonable expenditure, it was his duty to disallow the items.

G The material facts are as follows. The year under review is 1921-1922, and in that year both men and women in Grade A, which, it seems, is the lowest grade, received a wage of £4 a week. There are two tests by which these payments can be criticised. One is the rise or fall in the cost of living, according to the index figures published monthly by the Ministry of Labour in the "Labour Gazette"; the other is the publication every three months of the rates of wages fixed for various grades of workpeople by the Joint Industrial Council for Local Authorities' employees in the London district. Neither has any binding authority over the Poplar council, and no doubt exception can be taken to both. The first is based on careful and extensive statistical inquiries, and has been widely relied on for many years past. The second represents what numbers of employers and employees have been content to pay and to take, following the agreed opinion of representatives of both sides assembled for the purpose. The respondents have not criticised any of these figures in detail, or pointed out any errors in them, or put forward any comparable materials. They say simply that they did not think fit to adopt them. The rate in question—£4 a week—was fixed in May 1920 for Grade A, and in the case of women this was a rise of rather over 30s. per week. During the five months in 1920-21, and one in 1921-1922 the men's wages in this grade would have been 4s. to 7s. 6d. higher, if the awards of the Joint Industrial Council had been acted on, and for three months in the former year the cost of living figures had risen above the uniform wage of £4. For women the wage of

£4 was never less than 15s. above the cost of living figures, and 10s. above the Joint Industrial Council's awards. From about the middle of 1920-1921 a fall in the cost of living figures set in, and from the end of the first month in 1921-1922 a fall in the Joint Industrial Council's figures also, and both continued to fall steadily and without any material setback throughout the remainder of the period under review. A

The council did not fail to observe this fall, but took it into consideration, and in August, 1921, passed a resolution that wages or bonuses of the council's workmen in all departments be not reduced during the ensuing four months. The anticipatory character of this resolution is significant. It shows how little the respondents proposed to be guided by anything that could be called the market rate of wages. In fact, no reduction had taken place down to the end of the year under review. Under the operation of this general resolution the wages of Grade B (general labourers), which had previously followed and fallen with the awards for the building trade union, a higher class of award than that applicable to Grade B, no longer followed any awards downwards, but remained "stabilised," as it is called, at 80s. 6d. per week. Thus, as regards Grade B men, for eight months of the year under review, as regards Grade A men for eleven, and as regards Grade A women for the whole year, the council advisedly cut loose from both these modes of fixing fluctuating wages. Their reason the respondents give as follows: B

"The council did not and does not take the view that wages paid should be exclusively related to the cost of living. They have from time to time carefully considered the question of the wages and are of the opinion, as a matter of policy, that a public authority should be a model employer and that a minimum rate of £4 is the least wage which ought to be paid to an adult having regard to the efficiency of their workpeople, the duty of a public authority both to the ratepayers and to its employees, the purchasing power of the wages, and other considerations which are relevant to their decision as to wages." C

From this carefully considered answer I think it is plain that the respondents have deliberately decided not to be guided by ordinary economic (or economical) considerations. The first sentence above quoted means that, when the cost of living passes £4 a week, the rate of wages paid will follow it upwards, but, however it may fall, the £4 rate will be stabilised and will stand. There is nothing definite about the statement that a public authority should be a model employer. To whom is it to be a model? If to other public authorities, the council's resolution is vox clamantis in deserto, for other authorities with rare exceptions turn a deaf ear to it. If to other private employers, the example of the council is necessarily thrown away on concerns which must make both ends meet and have not the ratepayers' purse to draw on. Whatever "having regard to the efficiency of their workpeople" may mean, it is not proved or suggested that the workpeople employed in Poplar are in any way exceptional in their powers of work, or that the cost of maintaining a workman's efficiency is higher in Poplar than elsewhere. The one definite thing is that the respondents contend that no adult employee should in any circumstances have less than £4 a week, whether young or old, male or female, married or single, skilled or unskilled. It is not shown that the women's work is the same as, or is comparable with, the men's or that the women inter se or the men inter se are engaged in similar tasks. I express no opinion as to the merits of this view, that the dignity of adult labour requires at least a £4 wage, nor has the honesty of those who entertain it been questioned, but I think it is plain that such a course, whether it be ideal or social or political or all three, forms no part of the conduct, as ordinarily understood, of such practical enterprises, as borough councils are by statute authorised to engage in. No authority and no statutory provision was cited to your Lordships which enables D

A a borough council to give practical effect, at the ratepayers' expense, to such an abstract resolution, nor am I for my own part aware of any.

I am, therefore, of opinion that on their own showing the respondents have exercised such discretion as the Metropolis Management Act gives to the council in the matter of wages upon principles which are not open to the council, and for objects which are beyond their powers. Their exercise of those powers was
B examinable by the auditor, and on the above grounds the excess expenditure was liable to be disallowed by him as contrary to law. As to the amount of surcharge little was urged on your Lordships outside the contention that the whole question of the amount of wages to be paid was one for the council alone. The auditor, who had not challenged the wages paid in 1920-21, when it was possible to suppose that they had been fixed with some reference to the cost of living
C and the current awards, was moved to object to them in 1921-22, when he found that, in the face of an established and rapid decline both in cost of living and in the amounts awarded, these wages continued to be paid without change. I think he was justified in challenging them in the second year, and that the explanations now given show that his surcharge was right. He caused elaborate calculations to be made, based on a very liberal margin for discretion in the respondents' favour,
D and only surcharged the excess, and even that he reduced to a round figure of £5,000, the amount now surcharged. This is no arbitrary amount or penal sum, and the respondents have been treated by him in this regard with every indulgence. I see no reason to dispute his figures, and am of opinion that the order of the Divisional Court was right and that it ought to be restored.

E **LORD WRENBURY.**—The metropolitan borough of Poplar is a statutory body in whom is vested a statutory discretion expressed by the following words in the Metropolis Management Act, 1855, s. 62: They

“shall respectfully appoint or employ, or continue for the purposes of this Act, and may remove at pleasure, such clerks, treasurers, and surveyors, and such
F other officers and servants as may be necessary, and may allow to such clerks, treasurers, surveyors, officers and servants respectively such salaries and wages as the board or vestry may think fit.”

The council of the borough during the year in review paid certain wages to their employees. The question in the appeal is not whether they had a discretion as to the wages they should pay—they certainly had; it is not whether in the exercise of that discretion if exercised within the statutory limits and upon legitimate
G grounds, they are to be controlled by the court or by this House—they certainly are not. It is not alleged that the council acted *malâ fide*, neither is it alleged that they were guilty of negligence or misconduct. The question is what were the limits of their statutory discretion, whether they exceeded those limits, and whether they acted wholly upon grounds which they were entitled to regard.

The accounts of the borough council are by statute to be audited by a statutory auditor. His powers and duties are defined by s. 247 of the Public Health Act, 1875 (ante p. 27). The statutory auditor in this case surcharged a sum of £5,000 upon certain named members of the council. The Divisional Court were of opinion that the surcharge was right. The Court of Appeal by a majority reversed that decision. The statutory auditor appeals. For the decision of the appeal
H the first essential step is to ascertain with exactness what are the limits of the statutory discretion. This turns upon the exact meaning of the words in s. 62 of the Act of 1855 “such salaries and wages as [they] may think fit.” I proceed to examine these words and to state what is, in my opinion, their exact meaning, with a view to ascertaining the limits of the statutory discretion. The cardinal word upon which emphasis is principally to be laid is the word “wages.” Wages are the pecuniary return for services rendered. To determine the proper or true amount which in a given state of facts has been paid or is payable for services rendered is far from easy. It can never be determined with exactness. It is
I

impossible to name in any particular case an amount which if diminished by 1s. a week would be too small and if increased by 1s. a week would be too large. But it is possible to name an amount which would certainly be too large—as, for instance, if a charwoman were paid £2 a day. Using my best endeavour to state the matter in general terms, I express it thus. Wages in a particular service are such sum as a reasonable person, guiding himself by an investigation of the current rate in fact found to be paid in the particular industry, and acting upon the principle that efficient service is better commanded by paying an efficient wage, would find to be the proper sum. The figure to be sought is not the lowest figure at which the service could be obtained, nor is it the highest which a generous employer might, upon grounds of philanthropy or generosity, pay out of his own pocket. It is a figure which is not to be based upon or increased by motives of philanthropy nor even of generosity stripped of commercial considerations. It is such figure as is the reasonable pecuniary equivalent of the service rendered. Anything beyond this is not wages. It is in addition to wages and is a gratuity. The authority is to pay, not such sum, but such wages as they think fit.

I pass from the word “wages” to the words “as [they] may think fit.” We have heard arguments upon the question whether these words are or are not to be understood as if the word reasonable or “reasonably” were inserted so that the sentence would run “as they reasonably think fit” or “such reasonable wages as they may think fit.” Is the verb “think” equivalent to “reasonably think”? To my mind, there is no difference in the meaning whether the word “reasonably” or “reasonable” is in or out. I do not myself rely upon the fact that in the adoptive Acts (for instance, in the Baths and Washhouses Act, 1846) the word “reasonable” is found in the connection “reasonable salaries, wages, and allowances” (s. 12) and is not found in the Act of 1855, which is by later legislation made applicable to this borough council. It is no doubt difficult to suppose that the council would have to maintain a different standard as regards reasonable conduct in determining the wages of a man employed under the Baths and Washhouses Act and that of a man employed under some other Act. But if it is the fact that either the statute which does or the statute which does not contain the word “reasonable” must give way to the other, it is not obvious which is the statute which is to give way. I rest my opinion upon higher grounds. A person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so—he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by use of his reason, ascertain and follow the course which reason directs. He must act reasonably. Thirdly and lastly, I point to the word “fit.” That word means, I think, “fitting” or “suitable.” The words “as [they] think fit” do not mean “as they choose.” The measure is not the volition of the person vested with the discretion, it is the suitability and adequacy or fitness of the amount in the reasonable judgment of the person vested with the discretion.

I pass on to apply the above principles to the facts of this case. In the year 1920–21 the auditor found that the council had adopted a rate of £4 a week as the minimum rate payable both to men and women in the lowest grades of labour. In that year he made no surcharge, but accepted (startling as it may seem) the view that the council had not exceeded the limits of their discretion in paying £4 a week, say, to a charwoman for the class of work in which she is employed. For the year 1921–22 he made, on June 6, 1923, a certificate of disallowance and surcharge to the amount of £5,000 on the ground that to that extent at least the wage charges were unnecessary and unreasonable and therefore items contrary to law. He arrived at the surcharge of £5,000 in the following way. He found that the wage payments ranging upwards from £4 a week were still being maintained in the year 1921–22, notwithstanding that the cost of living had fallen from 176 per cent. in the earlier period to 82 per cent. in the latter period over the

A cost of living in the year 1914. He found that the wage payments made in the year 1921-22 exceeded by about £17,000 the amount of wages that would have been paid if the agreed wages of the awards made by the Joint Industrial Council had been followed. On May 18, 1923, he had written to Mr. C. W. Key that he adjourned his audit to May 31, and that he would then hear any representations that might be made on the matter of the audit or would consider any representations that might be made to him in writing. At the adjourned audit he heard the parties, B gave effect to some of their contentions, reduced the figure of £17,000 to £5,000, and on June 6, certified, as above stated, a surcharge of £5,000, on the ground that the council had made payments far in excess of those necessary to obtain the services required and to maintain a high standard of efficiency and which were thus in reality gifts to their employees in addition to remuneration for their services. C The principle upon which the auditor proceeded was as follows. He started as a basis with the wage current at a past date before the war. For the moment he assumed that that wage was a fair wage at that date. For any error in that respect, allowance was made as presently mentioned. He then took the cost of living, acting upon the principle that if 20s. in the year under review was required to purchase commodities which at the date of the basic wage could have been D purchased for 10s., the basic wage must be multiplied by two to reproduce in the year of review the basic wage of the past date. He also took as an assistance and guide the bonuses allowed by the Joint Industrial Council's awards. He then arrived at a figure and to that figure added 20s. a week to cover and make allowance for any error by way of insufficiency that might be lurking behind the amount of the estimate. Anything beyond this he regarded as a gift and made his surcharge E on the ground that it was contrary to law for the council to make gifts. The principles upon which the auditor acted are, in my opinion, sound principles. He further found that, on Aug. 31, 1921, the council had passed a resolution to the effect that no reduction of wage or bonus should be made during the ensuing four months and that this was acted upon for twelve months. He regarded this as not a legitimate exercise of the council's powers. He said: "It disregarded F very important reductions which had already taken place in the cost of living and in the trade union and other awards, and during the period of its operation further important reductions were likely to occur and did in fact occur." In this, again, I think the auditor was right. The auditor has not proceeded upon the footing that he was bound to trace and state every separate case and overpayment G of wage; he had not certified that A. B. was overpaid 5s. in this named week and 10s. in that named week and so on. He was not, I think, bound to do so. It would be practically impossible to deal with the matter in that way. He has taken the wages bill as a whole and has certified that a round sum of £5,000 (which may well be much below the mark) is a sum which at least has been paid in excess of the sum which would result from a proper and legitimate exercise of the statutory discretion. If he is right in that, as I think he is, it follows that the excess payment is within s. 247 (7) of the Act of 1875 contrary to law and in discharge of his statutory duty he was bound to surcharge the amount. H

I do not find it necessary to say more than a word upon the argument as to the words "item of account" in s. 247 (7). Item of account is not the same as head of account. The wage bill is no doubt a head of account—but every item of weekly I payment to each employee is an item of account. If a man's wages were charged for eight weeks and he had been employed only five weeks, the wages for three weeks would be items of account which ought to be disallowed. For the reasons which I have given I think that the three judges in the Divisional Court were right; that BANKES, L.J., was right, that SCRUTTON, L.J., would have been right if he had correctly applied to the facts some of the principles which he had stated, and that this appeal succeeds.

LORD CARSON.—In the course of the arguments in this case, and indeed afterwards, I felt inclined to concur with the opinion of SCRUTTON, L.J., in the Court of

Appeal which he shortly summarises in the following passage ([1924] 2 K.B. at A p. 721):

"I come to the conclusion that for that year, and I limit my conclusions to that year, though the figures are near the line where interference should take place, I cannot find they have reached it. The question is not whether I should have sanctioned these wages ; I probably should not ; nor whether the auditor or the Whitley Council would have sanctioned these wages . . . it is for the Poplar Borough Council to fix these wages, which are not to be interfered with unless they are so excessive as to pass the reasonable limits of discretion in a representative body."

I can find nothing, however, in the reasoning of the lord justice which is at variance with the propositions as I understand them which your Lordships have laid down. I was also much impressed by the reasoning to be found in the judgment of ATKIN, L.J., where he said ([1924] 2 K.B. at p. 725), as regards the principle on which limitation should be placed on the words of the Metropolis Management Act, 1855, viz. :

"The answer, I think, is to be found in the restriction that the council must act in good faith. They must determine the amount of wages as wages in an existing industrial system ; they must not fix the amount as a dole or as a bribe, or with any object other than that of fairly remunerating the servant. In this case bad faith is not alleged by the auditor or found by the Divisional Court. Indeed, it is stated in the judgment below that it is admitted that the council exercised their discretion honestly."

Upon a further consideration of the case on both these points, I do not feel confident they can be supported. As regards the question of the exorbitant or excessive nature of the payments made, it seems to me that that is not the only question which we have to determine to see whether the rates paid "are," to quote SCRUTTON, L.J., "near the line where interference should take place." As LORD BUCKMASTER has pointed out, in the joint affidavit of members of the borough council, para. 9, it is stated as follows :

"The council did not and does not take the view that wages paid should exclusively relate to the cost of living. They have from time to time carefully considered the question of the wages and are of the opinion, as a matter of policy, that a public authority should be a model employer and that a minimum rate of £4 is the least wage which ought to be paid to an adult having regard to the efficiency of their work people . . ."

That paragraph appears to show that they were acting upon a policy which claimed entirely to disregard the sharp decline in the cost of living and the nature of the labour that had to be paid for. That being so, I find a difficulty in supporting the conclusions arrived at by SCRUTTON, L.J., as I think that not merely the excessive wages paid but the reasons on which the council claimed to assess them have to be taken into consideration if we are to deal with the realities of the problem. As regards the reasons already referred to, of ATKIN, L.J., I am inclined to think, upon further consideration, that the admission that bad faith is not alleged or that the council exercised their discretion honestly has been misapplied. I do not myself know what these expressions were meant to cover, but having regard to the statements made in the affidavit of the auditor that the council, in the exercise of their statutory powers, had not paid due regard to the interests of the ratepayers whose funds they administered, had imposed unreasonable charges upon these funds and made payments which were far in excess of those necessary to obtain the services of those required and to maintain a high standard of efficiency, and were thus in reality gifts to their employees in addition to remuneration for their services, I find it difficult to come to a conclusion that the admissions referred to meant anything more than that the council honestly thought they were entitled to take

A the course they did, and, in my opinion, it was open to the auditor, upon coming to the conclusions as stated in his affidavit, to draw the inference that the council were not engaged in merely fixing a rate of wages, but were affected by considerations which could not be held to come within the ambit of discretion entrusted to them. Having regard to the great unanimity as to principles which has prevailed in all the judgments, both in the court of first instance and the Court of Appeal, and the judgments just delivered by your Lordships, with which I in the main agree, I do not find it possible, notwithstanding the doubts I have felt, to dissent from the opinion expressed by the noble Lord on the Woolsack.

Appeal allowed.

Solicitors: Last, Riches, & Fitton; W. H. Thompson.

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

R. v. BATEMAN

[COURT OF CRIMINAL APPEAL (Lord Hewart, C.J., Salter and Fraser, JJ.), February 9, 10, May 25, 1925]

[Reported 94 L.J.K.B. 791; 133 L.T. 730; 89 J.P. 162; 41 T.L.R. 557; 69 Sol. Jo. 622; 28 Cox, C.C. 33; 19 Cr. App. Rep. 8]

Medical Practitioner—Duty to patient—Fair and reasonable standard of care and competence.

If a person, e.g., a doctor, holds himself out as possessing special skill and knowledge, and he is consulted, as possessing such skill and knowledge, by or on behalf of another person, he owes a duty to that person to use due caution in undertaking the employment. If, in the case of the doctor, he assumes the responsibility and undertakes the treatment and the patient submits to his direction and treatment accordingly, he owes a duty to the patient to use diligence, care, knowledge, skill, and caution in administering the treatment. No contractual relation is necessary, nor is it necessary that the service be rendered for reward. It is for the judge to direct the jury what standard to apply and for the jury to say whether that standard has been reached. The jury should not exact the highest, or a very high, standard, nor should they be content with a very low standard. The law requires a fair and reasonable standard of care and competence. As regards cases where incompetence is alleged the unqualified practitioner cannot claim to be measured by any lower standard than that which is applied to the qualified man.

Criminal Law—Negligence—Degree of negligence to be proved.

To support an indictment for manslaughter the prosecution must prove, not only that the accused owed to the deceased person a duty to take care, that that duty was not discharged, and that the default of the accused caused the death of the deceased, but also that the negligence or incompetence of the accused went beyond a mere matter of compensation and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment. It is most desirable that in trials for manslaughter

by negligence it should be impressed on the jury that the issue is not negligence or no negligence, but felony or no felony. A

Notes. Considered: *Andrews v. D.P.P.*, [1937] 2 All E.R. 552. Approved: *Akerle v. R.*, [1943] 1 All E.R. 367. Referred to: *Rose v. Ford*, [1936] 1 K.B. 90; *R. v. Large*, [1939] 1 All E.R. 753.

As to manslaughter as the result of negligence see 10 HALSBURY'S LAWS (3rd Edn.) 716 et seq., and as to the responsibility and liability of a medical practitioner see *ibid.*, vol. 26, p. 17 et seq. For cases see 15 DIGEST (Repl.) 962 et seq., and 34 DIGEST 547 et seq. B

Cases referred to:

- (1) *Cashill v. Wright* (1856), 6 E. & B. 891; 27 L.T.O.S. 283; 20 J.P. 678; 2 Jur. N.S. 1072; 4 W.R. 709; 119 E.R. 1096; 29 Digest 14, 178. C
- (2) *R. v. Bull* (1860), 2 F. & F. 201; 15 Digest (Repl.) 966, 9362.
- (3) *R. v. Chamberlain* (1867), 10 Cox, C.C. 486; 15 Digest (Repl.) 967, 9381.
- (4) *R. v. Crick* (1859), 1 F. & F. 519; 15 Digest (Repl.) 967, 9379.
- (5) *R. v. Crook* (1859), 1 F. & F. 521; 15 Digest (Repl.) 967, 9380.
- (6) *R. v. Doherty* (1887), 16 Cox, C.C. 306; 15 Digest (Repl.) 930, 8913.
- (7) *R. v. Finney* (1874), 12 Cox, C.C. 625; 14 Digest (Repl.) 55, 192. D
- (8) *R. v. Markuss* (1864), 4 F. & F. 356; 15 Digest (Repl.) 966, 9363.
- (9) *R. v. Nicholls* (1874), 13 Cox, C.C. 75; 15 Digest (Repl.) 957, 9266.
- (10) *R. v. Noakes* (1866), 4 F. & F. 920; 14 Digest (Repl.) 55, 191.
- (11) *R. v. Spencer* (1867), 10 Cox, C.C. 525; 15 Digest (Repl.) 966, 9364.
- (12) *R. v. Spilling* (1838), 2 Mood. & R. 107; 15 Digest (Repl.) 966, 9361.
- (13) *R. v. Whitehead* (1848), 3 Car. and Kir. 202; 15 Digest (Repl.) 967, 9378. E
- (14) *R. v. Ferguson* (1830), 1 Lew. C.C. 181; 15 Digest (Repl.) 966, 9360.
- (15) *R. v. Long* (1831), 4 C. & P. 423; 15 Digest (Repl.) 966, 9372.
- (16) *R. v. Spiller* (1832), 5 C. & P. 333; 15 Digest (Repl.) 967, 9375.
- (17) *R. v. Webb* (1834), 2 Lew. C.C. 196; 1 Mood. & R. 405; 15 Digest (Repl.) 967, 9376.
- (18) *R. v. Williamson* (1807), 3 C. & P. 635; 15 Digest (Repl.) 967, 9383. F

Appeal from a conviction at the Central Criminal Court, and the sentence passed by SHEARMAN, J., thereon.

The appellant was a doctor practising at Deptford. On July 23, 1924, he was called in to attend a woman named Mary Ann Harding in her confinement. He found a difficult presentation, and, after administering chloroform, attempted delivery by means of instruments, but was unsuccessful. He then tried to perform manually the operation of "version" and after an hour the child was born dead. On July 28 the patient, who was then very seriously ill was removed to the infirmary, where she died on July 30. The appellant was subsequently charged with the manslaughter of the woman, and the negligence alleged against him fell under three main heads: (a) the causing of an internal rupture in performing the "version"; (b) removal of part of the uterus with the placenta; (c) undue delay in sending the patient to the infirmary. At the trial, counsel for the defence invited SHEARMAN, J., to withdraw the first two charges from the jury, but the learned judge declined to do so. The jury returned a general verdict of "Guilty" and the accused was sentenced to six months' imprisonment in the second division. Against this conviction and sentence he appealed. G

Marshall-Hall, K.C., Birkett, K.C. and Arthur Davis for the appellant. H
Roome for the Crown. I

The following cases were referred to: *Cashill v. Wright* (1), *R. v. Bull* (2), *R. v. Chamberlain* (3), *R. v. Crick* (4), *R. v. Crook* (5), *R. v. Doherty* (6), *R. v. Finney* (7), *R. v. Markuss* (8), *R. v. Nicholls* (9), *R. v. Noakes* (10), *R. v. Spencer* (11), *R. v. Spilling* (12), *R. v. Whitehead* (13), *R. v. Ferguson* (14), *R. v. Long* (15), *R. v. Spiller* (16), *R. v. Webb* (17), *R. v. Williamson* (18).

May 25. **LORD HEWART, C.J.**, read the following judgment of the court.—The appellant was convicted at the Central Criminal Court before SHEARMAN, J., of manslaughter, and was sentenced to six months' imprisonment in the second division. He appealed by leave against conviction and sentence. This court, after hearing arguments of counsel, quashed the conviction, and intimated that a considered judgment would be delivered at a later date.

The appellant, who is a qualified medical practitioner, was indicted for having on July 30, 1924, unlawfully killed one Mary Ann Harding. He was called in by the midwife on the night of July 23, and found a very unusual and difficult presentation. He administered chloroform and attempted unsuccessfully to effect delivery by the use of instruments. No blame was imputed to the appellant on that account. He then proceeded by using his hands to perform the operation known as "version," using, of necessity, considerable force. He worked at this operation for an hour and then delivered the child, which was dead. In removing the placenta, he, by mistake, removed along with it a portion of the uterus. The patient was much exhausted, and the appellant did not expect her to live. He visited her twice daily until the 28th. Although requested by the husband and the midwife to have her removed to the infirmary, he did not remove her until the 28th, on which day he wrote a letter to the superintendent that was alleged by the prosecution to be uncandid. On admission to the infirmary she was found unfit to undergo an operation. She grew gradually weaker, and died on the 30th. On a post mortem examination the bladder was found to be ruptured, the colon was crushed against the sacral promontory, there was a small rupture of the rectum, and the uterus was almost entirely gone. The charges of negligence made against the appellant were, in substance (i) causing the internal ruptures in performing the operation of "version"; (ii) removing part of the uterus along with the placenta; (iii) delay in sending the patient to the infirmary. For the defence it was contended that (i) and (ii) were, in the difficult circumstances of the case, not inconsistent with a fair degree of care and competence, and that to have moved the patient at an earlier date would only have accelerated her death. At the hearing of the appeal, counsel for the appellant relied mainly on the following grounds: Misdirection in law, misdirection and non-direction on the facts, and that the verdict was against the weight of the evidence.

Before we deal with the direction of the learned judge to the jury, it is desirable to consider generally the law on this subject. In expounding the law to juries on the trial of indictments for manslaughter by negligence the judges have often referred to the distinction between civil and criminal liability for death by negligence. The law of criminal liability for negligence is conveniently explained in that way. If A. has caused the death of B. by alleged negligence, then, in order to establish civil liability, the plaintiff must prove (in addition to pecuniary loss caused by the death) that A. owed a duty to B. to take care, that that duty was not discharged, and that such default caused the death of B. To convict A. of manslaughter, the prosecution must prove the three things above mentioned and must satisfy the jury, in addition, that A's negligence amounted to a crime. In the civil action, if it is proved that A. fell short of the standard of reasonable care required by law, it matters not how far he fell short of that standard. The extent of his liability depends not on the degree of negligence, but on the amount of damage done. In the criminal court, on the contrary, the amount and degree of negligence are the determining question. There must be *mens rea*. The difference between negligence and gross negligence is illustrated by *Cashill v. Wright* (1), which was an action against an innkeeper for damages for the loss of the plaintiff's property stolen from him while he was putting up at the defendant's inn. The defendant contended that the loss had been occasioned or contributed to by the negligence of the plaintiff. At the trial the jury were directed that the defence failed unless they thought that the plaintiff had been guilty of gross negligence. On a rule for a new trial, **ERLE, J.**, delivering the considered judgment of the court

(LORD CAMPBELL, C.J., WIGHTMAN, ERLE, and CROMPTON, JJ.), said, (6 E. & B. A
at p. 899):

"The other question was as to the alleged misdirection, in the direction to the jury that there must be gross negligence, to maintain the defence. It does not appear that there was any information given to the jury what they were to understand by gross negligence. If they were told to understand by gross negligence the absence of that ordinary care which, under the circumstances, a prudent man ought to have taken, as seems to have been the meaning given to gross negligence in some of the modern cases cited before us, the direction as to the degree of negligence might not have been objectionable; but the legal meaning of gross negligence is greater negligence than the absence of such ordinary care. It is such a degree of negligence as excludes the loosest degree of care, and is said to amount to *dolus*."

The rule was made absolute. In explaining to juries the test which they should apply to determine whether the negligence, in the particular case, amounted or did not amount to a crime, the judges have used many epithets, such as "culpable," "criminal," "gross," "wicked," "clear," "complete." But, whatever epithet be used and whether an epithet be used or not, in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment.

It remains to consider the application of this principle to cases like the present where death has been caused, in the exercise of his calling, by the alleged negligence of a person professing special knowledge and skill, and a charge of manslaughter is preferred. The following cases may be cited as illustrating the language in which criminal negligence of this kind has been discussed and explained by the judges in modern times: *HALE'S PLEAS OF THE CROWN*, p. 429; *R. v. Williamson* (18), *R. v. Ferguson* (14), *R. v. Long* (15), *R. v. Spiller* (16), *R. v. Webb* (17), *R. v. Spilling* (12), *R. v. Whitehead* (13), *R. v. Crick* (4), *R. v. Crook* (5), *R. v. Bull* (2), *R. v. Markuss* (8), *R. v. Noakes* (10), *R. v. Chamberlain* (3), *R. v. Spencer* (11), *R. v. Finney* (7), *R. v. Nicholls* (9), *R. v. Doherty* (6). The law as laid down in these cases may be thus summarised. If a person holds himself out as possessing special skill and knowledge, and he is consulted, as possessing such skill and knowledge, by or on behalf of a patient, he owes a duty to the patient to use due caution in undertaking the treatment. If he accepts the responsibility and undertakes the treatment and the patient submits to his direction and treatment accordingly, he owes a duty to the patient to use diligence, care, knowledge, skill and caution in administering the treatment. No contractual relation is necessary, nor is it necessary that the service be rendered for reward. It is for the judge to direct the jury what standard to apply and for the jury to say whether that standard has been reached. The jury should not exact the highest, or a very high, standard, nor should they be content with a very low standard. The law requires a fair and reasonable standard of care and competence. This standard must be reached in all the matters above mentioned. If the patient's death has been caused by the defendant's indolence or carelessness, it will not avail to show that he had sufficient knowledge; nor will it avail to prove that he was diligent in attendance if the patient has been killed by his gross ignorance and unskilfulness. No further observation need be made with regard to cases where the death is alleged to have been caused by indolence or carelessness. As regards cases where incompetence is alleged, it is only necessary to say that the unqualified practitioner cannot claim to be measured by any lower standard than that which is applied to a qualified man. As regards cases of alleged recklessness, juries are likely to distinguish between the qualified and the unqualified man. There may be recklessness in undertaking the treatment and recklessness in the conduct of it. It is, no doubt, conceivable that

A a qualified man may be held liable for recklessly undertaking a case which he knew, or should have known, to be beyond his powers, or for making his patient the subject of reckless experiment. Such cases are likely to be rare. In the case of the quack, where the treatment has been proved to be incompetent and to have caused the patient's death, juries are not likely to hesitate in finding liability on the ground that the defendant undertook, and continued to treat, a case involving
B the gravest risk to his patient, when he knew he was not competent to deal with it, or would have known if he had paid any proper regard to the life and safety of his patient. The foregoing observations deal with civil liability. To support an indictment for manslaughter the prosecution must prove the matters necessary to establish civil liability (except pecuniary loss), and, in addition, must satisfy the jury that the negligence or incompetence of the accused went beyond a mere
C matter of compensation and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment.

We have now to deal with the alleged misdirection. At the outset of the summing-up the learned judge directed the jury as follows :

"I want first of all to explain the law to you. The law is that anybody who causes the death of anybody else—it does not only apply to a doctor, it applies to motor-drivers, railwaymen, or signalmen, to a number of people—is criminally responsible. It is equally clear law that no one is criminally responsible for what I call making a mere mistake, and it is really for the jury to draw the line between what is called making a mere mistake, an error of judgment, and doing something which is grossly and palpably wrong.
D I have only one objection to make to the law as put before you by counsel for the defence, that the man is bound to do the best with such skill as he has. That is not quite accurate. A medical man who practises for profit—the medical profession—professes skill. He does not come and say: 'I am an unskilled person'—he is engaged and professes skill. Of course, you will understand it is not for every humble man of the profession to have all that great skill of the eminent men in Harley-street, but, on the other hand, people are not allowed to practise medicine in this country unless they have acquired a certain amount of skill. They are bound to show a reasonable amount of skill according to the circumstances of the case and you have to judge them on the basis that they are skilled men, but not necessarily as skilled as more skilful men in the profession ; and you can only convict them
F criminally if in your judgment they fall below the standard of skill which is the least qualification which any doctor should have. You should only convict a doctor of causing a death by negligence if you think he did something which no reasonably skilled doctor should have done."

The learned judge then quoted the language used by TINDAL, C.J., in *R. v. Ferguson* (14), and continued :

"You have got to consider if this man, in anything he did, fell below the level which you expect of a doctor—below the degree of skill which you think you have the right to expect of a doctor—by no means the extreme skill everybody knows of, but that degree of skill which you expect from a doctor who attends an accouchement and who is taken to know his business."

I In the course of his review of the evidence the learned judge referred to the law in the following passages :

"That is the whole of the evidence with regard to what is called the first part of the case. It is said that this man so treated her that by his treatment he committed all these injuries: he ruptured the womb, he ruptured her bladder in pushing about, and he caused the injuries to her intestines ; and in the same way it is said that when he came to pull out the placenta, instead of pulling the placenta out of the womb, he caught hold of, not the placenta,



but some tear or slit in the torn womb, and with a tug—the expression was ‘a sharp pull’—he pulled it away. It is said by the Crown that that shows that in doing this—and pulling out the womb—he was guilty of gross negligence. It is said on behalf of the defence—and they called eminent surgeons—that the nurse saw nothing wrong with the way he treated the patient, and, although the force used was necessary, it was unfortunate. It is said that there was no gross negligence, and it is for you, if you feel any doubt, to see that the prisoner gets the benefit of the doubt. But are you satisfied that there was gross negligence? The doctors for the defence say that it is quite reasonable to mistake a tear in the womb for the placenta. That is entirely a matter for you, and it is a view not entirely accepted by the doctors called for the prosecution, although they agreed in cross-examination that, after all this working, a portion of the womb might be torn, but they said that a reasonably skilful man might know the difference between pulling a womb and something that might be adherent to the inside, and the prosecution called attention to the fact of the steady outflow of blood and say that in pulling out the womb he was guilty of gross negligence. The defence say it was a very natural mistake in the circumstances of the case. . . . The Crown, first of all, say there was gross negligence (and you will not find it unless you are quite satisfied of it) in pulling away the womb at all—in what he did before and in pulling it away. It is suggested by the defence that nothing of the sort should be inferred: at most and at worst it was a very difficult case, and at most and at worst it was a mistake, and not negligence; it was the sort of thing that might have happened in this remarkable case. . . . Passing away from that and summing up the first case, if you think that you are quite satisfied that it was his treatment in tearing away the womb—previously to, and up to the tearing away the womb—that caused death, you will convict him; if you are not satisfied and think that there was no negligence at all, or if you have a reasonable doubt whether there was gross and culpable negligence up to that point, you will acquit him. . . . On the second part of the case the Crown say, substantially, that the appellant was guilty of grave, wicked neglect and culpable neglect of duty in not taking some steps to remedy what had been done by his own fault; or, if you do not think it was gross negligence, they say he ought to have done something to try and save the woman’s life, but he did not do anything because he wished to save his reputation. . . . These are the historical facts. Do you think, assuming you are satisfied by the prosecution, that in pulling away the womb at all and in the acts preceding that, he was guilty of gross and culpable negligence so as to cause her death? Then you come to the second head: Was he guilty of gross or culpable negligence in accelerating this woman’s death by so neglecting her from the time that he knew her uterus had been removed? If you are satisfied that the woman wanted treatment and that from the history of the case, if she had had some treatment, her life would have been prolonged, you will find him Guilty; if you have doubt about it, you will find him Not Guilty. I will remind you of what I have said to you at the outset, that you have to be satisfied, not only that he was guilty of gross and culpable negligence, but that he caused or accelerated her death. . . . That is the whole of the case. If you are satisfied that either in the way he delivered the child or in the way he acted afterwards he acted with gross negligence and thereby caused her death, you will find him Guilty; if you are not satisfied, you must acquit him on that part of the case. If you think after the womb had come away his conduct and neglect of her substantially accelerated the date of her death—if you are quite satisfied of that—you will convict him on that part of the case. If you feel any reasonable doubt on either theory, you will give him the benefit of the doubt and acquit him.”

If the words “wicked” and “culpable” are put aside, this summing-up amounts to a direction to the jury that they must draw the line between mistake or error

A of judgment, on the one hand, and carelessness or incompetence, on the other hand. If there was only mistake or error of judgment there is no liability, but if there was any falling short of a fair average degree of care and competence, then there is liability. Such a direction would be complete and accurate on the trial of an action for damages for negligence. It is not adequate on the trial for an indictment for manslaughter. There is, however, in the passages dealing with the evidence, a frequent use of some of the adjectives which have always been employed in explaining criminal negligence to a jury. For this reason, looking at the summing-up as a whole, this court is of the opinion that there is no misdirection. It is, nevertheless, most desirable that in trials for manslaughter by negligence it should be impressed on the jury that the issue is not negligence or no negligence, but felony or no felony. It is desirable that, as far as possible, the explanation of criminal negligence to a jury should not be a mere question of epithets. It is, in a sense, a question of degree, and it is for the jury to draw the line, but there is a difference in kind between the negligence which gives a right to compensation and the negligence which is a crime. The learned judge was invited to withdraw the first and second charges of negligence from the jury on the ground that there was no evidence to support them. He declined to do so, and left all these to the jury with the instruction that they could convict on all or any of them. The jury returned a general verdict of "Guilty." In the opinion of this court, there was no evidence to support the first charge, based on the manner in which the accused performed the operation of version. A strong defence was presented on the third charge, and it may well be that the jury relied largely on the first and second charges. If the first had been withdrawn from them, it is impossible to say that they would certainly have convicted. For this reason the conviction cannot stand.

Conviction quashed.

Solicitors: *Amery, Parkes & Co.; Director of Public Prosecutions.*

[*Reported by T. R. FITZWALTER BUTLER, ESQ., Barrister-at-Law.*]

MACAURA v. NORTHERN ASSURANCE CO., LTD. AND OTHERS

[HOUSE OF LORDS (Lord Buckmaster, Lord Atkinson, Lord Sumner, Lord Wrenbury and Lord Phillimore), March 6, 9, April 3, 1925]

[Reported [1925] A.C. 619; 94 L.J.P.C. 154; 133 L.T. 152; 41 T.L.R. 447; 69 Sol. Jo. 777; 31 Com. Cas. 10]

Insurance—Insurable interest—Property of company—Interest of shareholder or creditor.

Neither a creditor of nor shareholder in a company has any property, legal or equitable, in the property of the company, and, therefore, neither has an insurable interest in any particular asset of the company, and this is so even though the debt due from the company to the creditor is a very large sum and the shareholder is practically the sole shareholder of the company.

Notes. Referred to: *I.R. Comrs. v. Clark & Sons, Ltd., British American Tobacco Co. v. I.R. Comrs.*, [1941] 2 All E.R. 86.

As to insurable interest in fire policies see 22 HALSBURY'S LAWS (3rd Edn.) 310 et seq., and for cases see 29 DIGEST 311-313.

Cases referred to:

- (1) *Godsall v. Boldero* (1807), 9 East, 72; 103 E.R. 500; 29 Digest 343, 2772.
- (2) *Moran, Galloway & Co. v. Uzielli*, [1905] 2 K.B. 555; 74 L.J.K.B. 494; 54 W.R. 250; 21 T.L.R. 378; 10 Com. Cas. 203; 29 Digest 43, 57.
- (3) *Lucena v. Craufurd* (1806), 2 Bos. & P.N.R. 269; 127 E.R. 630, H.L.; 29 Digest 97, 555.
- (4) *Paterson v. Harris* (1861), 1 B. & S. 336; 30 L.J.Q.B. 354; 5 L.T. 53; 7 Jur. N.S. 1276; 9 W.R. 743; 1 Mar. L.C. 124; 121 E.R. 740; 29 Digest 200, 1594.
- (5) *Wilson v. Jones* (1866), L.R. 1 Exch. 193; 35 L.J.Ex. 94; 14 L.T. 65; 14 W.R. 499; affirmed (1867), L.R. 2 Exch. 139; 36 L.J.Ex. 78; 15 L.T. 669; 15 W.R. 435; 2 Mar. L.C. 452, Ex. Ch.; 29 Digest 116, 709.

Appeal from an order of the Court of Appeal in Northern Ireland affirming an order of the King's Bench Divisional Court of the High Court of Justice in Northern Ireland, made on a Case Stated by an arbitrator.

The appellant, who was the owner of an estate in co. Tyrone with the timber thereon, some of which was felled and some unfelled, by an assignment of Dec. 30, 1919, agreed to sell all the timber both felled and standing on the estate to a company for the sum of £42,000. That sum was satisfied by the allotment to the appellant of 42,000 fully-paid shares in the company of £1 each, which was the total amount issued by the company, so that the appellant was the sole owner of the shares in the company. The appellant had also financed the company, and was an unsecured creditor for £19,000. The appellant effected insurances on the timber against fire with various insurance companies. On Feb. 22, 1922, the greater part of the timber was destroyed by fire, and on June 12, 1922, the appellant instituted an action in the High Court for the recovery of moneys alleged to be due under the policies. By an order dated July 21, 1922, all proceedings in the action were stayed and the matter in dispute was referred to arbitration as provided by the policies. The arbitrator held that the appellant had not at any time during the currency of the policies any insurable interest in the timber, the subject-matter of the policies, and he submitted for the decision of the King's Bench Division (inter alia) the following questions: "Had the said Gerald J. Macaura any insurable interest in the said timber by reason (a) of his being the beneficial owner of all the shares in the said company; or (b) by reason of his being a creditor of the said company?" The King's Bench Divisional Court in Northern Ireland (HENRY, C.J., and BROWN, J.) answered that question in the negative, and that decision was affirmed by the Court of Appeal in Northern Ireland (ANDREWS and MOORE, L.JJ.). The appellant appealed to the House of Lords.

Serjeant Sullivan, K.C., and *M. F. Healy* for the appellant.

S. L. Brown, K.C., *E. S. Murphy, K.C.*, and *William Lowry* (all of the Irish Bar), for the respondents, were not called on to argue.

The House took time for consideration.

April 3. The following opinions were read.

LORD BUCKMASTER.—The appellant is the owner of the Kellymoon estate in the county of Tyrone. The respondents are five insurance companies with whom at various dates in January and February, 1922, the appellant effected insurance against fire on timber and wood goods in the open situate on the Kellymoon domain not within a hundred yards of any saw mill or any building in which woodworking by power other than wind or water was carried on. Neither the amounts nor the exact language of the policies are material for the purposes of the present appeal, nor is the fact that the policies were really effected in the name of the appellant and the governor and the company of the Bank of Ireland, for the real questions that arise for determination are (i) whether the appellant had any insurable interest in the goods the subject of the policies, and (ii) whether the respondents were, in

A the circumstances, at liberty to raise the contention that he had no such interest in the manner in which it was raised in the course of these proceedings.

The history of the matter can be stated in a few sentences. The appellant upon whose estate the timber in question was originally standing on Dec. 30, 1919, assigned the whole of it to a company known as the Irish Canadian Saw Mills, Ltd., the amount to be paid for the timber felled and unfelled being £27,000, while a further £15,000 was to be paid for the cost incurred by the appellant in felling the timber that was then down. The total price paid was, therefore, £42,000, satisfied by the allotment to the appellant or his nominees of £42,000, fully paid £1 shares in the company. No further shares than these were ever issued. The company proceeded with the operations of cutting the timber, and by the end of August, 1921, it had all been felled and sawn up in the saw mills. In the course of these operations the appellant had become the creditor of the company for £19,000, and beyond this it is stated that the debts were trifling in amount. The timber when cut remained lying on the appellant's land, and on Feb. 22, 1922, the greater part of it was destroyed by fire. The appellant accordingly claimed against the companies upon the policies and, on May 30, 1922, in an answer sent on behalf of all the companies, it was stated that the companies must decline to accept liability for the loss of any timber within a hundred yards of the saw mill. The appellant and the Bank of Ireland accordingly instituted proceedings by issuing writs against each of the respondent companies, and each of the statements of claim delivered contained the following allegation :

"3. The plaintiffs were at the date of the effecting of the said policy of insurance and at the time of the loss and damage hereinafter mentioned interested in the said timber to the amount so insured thereon as aforesaid."

On production of the policies all these actions must have been dismissed since each contained a clause referring all disputes to arbitration and making the award of the arbitrator a condition precedent to any liability on the part of the companies. Instead of pleading this as a defence to the actions the companies applied to stay the actions and refer the matters in dispute to arbitration, and on July 21, 1922, an order was made to that effect. Upon the hearing of the arbitration several charges of fraud and dishonesty were made against the appellant, all of which failed, and upon the point initially raised in the letter to which reference has been made the arbitrator decided in the appellant's favour, but he held that in the circumstances the appellant had no insurable interest in the timber, and this view has been supported in the Court of King's Bench and in the Court of Appeal.

The question as to the competency of the arbitrator to determine the dispute as to the insurable interest of the plaintiff only arises if no such insurable interest can be recognised by the law, and it is this point, therefore, that first arises for consideration. It must, in my opinion, be admitted that at first sight the facts suggest that there really was no person other than the plaintiff who was interested in the preservation of the timber. It is true that the timber was owned by the company, but practically the whole interest in the company was owned by the appellant. He would receive the benefit of any profit and on him would fall the burden of any loss. But the principles on which the decision of this case rests must be independent of the extent of the interest he held. The appellant could only insure either as a creditor or as a shareholder in the company, and if he was not entitled in virtue of either of these rights he can acquire no better position by reason of the fact that he held both characters. As a creditor his position appears to me quite incapable of supporting the claim. If his contention were right it would follow that any person would be at liberty to insure the furniture of his debtor, and no such claim has ever been recognised by the courts. It is true that since *Godsall v. Boldero* (1), where a creditor of Mr. Pitt was held entitled to effect an insurance upon his life, this interest has always been recognised, but this depended, as was said by LORD ELLENBOROUGH, upon the means and probability

of payment which the continuance of a debtor's life affords to his creditors and the probability of loss which would result from his death. In *Moran, Galloway & Co. v. Uzielli* (2), where a creditor for ships' necessities was held entitled to insure the ship, the decision expressly depended upon the fact that the creditors had a right in rem against the vessel, and the learned judge said that

"in so far as the plaintiffs' claim depends upon the fact that they were ordinary unsecured creditors of the shipowners for an ordinary unsecured debt, I am satisfied that it must fail. The probability that if the debtor's ship should be lost he would be less able to pay his debts does not, in my judgment, give to the creditor any interest, legal or equitable, which is dependent upon the safe arrival of the ship."

This is, in my opinion, an accurate statement of the law, and the appellant, therefore, cannot establish his claim as creditor.

Turning now to his position as shareholder, this must be independent of the extent of his share interest. If he were entitled to insure because he held all the shares in the company, each shareholder would be equally entitled, if the shares were all in separate hands. Now, no shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein. He is entitled to a share in the profits while the company continues to carry on business and a share in the distribution of the surplus assets when the company is wound-up. If he were at liberty to effect an insurance against loss by fire of any item of the company's property, the extent of his insurable interest could only be measured by determining the extent to which his share in the ultimate distribution would be diminished by the loss of the assets—a calculation almost impossible to make. There is no means by which such an interest can be definitely measured and no standard which can be fixed of the loss against which the contract of insurance could be regarded as an indemnity. This difficulty was realised by counsel for the appellant, who really based his case upon the contention that such a claim was recognised by authority and depended upon the proper application of the definition of insurable interest given by LAWRENCE, J., in *Lucena v. Craufurd* (3) (2 Bos. & P. N.R. at p. 302). I agree with the comment of ANDREWS, L.J., upon this case. I find equally with him a difficulty in understanding how a moral certainty can be so defined as to render it an essential part of a definite legal proposition. In the present case, though it might be regarded as a moral certainty that the appellant would suffer loss if the timber which constituted the sole asset of the company were destroyed by fire, this moral certainty becomes dissipated and lost if the asset be regarded as only one in an innumerable number of items in a company's assets and the shareholding interest be spread over a large number of individual shareholders.

The authorities which have the closest relation to the present are those of *Paterson v. Harris* (4) and *Wilson v. Jones* (5). In the first of these cases a shareholder in a company that was established for the purpose of laying down a submarine cable between the United Kingdom and America, effected an insurance upon his interest in the cable. The shareholder's insurable interest in the cable does not appear to have been disputed and the real question, therefore, was never argued. In *Wilson v. Jones* (5) where another policy was effected by a shareholder in the same company, it was distinctly held that the policy was not upon the cable, but upon the shareholder's interest in the adventure of the cable being successfully laid. It was attempted by the underwriters to limit the insurance to an interest in the cable itself, which would have lessened the risk, but it was held that this was not the true construction of the policy. It was not argued that, if it were, the shareholder had no interest to insure, but both MARTIN, B., in the Court of Exchequer and WILLES, J., in the Exchequer Chamber, stated that the plaintiff had no direct interest in the cable as a shareholder in the company, and, so far as I can see, this consideration it was that assisted the court in determining

A that the insurance was upon the adventure in which the shareholder had an interest and not upon the cable in which he had none. There are no other cases that even approximately approach the present case, and, properly regarded, I think *Wilson v. Jones* (5) is against, and not in favour, of the appellant's contention. Upon the merits of this dispute, therefore, the appellant must fail. Neither a simple creditor
B of nor a shareholder in a company has any insurable interest in a particular asset which the company holds.

Nor can the appellant's claim to insure be supported on the ground that he was a bailee of the timber, for in fact he owed no duty whatever to the company in respect of the safe custody of the goods; he had merely permitted their remaining upon his land. [His LORDSHIP dealt with further contentions of the appellant which do not call for report, and concluded:] For these reasons I am of opinion
C that this appeal must fail, and should be dismissed with costs.

LORD SUMNER.—This appeal relates to an insurance on goods against loss by fire. It is clear that the appellant had no insurable interest in the timber described. It was not his. It belonged to the Irish Canadian Sawmill Co., Ltd., of Skibbereen, co. Cork. He had no lien or security over it, and, though it lay on his land by
D his permission, he had no responsibility to its owner for its safety, nor was it there under any contract that enabled him to hold it for his debt. He owned almost all the shares in the company, and the company owed him a good deal of money, but, neither as creditor nor as shareholder, could he insure the company's assets. The debt was not exposed to fire nor were the shares, and the fact that he was virtually the company's only creditor, while the timber was its only asset, seems
E to me to make no difference. He stood in no "legal or equitable relation to" the timber at all. He had no "concern in" the subject insured. His relation was to the company, not to its goods, and after the fire he was directly prejudiced by the paucity of the company's assets, not by the fire. No authority has been produced for the proposition that the appellant had any insurable interest in the timber in any capacity, and the books are full of decisions and dicta that he had
F none. *Paterson v. Harris* (4) and *Wilson v. Jones* (5) are very special cases, and neither is in point here. In the former there was no plea traversing the allegation that the plaintiff had an insurable interest. The court, construing the policy as one really expressed to be on the cable, dealt with the case as one in which interest was admitted therein, but its decision of the case after this admission of interest is not a decision that a shareholder as such has an insurable interest in a company's
G assets themselves. In the latter, where the policy described the subject-matter of the insurance in a very obscure manner, it was held that the shareholder insured had an interest that he could insure in the profits of the adventure so described, but it was expressly stated that he had no such interest in his shares in the company. [His LORDSHIP dealt with the further contentions already mentioned and said that, in his opinion, the appeal should be dismissed.]

LORD WRENBURY.—This appeal may be disposed of by saying that the corporator, even if he holds all the shares, is not the corporation, and that neither he nor any creditor of the company has any property, legal or equitable, in the assets of the corporation. Further, I have read and concur in the judgment delivered by my noble and learned friend LORD SUMNER. I think the appeal should be dismissed.
H
I

LORD ATKINSON and **LORD PHILLIMORE** concurred.

Appeal dismissed.

Solicitors: *Herbert Z. Deane & Co.; Bircham & Co., for Hoey & Denning, Dublin.*

[*Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.*]

HOYSTED AND OTHERS v. TAXATION COMMISSIONER

[PRIVY COUNCIL (Lord Shaw, Lord Sumner, Lord Phillimore, Lord Darling and Lord Salvesen), October 22, 23, 26, 27, December 17, 1925]

[Reported [1926] A.C. 155; 95 L.J.P.C. 79; 134 L.T. 354; 42 T.L.R. 207]

Estoppel—Estoppel by record—Earlier decision founded on fact admitted but not decided—Fact traversable, but not traversed—Australian Land Tax Assessment Act, 1910–1916 (No. 22 of 1910, No. 33 of 1916), s. 38 (7).

If in any competent court a decision is reached a party to that decision is estopped from questioning it in new legal proceedings relating to the same subject-matter and raising the same issues even though the decision was founded on a fact which was admitted and was not the subject of decision by the court. The admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started with a view to obtaining another judgment upon a different assumption of fact. The same principle, namely, that of setting to rest rights of litigants, applies not only to an erroneous admission of a fundamental fact, but also an erroneous assumption as to the legal quality of that fact. The principle applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. There, also, estoppel occurs.

By his will a testator directed his trustees (the appellants) to stand possessed of the annual income to arise from the carrying on of his sheep stations upon trust for his seven daughters. By their return under s. 15 (1) of the Australian Land Tax Assessment Act, 1910 to 1916, in respect of land tax upon the land for the financial year 1918 to 1919, the appellants claimed seven deductions of £5,000 each, one in respect of each beneficiary. The respondent having disallowed the deductions, the appellants lodged objections and claimed to be entitled to the seven deductions, as the beneficiaries, or, in the case of one of them, her children, were taxable as joint owners and holders of original shares within s. 38 of the Act. On a Case stated for their opinion the full court held that the six surviving children had original shares and that six deductions should be made, and judgment was entered accordingly. The question whether or not the beneficiaries were joint owners was not argued by the respondent. By their return for the financial year 1920–1921 the appellants claimed seven deductions of £5,000—one in respect of each of the surviving children of the testator, and one in respect of the two children of the deceased child. The respondent allowed one deduction of £5,000 only, upon the ground that the beneficiaries did not come within the definition of joint owners in s. 3 of the Act.

Held: although in the earlier proceedings it was not a matter of decision that the beneficiaries were joint owners, but was matter of admission, the respondent was estopped by the previous judgment from contending that the trustees were not entitled to six deductions of £5,000.

Notes. Considered: *Pickford v. Quirke*, *Pickford v. I.R. Comrs.* (1927), 44 T.L.R. 15. Distinguished: *I.R. Comrs. v. Sneath*, [1932] All E.R. Rep. 739. Considered: *Marginson v. Blackburn Borough Council*, [1938] 2 All E.R. 539; *New Brunswick Rail. Co. v. British and French Trust Corp., Ltd.*, [1938] 4 All E.R. 747; *Bright v. Bright*, [1953] 2 All E.R. 939; *Patchett v. Sterling Engineers Co.* (1953), 71 R.P.C. 61; *Hill v. Hill*, [1954] 1 All E.R. 491; *Cooper v. Cooper*, [1954] 3 All E.R. 358. Referred to: *Green v. Weatherill*, [1929] All E.R. Rep. 428; *Dixon v. Dixon*, [1953] 1 All E.R. 910; *Thompson v. Thompson*, [1957] 1 All E.R. 161.

As to estoppel by record see 15 HALSBURY'S LAWS (3rd Edn.) 176 et seq., and for cases see 21 DIGEST 140 et seq.

A Cases referred to :

- (1) *Outram v. Morewood* (1803), 3 East, 346; 102 E.R. 630; 21 Digest 185; 334.
- (2) *Barrs v. Jackson* (1842), 1 Y. & C. Ch. Cas. 585; 7 Jur. 54; 62 E.R. 1028; on appeal (1845), 1 Ph. 582, L.C.; 21 Digest 165, 232.
- (3) *Re Graydon, Ex party Official Receiver*, [1896] 1 Q.B. 417; 65 L.J.Q.B. 328; 74 L.T. 175; 44 W.R. 495; 12 T.L.R. 208; 40 Sol. Jo. 420; 3 Mans. 5; 5 Digest 733, 6349.

B

- (4) *Carter v. James* (1844), 2 Dow. & L. 236; 13 M. & W. 137; 13 L.J.Ex. 373; 3 L.T.O.S. 183; 8 Jur. 912; 153 E.R. 57; 21 Digest 170, 257.
- (5) *Howlett v. Tarte* (1861), 10 C.B.N.S. 813; 31 L.J.C.P. 146; 9 W.R. 868; 142 E.R. 673; 21 Digest 146, 96.

C

- (6) *Henderson v. Henderson* (1843), 3 Hare, 100; 1 L.T.O.S. 410; 67 E.R. 313; 21 Digest 174, 276.
- (7) *Humphries v. Humphries*, [1910] 1 K.B. 796; 79 L.J.K.B. 544; 102 L.T. 492, D.C.; affirmed [1910] 2 K.B. 531; 79 L.J.K.B. 919; 103 L.T. 14, C.A.; 21 Digest 177, 294.
- (8) *Badar Bee v. Habib Merican Noordin*, [1909] A.C. 615; 78 L.J.P.C. 161, P.C.; 21 Digest 168, 253.

D

Appeal by special leave from an order of the full court of the High Court of Australia, dismissing an appeal by the appellants against an order of STARKE, J., dismissing an appeal by the appellants from an assessment by the respondent for the financial year 1920 to 1921 for the purpose of land tax, made under the Federal Land Tax Assessment Act, 1910 to 1916.

E

The questions raised by this appeal were: (i) Whether, upon the proper construction of the Land Tax Assessment Act, 1910-1916, of the Commonwealth of Australia, the appellants were entitled for the purpose of their assessment as trustees under the will of Charles Campbell, deceased, to have deducted from the value of land subject to the trusts of such will six deductions of £5,000 each (viz., £30,000) or one deduction of £5,000 only; and (ii) whether the respondent was not estopped from making less than six such deductions by an order of the High Court made on the same state of facts upon an appeal by the appellants from an assessment for a prior financial year whereby it was ordered by the said court that six such deductions should be made.

F

The full court (KNOX, C.J., STARKE and HIGGINS, JJ.) held that, on the true construction of the Act and the will, the beneficial interest in either the land or the income therefrom was not for the time being shared by the beneficiaries in such a way that they were taxable as joint owners within the definition in s. 3 of the Act, and that the trustees were only entitled to one deduction of £5,000 pursuant to s. 11 of the Act. They further held (HIGGINS, J., dissenting) that the commissioner was not estopped by a judgment upon an objection to the 1918-1919 assessment from contending that the trustees were not entitled to six deductions of £5,000.

H

Clauson, K.C., W. A. Greene, K.C., and du Parc for the appellants.
Sir John Simon, K.C., and Geoffrey Lawrence, K.C., for the respondent.

I

Dec. 17. **LORD SHAW.**—This is an appeal by special leave from two judgments of the full court of the High Court of Australia given on Dec. 16, 1921, and Nov. 2, 1923. The first judgment was given upon a Special Case which had been stated for the opinion of the full court by STARKE, J., upon the hearing of an appeal by the appellants against their assessment by the Commissioner of Taxation for the purpose of land tax for the financial year 1920-1921. That learned judge, giving effect to the answers made by the full court to the questions in the Special Case, dismissed the appellants' appeal and, on Nov. 2, 1923, the full court affirmed his judgment. The substance of the appeal has reference to the correctness of the answers given to the questions in the Special Case. These questions and answers will be afterwards stated.

Mr. Charles Campbell, a merchant and station owner, resident in Melbourne, died on Sept. 13, 1905, possessed of considerable real and personal estate in Australia. Seven children survived him. By his will he devised and bequeathed his station properties and the stock, &c., thereon upon trust to carry on and work the properties until twenty-one years from his death. The income was to be enjoyed by his children, and should any child predecease him, leaving issue, the issue was to enjoy the parent's share of income. There are various provisions as to the particular dates and periods from and during which annual income should be reckoned. In the view taken in this case these points are immaterial. Upon the expiration of the twenty-one years the trustees were directed to sell the properties and stock, &c., and to divide the proceeds equally among such children as should be living at the expiration of the twenty-one years, grandchildren again taking their parent's share. As mentioned, the seven children named in the will were alive at the testator's death; but one married daughter died in January, 1912, leaving two children. A question was raised in the proceedings after-mentioned as to the rights of these grandchildren and it was held that they were not entitled to what is termed in the statute an "original share in the land," they not having a "first life or greater interest . . . in the land or income therefrom." This question is frequently referred to in the course of the case, but the judgment upon it was accepted at their Lordships' Bar, and that matter is, accordingly, no longer in issue. The appeal may be, therefore, treated as an appeal by the six children of the testator named in his will and still surviving. The question in the case has reference to the taxation to be imposed upon the estate or various portion of it or interests therein under Mr. Campbell's will.

This depends upon the construction to be given to certain sections and sub-sections of the Land Tax Assessment Act, 1910-1916. The relevant provisions of the Act are as follows:—

Section 10—(1) Subject to the provisions of this Act, land tax shall be levied and paid upon the unimproved value of all lands within the Commonwealth which are owned by taxpayers, and which are not exempt from taxation under this Act. Section 11—(1) Land tax shall be payable by the owner of land upon the taxable value of all the land owned by him. . . . (2) The taxable value of all the land owned by a person is . . . (b) in the case of an owner . . . the balance of the total sum of the unimproved value of each parcel of the land, after deducting the sum of £5,000.

So far for the simplest case, namely, that of owners. The case of joint owners is specifically dealt with in s. 38. The sub-sections thereof which are material to the question in the appeal are:

(1) Joint owners of land shall be assessed and liable for land tax in accordance with the provisions of this section. (2) Joint owners (except those of them whose interests are exempt from taxation under s. 13 or s. 41 of this Act) shall be jointly assessed and liable in respect of the land (exclusive of the interest of any joint owner so exempt) as if it were owned by a single person, without regard to their respective interests therein or to any deductions to which any of them may be entitled under this Act, and without taking into account any land owned by any one of them in severalty or as joint owner with any other person. (3) Each joint owner of land shall in addition be separately assessed and liable in respect of: (a) his individual interest in the land (as if he were the owner of a part of the land in proportion to his interest), together with (b) any other land owned by him in severalty, and (c) his individual interests in any other land.

Then come sub-ss. (7) and (8), in the construction of which arises the true subject of controversy in the appeal. These sections are as follows:

(7) Where, under a settlement made before July 1, 1910, or under the will of a testator who died before that day, the beneficial interest in any land or in

A the income therefrom is for the time being shared among a number of persons, all of whom are relatives of the settlor or testator by blood, marriage, or adoption, in such a way that they are taxable as joint owners under this Act, then, for the purposes of their joint assessment as such joint owners, there may be deducted from the unimproved value of the land, instead of the sum of £5,000 as provided by s. 11 (2) (b) of this Act, the aggregate of the following sums,

B namely: In respect of each of the joint owners who hold an original share in the land under the settlement or will; (a) the sum of £5,000, . . . Provided that, where the same persons have a beneficial interest in land or in the income therefrom under more than one settlement or will or under a settlement and will, they shall be jointly assessed in respect of the whole of their interests under the settlements or wills or settlement and will, and there may be deducted

C in the joint assessment from the unimproved value of the land comprised in the joint assessment, instead of the sum of £5,000 as provided by s. 11 (2) (b) of this Act, the aggregate of the following sums, namely: In respect of each of the joint owners who holds an original share in the land being jointly assessed; (a) the total sum of £5,000, . . . (8) In this section, "original share in the land" means the share of one of the persons specified in the settlement

D or will as entitled to the first life or greater interest thereunder in the land or the income therefrom, or to the first such interest in remainder after a life interest of the settlor or after a life interest of the wife or husband of the settlor or testator.

In the full argument on the appeal much stress was laid upon the definition section of the statute and specially upon the following definitions:

"Owner," in relation to land, includes every person who jointly or severally, whether at law or in equity (a) is entitled to the land for any estate of freehold in possession; or (b) is entitled to receive, or in receipt of, or if the land were let to a tenant would be entitled to receive, the rents and profits thereof, whether as beneficial owner, trustee, mortgagee in possession, or otherwise; and includes every person who by virtue of this Act is deemed to be the owner. "Joint owners" means persons who own land jointly or in common, whether as partners or otherwise, and includes persons who have a life or greater interest in shares of the income from the land.

While the present appeal concerns the assessment for the year 1920-1921, its determination may depend upon, or at least it is material to see what had been done by and decided between the parties concerning, the assessment of two years before, namely for the year 1918-1919. By their return under s. 15 (1) of the Act in respect of land tax for the financial year 1918-1919 the appellants claimed seven deductions of £5,000. The respondent on that occasion, in assessing, disallowed the deductions claimed in respect of the shares of the beneficiaries. The appellants thereupon lodged objections and claimed to be entitled to seven deductions as being trustees for persons taxable as joint owners and holders of the original shares within s. 38 of the Act. In accordance with the statute the objections were treated as an appeal, and were so transmitted to the High Court. In the opinion of the Board it is highly important to keep fully in view what were the exact terms of that objection. (It is again explained that no question arose before the Board as to seven deductions, as it was not argued that grandchildren, but only that each of the six children, were entitled to a deduction of £5,000. For the sake of convenience accordingly the word "seven" is named as "six" throughout.) The objection was in the following terms:

I hereby give you notice that I object to the assessment of land tax under the above register number, and contained in the notice of assessment issued by you under date April 12, 1919, for the following reasons: (i) That the beneficiaries named in the will of the testator Charles Campbell who died before the first day of July, 1910, all of whom are relatives of the testator by blood, marriage or

adoption are entitled to the beneficial interest in the lands known as "the Station properties" or in the income therefrom in such a way that they are taxable as joint owners under the Land Tax Assessment Act, 1910-1916 and that they are the holders of original shares in such lands being entitled to the first life or greater interest in such lands or the income thereof; (ii) That the taxpayer is entitled to six deductions of £5,000 each pursuant to the provisions of ss. 38 and 38A of the Land Tax Assessment Act, 1910-1916 and any amendments thereof.—Date May 3, 1919.

The Commissioner of Taxation disallowed the objection. In the transmission to the High Court, according to the procedure under the statute, the Commissioner of Taxation thus narrated what had been done:

And whereas pursuant to reg. 40 (1) of the regulations made under the said Act the taxpayers being dissatisfied with such assessment did within 30 days from date of the service of the said notice of assessment, namely, on May 3, 1919, lodge an objection in writing dated the same day with the commissioner against such assessment, and whereas the commissioner considered such objection and pursuant to reg. 40 (2) of the said regulations gave written notice to the taxpayer on July 29, 1919, wholly disallowing the said objection, and whereas the taxpayers being dissatisfied with the decision of the commissioner on August 4, 1919, required the objection to be treated as an appeal and transmitted to the High Court of Australia in its original jurisdiction at Melbourne pursuant to reg. 40 (2) of the said regulations. Now, therefore, the Commissioner of Taxation, as required by the taxpayers as aforesaid, hereby transmits the said objection to the High Court of Australia at Melbourne.

At the hearing GAVAN DUFFY, J., stated a Case for the opinion of the full court upon the questions—(i) Whether the shares of the joint owners or of any and which of them in the land were original shares within s. 38; and (ii) how many deductions of £5,000 the respondent should make. The full court (KNOX, C.J., and STARKE, J., ISAACS, J., dissenting), having heard the appeal, pronounced judgment thereupon, holding that the questions should be answered as follows: (i) The shares of the six children surviving at the date of the assessment. (ii) Six. This opinion on the Special Case being given, the further hearing of the appeal was resumed before GAVAN DUFFY, J., and, upon May 24, 1920, he pronounced a final order. It narrated the notice of objection of the appellants and the memorandum of the respondent transmitting the objection for determination of formal appeal, together with the subsequent presentation of the Case for the opinion of the full court, and it concluded:

"This court doth order that this appeal be and the same is hereby allowed and that the number of deductions of £5,000 to be made by the respondent in the said assessment be six."

The learned judge (in the subsequent Special Case about to be referred to) narrated what had happened at this last stage of that litigation, in this language:

"(iii) That the hearing of the appeal was purely formal. No arguments were adduced by either party. The parties treated the answers of the High Court to the questions stated as covering the whole ground of the appeal. The attention of the justice who heard the appeal was not directed to the question whether the beneficiaries under the will of Charles Campbell were taxable as joint owners and he did not in fact decide that question."

Matters were allowed to rest upon this footing for another year. And then, in the subsequent year, the whole matter was reopened by the action of the Commissioner of Taxation, who in respect of the same estate and the same parties, reverted to the position that the taxable value should be, not six sums of £5,000 as decided in the former case, but one sum of £5,000. To this it was answered, to

A put the matter briefly, that the former decision was right upon its merits, but that, whether so or not, the respondent was estopped by the judgment already pronounced. If this argument be sound there is an end of the case, and it will be unnecessary to enter upon the merits of the difference between the parties upon the construction of the statute.

B In the opinion of their Lordships the contention of the appellants is sound, and the respondent is estopped by judgment. It is, however, necessary to examine carefully the argument presented against such estoppel. It amounts to this—that in the former case it was not matter of decision that the beneficiaries were joint owners, but was matter of admission. In the judgment of ISAACS, J., who dissented from his two learned brethren, he pointed this out in such a way as to suggest that, although the court had been bound to accept the admission, still it was erroneous in law. C Accepting this hint, the respondent proceeded as for the year 1920–1921 to challenge the fact of joint-ownership which it was alleged had been matter of admission, and to assess upon the footing that the number of deductions from the capital should be one, and should not be six, as had been decided. To this a notice of objection was lodged on May 16, 1921, the first head being that “the said assessment is erroneous in matter of law,” and the second being as follows:

D “That the beneficiaries in the Station properties trust came within the definition of joint owners and that the six deductions of £5,000 each under s. 38 (7) of the Act as claimed in the trustee’s return and as allowed by the High Court of Australia in respect of the trustee’s return for 1918–1919 have wrongly been disallowed in the said assessment—and that such assessment E should, accordingly, have been made on a taxable balance of £183,254.”

The objection, being transmitted as an appeal, came before STARKE, J., and a Special Case was stated by him for the opinion of the full court, which contained the following questions, namely:

F “(ii) How many deductions of £5,000 are the trustees entitled to on the footing that the commissioner is not estopped by any judgment? (iii) Is the commissioner estopped by judgment from contending that the trustees are not entitled to six deductions of £5,000?”

The full court (KNOX, C.J., STARKE and HIGGINS, JJ.) answered as follows: (ii) One —pursuant to s. 11 of the Act, (iii) No. HIGGINS, J., dissented as to answer (iii), and stated that in his opinion the respondent was estopped by the previous G judgment.

H The appellants contend that the dissent of the learned judge was right and that the question how many deductions of £5,000 the trustees are entitled to has already been settled for the years 1918–1919 and settled expressly by the High Court of Australia. This was the subject of a full argument in which the respondent contended that the previous litigation proceeded upon the footing of an admission that Mr. Campbell’s children were joint owners and that such an admission was erroneous in law. Arguing on the merits, he maintained that, a proper construction being put upon the terms of Mr. Campbell’s will, such error is made out, and that accordingly no decision of the courts was obtained on what it is argued was the true point for determination in the later appeal. As to the amount of deduction I to be made under the Act being either six sums of £5,000 or one sum of £5,000, the former litigation settled six; the judgment under appeal settled one. There is, accordingly, between the same parties in regard to the same property a definite prescription of deduction from assessable values. The Board is of opinion that that prescription was as conclusively settled in the former litigation as language could settle it, it having been: “How many deductions of £5,000 the respondent should make?” and the judicial answer being “Six.” Apart from the other arguments and the authorities to be presently alluded to, the case appears thus to be concluded in favour of the appellants.

Very numerous authorities were referred to. In the opinion of their Lordships it is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started with a view of obtaining another judgment upon a different assumption of fact ; secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted, litigation would have no end, except when legal ingenuity is exhausted. It is a principal of law that this cannot be permitted and there is abundant authority reiterating that principle. Thirdly, the same principle, namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken. The same principle of setting parties' rights to rest applies and estoppel occurs.

Out of respect to the learned judges in the courts below and to the sustained argument at the Bar, one or two of the cases of outstanding authority are referred to. In *Outram v. Morewood* (1), an action of trespass over a certain vein of coals lying under the close of the plaintiff, it was held that if a verdict be found on any fact or title, distinctly put in issue in an action of trespass, such verdict may be pleaded by way of estoppel in another action between the same parties or their privies, in respect of the same fact or title. In a previous action an issue was found for the plaintiff and against the wife, one of the two subsequent defendants, her husband being the other defendant with her in the action under decision. LORD ELLENBOROUGH, C.J., said (3 East, at p. 353) :

"The operation and effect of this finding, if it operate at all as a conclusive bar, must be by way of estoppel. If the wife were bound by this finding, as an estoppel, and precluded from averring the contrary of what was then so found, the husband, in respect of his privity, either in estate, or in law, would be equally bound."

In subsequent portions of his judgment he spoke as follows :

"A finding upon title in trespass not only operates as a bar to the future recovery of damages for a trespass founded on the same injury, but also operates by way of estoppel to any action for an injury to the same supposed right of possession. And it is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel. The recovery of itself in an action of trespass is only a bar to the future recovery of damages for the same injury : but the estoppel precludes parties and privies from contending to the contrary of that point, or matter of fact, which having been once distinctly put in issue by them, or by those to whom they are privy in estate or law, has been on such issue joined, solemnly found against them."

The rule extends, not merely to courts having the same jurisdiction, but to the judgments of all courts of competent jurisdiction. A striking instance of this was *Barrs v. Jackson* (2), in which a judgment was pronounced by KNIGHT-BRUCE, V.-C., in the course of which much citation was made as to courts of ecclesiastical jurisdiction. The decision of the Vice-Chancellor is compendiously stated in the headnote (1 Y. & C. Ch. Cas. 585). It was to the following effect :

"In a suit instituted in the Chancery Division for the distribution of the assets of an intestate, the grant of letters of administration is not conclusive evidence upon the question who is the intestate's sole next of kin."

A This judgment was reversed, and a judgment in a directly contrary sense was pronounced by LORD LYNTHURST. A further instance, this time of the application of the doctrine to estoppel in the King's Bench Division by reason of a judgment of a county court, is *Re Graydon, Ex parte Official Receiver* (3), in which a county court judge had held that a sum of £20 was in the nature of personal earnings on the part of a bankrupt patentee and belonged to the bankrupt. Subsequent
B royalties having become due, the trustee applied to the Bankruptcy Court for a declaration that they vested in him after-acquired property. It was held that the judgment of the county court estopped the trustee from asserting that the royalties were not the bankrupt's personal earnings. The question as to the quantum of the allowance to be made to the bankrupt was another matter, and that allowance was varied, but VAUGHAN WILLIAMS, J., said that he thought the
C fair inference from the judgment of the county court judge was that the trustee did decide that the sums in question were in the nature of personal earnings. The trustee was, accordingly, estopped from denying this to be the nature of the payments when made. It plainly appears that the learned judge was himself of opinion that the royalties were not the personal earnings of the bankrupt, but this very properly made no difference upon the point of estoppel. The trustee was
D estopped from making that assertion by the judgment of the county court.

But the respondent maintained with much elaboration that an analysis of the first judgment pronounced by the full court in the present case showed that the grounds of that judgment, which it was maintained were erroneous in law, proceeded upon an admission that Mr. Campbell's children were joint owners; and he
E founded strongly upon such statements from the Bench as that of STARKE, J., already quoted, that attention had not been directed to the question of joint ownership in the debates in the former case. It might be sufficient to say, in answer to the entire argument on this head, that whether the point as to joint ownership depended upon admission of fact upon evidence led or upon argument upon
F construction of a statute, that is, as already stated, nothing to the point in considering the question of estoppel. There would be no quieting of litigation unless the judgment was taken as it stands. It is plain that the res in the present case was adjudged, that res being, in figures, that six times £5,000 should be the suitable deduction from the assessed property.

In the citation of authority upon this topic confusion is apt to be introduced by lack of the following consideration of a point peculiar in former days to English
G procedure. Two authorities were relied upon by counsel for the respondent. Taking them in order of date they are *Carter v. James* (4) and *Howlett v. Tarte* (5). As is shown by passages in the judgment of ALDERSON, B., in the one, and BYLES, J., in the other they depended upon the old rules of pleading. The rules that pleadings must not be double as expressed by STEPHEN ON PLEADING (cap. III, s. 3) and BULLEN AND LEAKE (3rd Edn.) p. 441, prevented a defendant from pleading more
H than one plea to the declaration, or if there were several counts in the declaration more than one plea to each count, and prevented a plaintiff from pleading more than one replication to each plea. The strictness of the common law rule was relaxed by the statute 4 & 5 Anne, c. 16, s. 4, enabling a defendant with leave of a judge to plead several pleas, and by the Common Law Procedure Act, 1852, and the rules of Hilary Term, 1853, extending this principle to replications, and
I allowing certain specified pleas to be pleaded as of right without leave. But till the Judicature Acts, 1873 and 1875, it remained the law that, except in those cases specially mentioned, several pleas and several replications could only be pleaded by the leave of the court or a judge, and this leave was by no means obtainable as a matter of course, and was, indeed, not seldom refused.

It was customary in order to save a possible estoppel for a defendant who had two answers each of which seemed to be good, but who was limited by the rules to one, to insert in his plea or accompany his plea with the protestation, and the pleading was known as a protestando. In this way the defendant, while protesting

that he had other answers to the declaration, nevertheless being confined to one answer, put forward one only. ALDERSON, B., refers in his judgment, already cited, to "the ancient practice" of pleading the facts with a protestation. Protestandos, however, were abolished by the Rules of Court of 1834, and their value was always doubtful. While the rules against double pleading were in force, it would have led to much injustice if a suitor who had two answers to a claim, or two replies to a defence, but was prevented from raising more than one, was deemed to have admitted that he had no other answer or reply than that to which he had to confine himself, and this is the ratio decidendi of the two cases on which reliance was placed for the respondent. Thus explained, they in no way derogate from the general principles of law.

It is seen from this citation of authority that if in any court of competent jurisdiction a decision is reached, a party is estopped from questioning it in a new legal proceeding. But the principle also extends to any point, whether of assumption or admission, which was in substance the ratio of and fundamental to the decision. The rule on this subject was set forth in the leading case of *Henderson v. Henderson* (6) by WIGRAM, V.-C., as follows (3 Hare, at p. 114):

"I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

This authority has been frequently referred to and followed, and is settled law.

WILLIAMS, J., in *Howlett v. Tarte* (5), said:

"I think it is quite clear upon the authorities to which our attention has been called, and upon principle, that, if the defendant attempted to put upon the record a plea which was inconsistent with any traversable allegation in the former declaration, there would be an estoppel."

This passage has been accepted expressly over and over again, as for instance by PHILLIMORE, J., in *Humphries v. Humphries* (7) ([1910] 1 K.B. at p. 801) and FARWELL, L.J., in the same case on appeal ([1910] 2 K.B. at p. 535). An instance of the application of the principle to the construction of clauses in the testator's will is to be found in the judgment of this Board pronounced by LORD MACNAGHTEN in *Badar Bee v. Habib Merican Noordin* (8). It must, however, be pointed out that *Carter v. James* (4) and *Howlett v. Tarte* (5) turned upon default in pleading in the prior proceedings, relied upon as an estoppel; but in a case like the present where there are no pleadings at all, the main question is whether a prior opportunity of raising the point now foreclosed by estoppel had in substance arisen and been passed by. In short, the present point was one which, if taken, went to the root of the matter on the prior occasion, so that its omission was no mere default in pleading but a real attempt to divide one argument into two, and to multiply litigation.

Reference may be finally made in a word to the argument submitted to the Board to the effect that the admission and assumption of joint ownership made in the former case between these parties were upon a matter which was only incidentally or collaterally related to the point actually discussed and litigated. Much stress was laid on the fact that, in the present case an express decision upon

- A the point of joint ownership was come to, and that this was not so in the former case. To which the answer is contained in a reference to the language of s. 38 (7) of the statute as follows, namely, that where, under a settlement, income is shared by relatives of the settlor "in such a way that they are taxable as joint owners under this Act," then, for the purpose of their joint assessment "as such joint owners there may be deducted . . . in respect of each of the joint owners who
- B hold an original share in the land " £5,000. The former judgment was pronounced by the Australian Courts under that section. It was not merely incidental or collateral to the question so decided that the appellants were joint owners. It was fundamental to it. Unless it had been decided that, under the settlement, Mr. Campbell's children had a beneficiary interest in land or income "in such a way that they are taxable as joint owners" they could not have been taxed at all.
- C On this portion of the case their Lordships' opinion is entirely in accord with the judgment of HIGGINS, J., in the court below.

Their Lordships will humbly advise His Majesty that the appeal be allowed with costs to the appellants both here and below, and that it be remitted to the High Court of Australia to direct that Question (iii) of the Special Case, namely: "Is the Commissioner estopped by judgment from contending that the trustees are not entitled to six deductions of £5,000?" be answered in the affirmative, and that the other questions are thus superseded.

Appeal allowed.

Solicitors: Radcliffes & Hood, St. Barbe Sladen & Wing; Coward, Chance & Co.

[Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.]

ADELAIDE STEAMSHIP CO. v. ATTORNEY-GENERAL

[HOUSE OF LORDS (Viscount Cave, L.C., Lord Atkinson, Lord Buckmaster, Lord Carson and Lord Blanesburgh), October 26, 27, 29, December 11, 1925]

[Reported [1926] A.C. 172; 95 L.J.K.B. 213; 134 L.T. 258;
42 T.L.R. 180; 16 Asp. M.L.C. 579; 31 Com. Cas. 145]

Shipping—Collision—Proximate cause—Collision due to negligence of ship while engaged in warlike operation—Charterparty—Cesser of hire clause—Ship damaged in collision and withdrawn for repair.

By a charterparty (known as "T. 99") by which the Admiralty requisitioned a vessel during the 1914–1918 war it was provided, by cl. 19: "The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following, or similar, but not more extensive, clause: Warranted free of capture, seizure, and detention and the consequences thereof . . . and also from all consequences of hostilities or warlike operations. . . ." By cl. 25 hire was to cease to be payable if the working of the ship should be suspended "owing to deficiency of men or stores, breakdown of machinery, or any other cause." While the ship was engaged in a warlike operation she was in collision with another vessel, and it was held in a collision action that the collision was due to the negligence of her master and she was liable to the other vessel in damages. On a petition of right by the shipowners in which they claimed that under cl. 19 of the charterparty they were entitled to be indemnified by the Admiralty in respect of their loss arising out of the collision,

Held (LORD CARSON and LORD BLANESBURGH dissentiente): in determining the effect of cl. 19 the court must look at the proximate and not at the remoter consequences of a warlike operation; although the accident arose in the course and as the consequence of a warlike operation, the risk that materialised was due to negligence and not to war; and, therefore the Admiralty were not liable in respect of either the damages or the costs incurred by the shipowners.

Held (LORD BLANESBURGH dubitante): a claim by the shipowners for payment of hire for the period during which the vessel was under repair was excluded by cl. 25 of the charterparty.

Per VISCOUNT CAVE, L.C.: The words "any other cause" in cl. 25 ought not to be limited by the ejusdem generis rule.

Decision of Court of Appeal, (1924), 131 L.T. 548, affirmed.

Notes. Referred to: *Clan Line Steamers, Ltd. v. Liverpool and London War Risks Insurance Association, Ltd.*, [1942] 2 All E.R. 367; *Yorkshire Dale Steamship Co. v. Minister of War Transport*, [1942] 2 All E.R. 6.

As to the f.c. and s. clause in a marine insurance policy see 22 HALSBURY'S LAWS (3rd Edn.) 76-81, and as to the cesser of hire clause in a charterparty see *ibid.*, 2nd Edn., vol. 30, pp. 309-312. For cases see 29 DIGEST 212 et seq. and 41 DIGEST 358 et seq.

Cases referred to:

- (1) *Ionides v. Universal Marine Co.* (1863), 14 C.B.N.S. 259; 2 New Rep. 123; 32 L.J.C.P. 170; 8 L.T. 705; 10 Jur. N.S. 18; 11 W.R. 858; 1 Mar. L.C. 353; 143 E.R. 445; 29 Digest 229, 1854.
- (2) *De Vaux v. Salvador* (1836), 4 Ad. & El. 420; 1 Har & W. 751; 6 Nev. & M.K.B. 713; 5 L.J.K.B. 134; 111 E.R. 845; 29 Digest 212, 1695.
- (3) *Xenos v. Fox* (1869), L.R. 4 C.P. 665; 38 L.J.C.P. 351; 17 W.R. 893, Ex.Ch.; 29 Digest 212, 1710.
- (4) *Cory v. Burr* (1883), 8 App. Cas. 393; 52 L.J.Q.B. 657; 49 L.T. 78; 31 W.R. 894; 5 Asp. M.L.C. 109, H.L.; 29 Digest 217, 1736.
- (5) *Taylor v. Dewar* (1864), 5 B. & S. 58; 3 New Rep. 640; 33 L.J.Q.B. 141; 10 L.T. 267; 10 Jur. N.S. 361; 12 W.R. 579; 2 Mar. L.C. 5; 122 E.R. 754; 29 Digest 214, 1709.
- (6) *Inman Steamship Co. v. Bischoff* (1882), 7 App. Cas. 670; 52 L.J.Q.B. 169; 47 L.T. 581; 31 W.R. 141; 5 Asp. M.L.C. 6, H.L.; 29 Digest 210, 1684.
- (7) *Leyland Shipping Co. v. Norwich Union Fire Insurance Society*, [1918] A.C. 350; 87 L.J.K.B. 395; 118 L.T. 120; 34 T.L.R. 221; 62 Sol. Jo. 307; 14 Asp. M.L.C. 258, H.L.; 29 Digest 230, 1858.

Appeal by the petitioners, the owners of the steamship *Warilda*, from an order of the Court of Appeal (BANKES, WARRINGTON, and SCRUTTON, L.JJ.) reported 131 L.T. 548.

The facts appear in the opinions of their Lordships.

C. R. Dunlop, K.C., and *H. C. S. Dumas* for the appellants.

The Solicitor-General (Sir Thomas Inskip, K.C.), *W. Norman Raeburn, K.C.*, and *R. H. Balloch* for the respondent.

The House took time for consideration.

Dec. 11. The following opinions were read.

VISCOUNT CAVE, L.C.—This appeal is concerned with the third stage in a prolonged litigation which has arisen out of a collision between the steamship *Warilda* (acting as an ambulance transport) and the steamship *Petinguadet* (a merchant vessel) which occurred in the early morning of March 24, 1918. In the first stage of the contest, a collision action which was carried to this House, it was determined that the collision was due to the negligence of the master of the *Warilda*, and the *Warilda* was held liable to the *Petinguadet* for damages. In the second stage, which also reached this House, it was determined that the collision

A was a consequence of a warlike operation in which the *Warilda* was engaged, and accordingly, that under cl. 19 of the charterparty under which the vessel was being employed (which was the familiar charterparty T. 99) the *Warilda* was entitled to recover from His Majesty damages for the collision. The third stage, in which the appeal arises, is concerned with the measure of these damages, and the questions litigated are whether the *Warilda* can recover from the Crown as part of

B such damages (i) three-fourths of the sum which the *Warilda* has been held liable to pay to the *Petingaudet* for the damage caused to that vessel, (ii) three-fourths of the costs incurred by the *Warilda* in defending the collision action, and (iii) hire money or compensation for loss of hire during the period when the *Warilda* was herself undergoing repair. GREER, J., and the Court of Appeal have held that none of these sums can be recovered, and the appeal is against that decision.

C Upon the first point the arguments were well balanced, but upon the whole I have come to the conclusion that the decision of the Court of Appeal is right. Clause 19 of charterparty T. 99 (which has the marginal note "War risks damage or loss of ship") is in the following terms :

D 19. The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following, or similar, but not more extensive, clause :—Warranted free of capture, seizure, and detention and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations whether before or after declaration of war.

E It is common ground that an ordinary English policy of marine insurance would contain the institute time clauses, including the first of those clauses, which is known as the collision or running-down clause and which provides (in effect) that, if the insured ship comes into collision with another ship and becomes liable to pay and pays damages in respect of such collision, the insurer will pay to the assured three-fourths of the sum so paid, and will also, if the liability of the insured ship has been contested with the consent in writing of the insurer, pay a like proportion

F of the costs which the assured thereby incurs or is compelled to pay. This being so, the question to be determined in this case is whether the liability undertaken by the collision clause is or is not a risk which would be excluded by the "f.c. and s." clause set out in cl. 19 of the charterparty as being a consequence of warlike operations. If it would, then the Crown is clearly liable; but, if not, the claim now under consideration must fail.

G My Lords, I do not think that it would be so excluded. It was held in *Ionides v. Universal Marine Insurance Co.* (1), and has not since been doubted, that in applying the exception created by the f.c. and s. clause the court must look at the proximate and not at the remoter consequences of the warlike operation ; and, while it has been decided by this House that the collision itself and the consequent damage to the *Warilda* were the direct result of the warlike operation

H in which the *Warilda* was engaged, it does not follow that the liability of the *Warilda* to the owner of the *Petingaudet* falls within the same category. That liability arose, not from the collision taken by itself, but from the negligence of the master of the *Warilda* which alone constituted the cause of action, and was, therefore, not a direct and proximate consequence of the warlike operation. This seems to me to follow from the decision in *De Vaux v. Salvador* (2), where it was held that

I the sum which a shipowner had to pay for damage to another ship caused partly by the negligence of his servants was too remote from the sea perils against which his ship was insured to be recovered by him under a marine policy. LORD DENMAN, C.J., in delivering the judgment of the court in that case, said :

"The ship insured is driven against another by stress of weather; the injury she thus sustains is admitted to be direct, and the insurers are liable for it. But the collision causes the ship insured to do some damage to the other vessel; and, whenever this effect is produced, both vessels being in fault, a

positive rule of the Court of Admiralty requires the damage done to both ships to be added together, and the combined amount to be equally divided between the owners of the two. It turns out that the ship insured has done more damage than she has received, and is obliged to pay the owners of the other ship to some amount, under the rule of the Court of Admiralty. But this is neither a necessary nor a proximate effect of the perils of the sea; it grows out of an arbitrary provision in the law of nations from views of general expediency, not as dictated by natural justice, not (possibly) quite consistent with it; and can no more be charged on the underwriters than a penalty incurred by contravention of the revenue laws of any particular State, which was rendered inevitable by perils insured against."

It is true that the policy to be hypothesised under cl. 19 of the charterparty is a policy containing the collision clause, and that where that clause is present in a policy the underwriters are liable for a proportion of the damage caused to the other ship; but this is the result, not of a loss by the perils insured against, but of the "special contract" of the underwriters contained in the collision clause: see *Xenos v. Fox* (3), L.R. 3 C.P. at p. 635. In these circumstances it seems to me to follow that the Crown is not liable in this case, and is not bound to indemnify the *Warilda* either wholly or partially against the liability which she has incurred to third parties in consequence of the negligence of her master.

In arriving at this conclusion I have not relied on the third sentence in cl. 19 of the charterparty, which is in the following terms:

Such risks are taken by the Admiralty on the ascertained value of the steamer, if she be totally lost, at the time of such loss, or, if she be injured, on the ascertained value of such injury.

I was impressed by the argument of counsel for the appellants that the purpose of this sentence was, not to limit the liability of the Admiralty to the payment of damage done to the *Warilda*, but only to define the value which was to be put upon the *Warilda* where the value of that vessel was material; and, accordingly, I do not found on this stipulation any conclusion adverse to the appellants. But the sentence is at all events not inconsistent with the view which I have taken of the meaning of the clause.

With regard to the claim for three-fourths of the costs incurred by the *Warilda* in resisting liability to the *Petingaudet*. I think that this falls with the claim for three-fourths of the damages; and in any case this claim could hardly have been supported in view of the fact that the Crown did not consent to the proceedings by the *Petingaudet* being contested. As to the claim for loss of hire while the *Warilda* was under repair, I agree with GREER, J., and the Court of Appeal in holding that this is excluded by cl. 25 of the charterparty, which is as follows:

25. If from deficiency of men or stores, breakdown of machinery, or any other cause, the working of the steamer is at any time suspended for a period exceeding twelve running hours, pay shall cease for the whole of such and any subsequent period of whatever duration during which the vessel is inefficient.

It is not argued before your Lordships, nor could it (I think) have been successfully argued, that the scope of the words "any other cause" ought to be limited by the ejusdem generis rule; but it was suggested that this claim, if excluded by cl. 25, might be recovered under the contract of insurance contained in cl. 19. To this the answer given by SCRUTTON, L.J., that the Admiralty were not insurers of freight, appears to me to be fatal. For these reasons I am of opinion that this appeal fails and should be dismissed with costs, and I move your Lordships accordingly.

LORD ATKINSON: I concur.

LORD BUCKMASTER.—Two facts lie at the threshold of this appeal and must be borne in mind in its determination. The first, that the collision between the

A *Warilda* and the *Petingaudet* has been declared by this House to be a consequence of warlike operations, and the other that it was due to the negligence of the navigating officer of the *Warilda*. It follows from the first that the Admiralty is responsible for the actual damage that the *Warilda* suffered, and from the second that the *Warilda* was responsible to the *Petingaudet* to make good her damage. The main question in this appeal is whether the damage so paid and the costs of the litigation which determined the *Warilda* to blame can be recovered by the *Warilda* from the Admiralty. The rights of the parties are contractual and arise under a document known as T. 99, upon the terms of which the Admiralty requisitioned the *Warilda* by a letter dated Aug. 3, 1915. This document was in the form of a charterparty, but it also contained clauses of marine insurance, the nature and extent of which form the subject of the present controversy. By cl. 18 the Admiralty was exempt from liability from ordinary sea risks, and by cl. 19 they accepted the risks of war in terms which have already been set out. The ordinary English policy of marine insurance contains clauses known as "institute time clauses," the first of which throws upon the insurer the liability to pay, to the extent of three-fourths of the value of the ship, the damages which the insured vessel may be called upon to pay by reason of collision—as well as three-fourths of the costs to which the assured is put in defending proceedings. It is this clause that the appellants say render the Admiralty liable in the present instance. In my opinion, this contention is not well founded. The ordinary marine policy never covered damages paid to third parties owing to negligent navigation: *De Vaux v. Salvador* (2); and the clause as to freedom from capture and seizure which operates to limit risks under such a policy does not exclude such liability, for the subject-matter on which this exclusion operates never included it: *Xenos v. Fox* (3). The introduction of cl. 1, which was, in fact, an indemnity as to third-party liabilities, was not within the ordinary compass of marine insurance, nor do I think its introduction has extended the meaning of the clause as to freedom from capture or seizure so as to make that warranty include something to which in its original meaning it never related. Even if this view be not accepted, I still think the appellants must fail, since the only risks undertaken by the Admiralty are risks of war, and, although this accident arose in the course, and, therefore, as the consequence, of a warlike operation, yet the risk that materialised was the risk due to negligence and not to the risk of war. In the course of a warlike operation an independent negligent act was committed, and it is the liability consequent thereon for which the *Warilda* has been held liable. On the question of hire I have nothing to add to what has already been said.

LORD CARSON.—Each of the learned lords justices in the Court of Appeal was of opinion that the words in cl. 19 of T. 99,

"such risks are taken by the Admiralty on the ascertained value of the steamer, if she be totally lost, at the time of such loss, or, if she be injured, on the ascertained value of such injury,"

excluded the third-party risk covered by the collision clause "because," as BANKES, L.J., said, "the extent of the Admiralty's liability cannot be measured by the scale indicated in this paragraph"—and indeed, the same lord justice said that, but for the paragraph quoted, he would have felt considerable doubt as to the construction to be put upon the clauses constituting the contract. It is clear that, if the effect of this paragraph was as held by the lords justices, there would be no need to go further in the discussion of the case, and that the claim of the appellants would on the main question be without foundation. I agree with the noble viscount on the Woolsack that the purpose of the sentence quoted was not to limit the liability of the Admiralty to the payment of damage done to the *Warilda*, but only to define the value which was put upon the *Warilda* when the value of that vessel was material. The sections to which we were referred by counsel for the appellants in the Marine Insurance Act, 1906, under the heading of "Measure

of indemnity," showed, in my opinion, the necessity for the limitation in the paragraph quoted, while it also seemed to me at least that cl. 19 covered risks in which the value of the ship was not involved. I do not think, therefore, that the words in cl. 19, so much relied upon, offer any answer to the case put forward for the appellants. A

The main question, however, to be decided is whether the owners of the *Warilda* can recover from the Crown the sums they have been compelled to pay to the owners of the *Petingaudet* for damages caused to that ship by the collision, having regard to the decision in this House that the *Warilda* was engaged in warlike operations, though negligently carried out, and that the collision or damage was a consequence of hostilities or warlike operations. I do not desire to repeat again at length cl. 18 and 19 of the charterparty T. 99, but read together they seem to me to define the risks taken by the owners, which may shortly be called as in the margin, "sea risk," and the risks against which the Admiralty became the insurers, viz., as also described in the margin, "war risk damage or loss of ship." Under this division of "risks" it is clear, to my mind, that all the possible risks were intended to be covered. The risks undertaken by the owners under cl. 18 would or might be insured against by them, and it is admitted that any ordinary English policy of marine insurance would contain the clauses known as "institute time clauses," by the first of which the insurer would be obliged to pay, to the extent of three-fourths of the value of the ship, the damages which the insured ship might be called upon to pay by reason of the collision. The question to be determined is, I think, what is the effect of the f.c.s. clause upon the liability of the insurer under this clause? If there was no f.c.s. clause it is, I think, clear that the insurer would be liable in the events that have happened. But as the f.c.s. clause applies, and as this house has decided that the collision occurred as a consequence of warlike operations, I think the question narrows down to the liability or non-liability of the insurer in these circumstances. I find it is difficult to see how the insurer in such a case could be held liable. If there had been no negligence I apprehend the liability of the Admiralty would be beyond question, but as between owners and the insurer can the negligence make any difference when the f.c.s. clause applies and you follow to its logical conclusion the decision of this House that the collision or damage "was a consequence of hostilities or warlike operations?" In my view, it is impossible in such a case by drawing a distinction between the "proximate" and the "remoter" consequences of the warlike operation to take away from the insurer the benefit of the f.c.s. clause and thus render him liable. D E F G

For the reasons I have briefly stated, I am of opinion that the appellants are entitled to succeed on this branch of their claim. As regards the other branches of claim, viz., the costs incurred by the *Warilda* owners in resisting liability for the consequences of the collision and the claims for loss of time while the *Warilda* was under repair, I am not prepared to dissent from the conclusions come to by the noble viscount on the Woolsack. H

LORD BLANESBURGH.—Three sums are claimed here by the appellants, and, as the considerations applicable to each are not identical, it is convenient to deal with them separately. I

The first and principal sum represents three-fourths of the amount which the appellants became liable to pay and have paid by way of damages to the owners of the *Petingaudet* for the damage caused to that vessel by the collision between her and the *Warilda*. The basis of the claim is made apparent by the terms in which it is expressed. It follows the language of the first of the institute time clauses, the collision clause to which the attention of your Lordships has been so frequently directed, and it proceeds upon the footing that the presumed contract between the appellants and the Admiralty—T. 99—is to be read as if there were embodied in it, by reference, a provision in the terms of that clause. I desire to

A say at once that unless that position can be made good by the appellants, they must, in my judgment, fail in this claim. I would, however, also add that if their position in this respect is well founded, then, in the events which have happened, the liability of the Crown in respect of this sum is, I think, at once established.

That being the issue, there has never, I think, been any controversy between the parties as to the governing considerations upon which its solution depended.

B It has throughout been common ground—to adopt the words of SCRUTTON, L.J.—that the effect of cl. 18 and 19 of T. 99 is to put sea risk on the owners and war risk on the Admiralty, a phrase which, further expanded, imports that, subject to any modifying provision in either of these clauses, there is hypothesised an ordinary policy of marine insurance embodying also the institute time clauses with a war risk policy so framed that the two together cover the whole ground.

C Accordingly, it having been decided by this House that the collision in question resulted from war-like operations of the *Warilda* negligently conducted—in other words, that it resulted from a war risk—it is again common ground—and I think rightly so—that the liability of the Crown in respect of this sum emerges unless one of two things is established—either (a) that albeit the collision was a war risk, still the marine underwriter under the hypothesised policy of marine insurance remains, upon the true construction of the collision clause in that policy, liable in respect of this sum; or (b) that, as a result, so it is said, of the third sentence of cl. 19 of T. 99 the hypothesised war risk policy is to contain no collision clause at all. The Solicitor-General, at your Lordships' Bar, in terms accepted this position. He agreed that unless that third sentence availed the Admiralty to the effect I have stated the Crown must accept liability for this claim, if it was once established, that, under his hypothesised policy the marine underwriter was free of liability in respect of it. This has been the position of the Crown's advisers throughout. GREER, J., said in his judgment:

"It was contended for the Crown that the promise of indemnity contained in the part of the institute time clauses above set out was not affected by the f.c.s. clause, and that the marine underwriters would continue liable under the institute time clauses, notwithstanding the presence in the policy of exceptions covered by the f.c.s. clause; and, secondly, whether that be so or not, the promise of indemnity contained in cl. 19 did not cover the liability of the shipowner to pay damages to the owners of the *Petingaudet*."

G It is of the first importance, as it strikes me, to realise that these are, with reference to this claim, the only issues between the parties. As so stated, the questions in debate at once resolve themselves into mere questions of construction—of the collision clause on the one hand; of the third sentence of cl. 19 of T. 99 on the other. And many considerations—such, for instance, as that of negligence—cease to be important or even relevant.

H Is, then, the marine underwriter, in the event, free of liability for this sum, notwithstanding the collision clause in his policy? On this point I find myself in agreement with what I take to be the view of BANKES, L.J. I think he is. The question turns entirely upon the meaning to be placed upon the introductory words of the clause: "If the ship hereby insured shall come into collision 'with any other ship or vessel'." Is the collision there referred to confined to one which

I is a peril of the sea insured against by the policy, or does it extend to one, which, resulting from warlike operations, is put beyond the purview of the policy altogether by the f.c.s. clause? As LORD SHAW pointed out when this matter was last before the House, a "collision" in this policy may be either a sea risk covered by it or a war risk excluded from it. To which class of collision is reference made in this clause? My Lords, if it were not for the opposite view taken by others for whose opinion I have a profound respect, I should have thought the answer was plain. Whether the question be treated purely as one of construction of the policy as a whole, regardless of the history and purpose of the collision clause, or

whether that history and purpose be also kept in mind, I should have thought that the reference clearly was to a collision, being a peril of the sea which is covered by the policy, and not to one with which the policy has no concern. A conviction that this is also the common-sense view of the matter must not be allowed to darken counsel. But that conviction is, I confess it, strong. A

The effect of a clause like the f.c.s. clause, as explained by LORD SELBORNE, L.C., in *Cory v. Burr* (4), is that the insurers are not to be liable for the things to which the warranty applies. *Primâ facie*, therefore, any term in this policy which is sufficiently satisfied by reference to a risk for which the insurers retain liability must be so confined if the warranty is to have its intended effect. An interesting illustration of this, and in a matter immediately relevant, is supplied by cl. 13 of the institute time clauses. That clause provides that "when the vessel shall have been stranded, sunk, on fire, or in collision with any other vessel"—note the identity of the phrase with that of the collision clause—"underwriters shall pay the damage created thereby." On this clause there is, of course, no question that, this present collision being an excepted risk, there is on the marine underwriters no liability at all in respect of that damage. The Crown has accepted liability for it in these present proceedings. The view, however, is apparently taken that in this matter the collision clause is a law unto itself, upon a ground, which is most clearly expressed by GREER, J., in his judgment. There he says that the clause introduced. B

"an additional contract of insurance dealing with an entirely new subject-matter which has nothing to do with damage to the insured ship, but is of the same character as a third-party risk policy on a motor-car or other vehicle moving on land. . . . The f.c.s. clause does not, in my judgment, free the insurer from the indemnity promised in the institute time clauses in respect of collision occasioned by the negligence of servants of the insured owners even where that negligence takes place in the course of carrying out a warlike operation." C

I have some difficulty in following the reasoning here because it does not appear to be directed to the terms of the clause with which in this case we are alone concerned. Unlike other forms of running-down clause to be found in the books, and with which the learned judge's observations seem more directly to deal, there is no reference in this clause to the negligence of the servants of the insured owners or of anybody else. The sole preliminary condition of liability prescribed by the clause is that the insured vessel shall have been in collision with another vessel and that the insured person shall have paid or shall have become liable to pay damages in respect of that collision. The learned judge omits even to consider whether the collision so referred to can in view of the f.c.s. clause have any meaning other than that which, for example, and in *pari materia*, it admittedly bears in cl. 13 of these same institute time clauses. The learned judge apparently treats the clause as if it were in the terms of that under discussion in *Taylor v. Dewar* (5) and *Xenos v. Fox* (3), where liability is made to attach in case "by accident or negligence of the master or crew" the insured ship runs down another, a perfectly general and independent form of expression. Such is neither the form nor, I believe, the intent of the present clause. Nor ought its terms to be stressed to give it that effect. These terms are relative and dependent reflecting the original purpose of the collision clause which certainly was not to attach liability to an insurer for damages unconnected with an insured risk. Its purpose was to extend liability in respect of a peril of the sea insured against for a consequence which the courts had held to be too remote to be recognised, but against which insured persons desired to be indemnified. In such a case, as LORD BLACKBURN observes, D

"the prejudice which the owner of the ship sustains . . . is a consequence of the peril of the sea, the collision, and it may be and every day is insured by a running-down or collision clause now in common use, but it is not a loss of the ship." E

A *Inman Steamship Co. v. Bischoff* (6), 7 App. Cas. at p. 686. It is, accordingly, quite foreign to the conception of the clause that an insurer should under it be liable for collision damage to another ship when under the same policy he is under no liability for damage from the same collision to the insured ship; or that, to take the present case, he should be free from liability under cl. 13 of these clauses, but should, under the very same words, be hit under cl. 1. In my judgment, B however the clause be regarded, there is no room for the view that under it and in respect of this collision the marine underwriter is under any liability whatever.

If that be so, it follows, for the reasons already given, that the liability of the Crown for this sum is established unless the provisions of the third sentence of cl. 19 of the charterparty are sufficient to show that the hypothesised war risk policy is to contain no collision clause at all. I think that all of your Lordships at the C hearing were of the opinion, at all events I myself hold the view very strongly, that that clause is merely operative to define the value of the *Warilda* in cases where it is material to ascertain it, and cannot be invoked to limit the liability of the Admiralty to the payment of damage sustained by the *Warilda* if, apart from that clause, a more extended liability is, upon the true view of the whole document, undertaken by the Admiralty. D It is not by such words of ambiguous import that you can effectively neutralise the operation upon the war risk insurance of the admission that the collision clause is part of the marine risk. For these reasons I am of opinion that the liability of the Crown in respect of the appellants' first claim is established.

Their second claim, also under the collision clause, is for three-fourths of the costs incurred or paid by the appellants in contesting the liability of the *Warilda* E for the collision. This claim, I think, is not sustainable. Such costs are, under the clause, only recoverable if the proceedings in question were taken "with the consent in writing" of the Admiralty. No such consent was given, probably, it may be, because the collision was then regarded by the Admiralty as a marine and not as a war risk. But for whatever reason, the consent was not given, and, F accordingly, the claims of the appellants for these costs must necessarily fail.

The third claim of the appellants has greatly exercised my mind. It is for hire money during the period the *Warilda* was undergoing repair of the damage sustained by the collision. The hire was withheld by the Admiralty under cl. 25 of the charterparty, the terms of which are before your Lordships. As I read that clause, it is in substance the complement of cl. 12 which places obligations upon the G appellants in the following terms:

The owners shall provide and pay for all wages provisions . . . and all other expenses in connexion with the master, officers, engineers and crew . . . for all deck and engine room stores . . . for boats . . . and for the maintenance of the steamer in a thoroughly efficient state in hull and machinery for and during the service.

H Clause 25, as I read it, is at all events primarily pointed to cases in which the working of the steamer is suspended owing to causes for which as between the owners and the Admiralty the owners are responsible, and I have difficulty in seeing how it can properly be extended to cases where the suspension, as here, is attributable to a cause for which, in a question with the owners, the Admiralty is responsible. This was apparently the view of the Admiralty when in August, I 1918, this claim was first made. It was rejected because, as was stated: "The vessel was inefficient owing to a marine risk—i.e., collision." I appreciate that answer, and my own view is that in principle it is right. But that principle concedes the appellants' case, for the result of your Lordships' previous decision is that the vessel was inefficient, not owing to a marine, but to a war risk. Applying that principle, could it, for instance, be contended that if the damage to the *Warilda* had been done, as was the damage to the *Ikaria* in *Leyland Shipping Co., Ltd. v. Norwich Union Fire Insurance Society, Ltd.* (7)—by hostile submarine

attack—that the *Warilda*, during the repair of that damage, would, under cl. 25, have been off hire. It seems to me that so to contend would stress the clause to breaking point. Yet, I have difficulty in finding any dividing line between such damage and that with which we are here concerned. These are my difficulties, and they are not met by the statement, quite correct as it is, that the war risk policy is an insurance on ship and not on freight. Accordingly, I have felt it my duty to express them in justice to the appellants. But having done so I do not further press them, as I understand all your Lordships are of opinion that the decision of the courts below on this point should be affirmed. I acquiesce in that view. But if, in other matters, the decision of this appeal had rested with me, I should, in common with my noble and learned friend who has just spoken, have allowed the first of the appellants' claims, with some consequential directions as to costs.

Appeal dismissed.

Solicitors : *Parker, Garrett & Co.*; *Treasury Solicitor.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

SHORT v. POOLE CORPORATION.

[COURT OF APPEAL (Sir Ernest Pollock, M.R., Warrington and Sargant, L.JJ.), November 11, 12, 20, 1925]

[*Reported* [1926] Ch. 66; 95 L.J.Ch. 110; 134 L.T. 110; 90 J.P. 25; 42 T.L.R. 107; 70 Sol. Jo. 245; 24 L.G.R. 14]

Public Authority—Statutory powers—Education authority—Exercise of powers bona fide—Review by court.

Where an authority, e.g., an education authority, is constituted under statute to carry out statutory duties with which it is entrusted the courts cannot interfere with the exercise by the authority of its powers unless the action of the authority was ultra vires or its powers were exercised corruptly or mala fide, i.e., for a purpose other than that for which those powers were entrusted to the authority. Where the action of the authority is challenged it is for the plaintiff to prove that there is a duty in the courts to interfere on the grounds stated. The authority may appear to be right or to be wrong in the course they have adopted, according as that course may be submitted to criticism from one point of view or another. On such discussion and criticism it is not for the courts to pronounce. So long as the limits of the powers are not exceeded the decision rests with the authority.

Notes. By s. 24 (3) of the Education Act, 1944 (8 HALSBURY'S STATUTES (2nd Edn.) 145), no woman shall be disqualified for employment as a teacher in any county school or voluntary school, or be dismissed from such employment, by reason only of marriage.

Applied: *Fennell v. East Ham County Borough Corpn.* (1925), 89 J.P. Jo. 721. Considered: *Richardson v. Abertillery U.D.C.*, *Thomas v. Same* (1928), 138 L.T. 688. Referred to: *Brown v. Dagenham U.D.C.*, [1929] 1 K.B. 737; *Leeds Corpn. v. Jenkinson*, [1935] 1 K.B. 168.

As to the exercise of statutory powers see 26 HALSBURY'S STATUTES (2nd Edn.) 257 et seq., and for cases see 38 DIGEST 15 et seq.

A Cases referred to :

(1) *Hayman v. Governors of Rugby School* (1874), L.R. 8 Eq. 28; 43 L.J.Ch. 834; 30 L.T. 217; 22 W.R. 587; 19 Digest 585, 176.

(2) *Wright v. Marquis of Zetland*, [1908] 1 K.B. 63; 77 L.J.K.B. 152; 97 L.T. 867; 24 T.L.R. 48, C.A.; 19 Digest 592, 222.

B

(3) *Notley v. L.C.C.*, [1915] 3 K.B. 580; 85 L.J.K.B. 113; 113 L.T. 1110; 80 J.P. 23; 13 L.G.R. 1346; 34 Digest 581, 34.

(4) *Price v. Rhondda U.D.C.*, [1923] 2 Ch. 372; 93 L.J.Ch. 1; 88 J.P. 69; 155 L.T. Jo. 387; 67 Sol. Jo. 536; 21 L.G.R. 753; 19 Digest 604, 302.

(5) *Hanson v. Radcliffe U.D.C.*, [1922] 2 Ch. 490; 91 L.J.Ch. 829; 127 L.T. 509; 86 J.P. 144; 38 T.L.R. 667; 66 Sol. Jo. 556; 20 L.G.R. 541, C.A.; 19 Digest 603, 297.

C

(6) *R. v. Adamson* (1875), 1 Q.B.D. 201; 45 L.J.M.C. 46; 24 W.R. 250; sub nom. *R. v. Tynemouth Justices*, 33 L.T. 840; 40 J.P. 182; 33 Digest 425, 1377.

(7) *R. v. St. Pancras Vestry* (1890), 24 Q.B.D. 371; 59 L.J.Q.B. 244; 62 L.T. 440; 54 J.P. 389; 38 W.R. 311; 6 T.L.R. 175, C.A.; 34 Digest 579, 27.

D

(8) *Roberts v. Hopwood*, ante p. 24; [1925] A.C. 578; 94 L.J.K.B. 542; 133 L.T. 289; 89 J.P. 105; 41 T.L.R. 436; 69 Sol. Jo. 475; 23 L.G.R. 337, H.L.; 33 Digest 20, 83.

(9) *R. v. Board of Education*, [1910] 2 K.B. 165; 79 L.J.K.B. 692; 102 L.T. 578; 74 J.P. 259; 26 T.L.R. 422; 8 L.G.R. 549, C.A.; affirmed sub nom. *Board of Education v. Rice*, [1911] A.C. 179; 80 L.J.K.B. 796; 104 L.T. 689; 75 J.P. 393; 27 T.L.R. 378; 55 Sol. Jo. 440; 9 L.G.R. 652, H.L.; 19 Digest 602, 290.

E

(10) *R. v. L.C.C., Ex parte Corrie*, [1918] 1 K.B. 68; 87 L.J.K.B. 303; 118 L.T. 107; 82 J.P. 20; 34 T.L.R. 21; 62 Sol. Jo. 70; 15 L.G.R. 889, D.C.; 34 Digest 577, 10.

F

(11) *Sadler v. Sheffield Corpn., Dyson v. Sheffield*, [1924] 1 Ch. 483; 93 L.J.Ch. 209; 131 L.T. 55; 88 J.P. 45; 40 T.L.R. 259; 63 Sol. Jo. 403; 22 L.G.R. 138; 19 Digest 603, 299.

(12) *R. v. Governors of Darlington School* (1844), 6 Q.B. 682; 14 L.J.Q.B. 67; 4 L.T.O.S. 175; 9 Jur. 21; 115 E.R. 257, Ex Ch.; 19 Digest 608, 336.

(13) *Kruse v. Johnson*, [1898] 2 Q.B. 91; 67 L.J.Q.B. 782; 79 L.T. 647; 62 J.P. 469; 46 W.R. 630; 14 T.L.R. 416; 42 Sol. Jo. 509, 19 Cox, C.C. 103, D.C.; 13 Digest (Repl.) 239, 639.

G

(14) *Stockton and Darlington Rail. Co. v. Brown* (1860), 9 H.L. Cas. 246; 3 L.T. 131; 24 J.P. 803; 6 Jur. N.S. 1168; 8 W.R. 708; 11 E.R. 724, H.L.; 38 Digest 280, 181.

(15) *Edgington v. Fitzmaurice* (1885), 29 Ch.D. 459; 55 L.J.Ch. 650; 53 L.T. 369; 50 J.P. 52; 33 W.R. 911; 1 T.L.R. 326, C.A.; 22 Digest (Repl.) 59, 385.

H

Appeal by the defendants from an order of ROMER, J.

The plaintiff, Mrs. Ethel Florence Short, a certificated assistant teacher in a public elementary school, who was appointed in March, 1914, and married in 1921, sought a declaration that a notice of July 30, 1924, served on her by the defendants purporting to terminate her engagement as an assistant mistress under the defendants as the local education authority was invalid and inoperative, and for an injunction restraining the defendants from acting on the notice or enforcing the same. The facts are set out in the judgment of the Master of the Rolls. ROMER, J., held that the defendants were attempting to dismiss the plaintiff in pursuance of motives in no way connected with the efficient maintenance of the schools or of education in their district, but for motives alien and irrelevant to the discharge of their statutory duties and made the declaration claimed by the plaintiff. The defendants appealed.

I

F. H. Maugham, K.C., and *C. D. Myles*, for the defendants, referred to *Hayman v. Governors of Rugby School* (1), *Wright v. Marquis of Zetland* (2), *Notley v. L.C.C.* (3), *Price v. Rhondda U.D.C.* (4), *Hanson v. Radcliffe U.D.C.* (5), and *R. v. Adamson* (6). A

A. C. Clauson, K.C., and *A. A. Thomas*, for the plaintiff, referred to *Price v. Rhondda U.D.C.* (4), *R. v. St. Pancras Vestry* (7), *Roberts v. Hopwood* (8), *R. v. Board of Education* (9), *Notley v. L.C.C.* (3), *R. v. L.C.C., Ex parte Corrie* (10), *Sadler v. Sheffield Corpn.* (11), and the Education Act, 1921, s. 29. B

Maugham, K.C., in reply, cited *R. v. Governors of Darlington School* (12).

Nov. 20. The following judgments were read.

Cur. adv. vult.

SIR ERNEST POLLOCK, M.R.—This is an appeal from the judgment of *ROMER, J.*, given on July 31, 1925, in an action brought by the plaintiff, *Mrs. Short*, against the mayor, aldermen, and burgesses of the borough of Poole, for a declaration that a notice dated July 30, 1924, served on her by or on behalf of the corporation, and purporting to terminate her engagement as an assistant mistress under the corporation as local education authority, is invalid and inoperative, and has not the effect of terminating the said engagement, and that her contract of service with the corporation is still subsisting. *ROMER, J.*, made the declaration in the above terms and ordered the corporation to pay the plaintiff's costs. Hence this appeal. C

The corporation are, by virtue of s. 3 of the Education Act, 1921, constituted the local education authority within their borough for the purposes of elementary education, and by s. 17 of the same Act they are charged "to maintain and keep efficient all public elementary schools within their area." By s. 148 (1) of the Act: D

"A local education authority may appoint necessary officers, including teachers, to hold office during the pleasure of the authority, and may assign to them such salaries or remuneration (if any) as they think fit, and may remove any of those officers." E

As from Jan. 1, 1905, the plaintiff, then unmarried, was duly appointed certificated assistant teacher of the girls' department of the Branksome Heath Council Elementary School, and in March, 1914, she was appointed as assistant mistress in the girls' department of the Heatherlands Council School, Parkstone, Dorset, also a public elementary school provided by the corporation, and continued to hold this latter appointment until the matters hereinafter mentioned. There was, and is, no question that she has performed her duties satisfactorily and is an efficient teacher. On Aug. 6, 1921, she married her husband, *Mr. Short*. On July 31, 1924—in common with certain other married women teachers in the service of the corporation—she received a notice from the town clerk of the corporation to terminate her engagement at the expiration of one calendar month from that date, that being the length of notice due. F

The question to be determined is whether the corporation had power, in the circumstances hereinafter stated, to serve that notice, and whether it is operative to terminate the plaintiff's engagement. From the terms of s. 148 (1) already referred to, it would seem that the powers of the corporation are not in any way circumscribed. The teachers are appointed to hold office "during the pleasure of the authority," who "may remove any of those officers." No question arises in the present case, as might arise in the case of non-provided schools, as to which certain conditions are laid down in s. 29 (1) of the Act, which requires the managers of such schools to carry out any directions of the local education authority "for the dismissal of any teacher on educational grounds." Those words were the subject of the decisions in *Hanson v. Radcliffe U.D.C.* (5), *Sadler v. Sheffield Corpn.*, and *Dyson v. Sheffield Corpn.* (11). No such limitation appears in s. 148 (1), and a local authority cannot impose limits upon its powers if the statute has not G

A done so: see *R. v. Governors of Darlington School* (12) (6 Q.B. at p. 717). But it is argued that, however unfettered the powers of the education authority are under the words of the section, simpliciter, there is evidence in the present case that the corporation were actuated by motives, and pursued aims, wholly outside their province as an educational authority, so that their action in giving the notice of July 30 was ultra vires, and not warranted as an exercise of their duty or powers.

B It appears that the question of the employment of married women as teachers had exercised the minds of the corporation for some time past, and at the close of 1922 a return had been required, and obtained, of the married women teachers in their employ. On Feb. 6, 1923, the corporation adopted the resolution which in its completed form is as follows:

C "That no fresh appointments be made of married women teachers whose husbands are alive and capable of supporting them, and that it be a condition in any future appointment of a woman teacher that in the event of her marriage she shall forthwith resign her teaching engagement."

D On May 6, 1924, the council adopted the report of their education committee, which was as follows:

E ". . . your committee are of opinion that, as a general rule, the retention of married women teachers in the public elementary schools is inadvisable, and they recommend that notice be given to all such married women teachers as are employed in council schools that their engagement will be terminated in accordance with the terms of their engagement, unless they can satisfy the committee that some sufficient reason exists for the engagement being continued, and that unless such satisfactory reason is given, their engagement will be terminated at the end of three months, and that the managers of the non-provided schools be recommended to take similar action."

F The particular circumstances relating to the married women teachers then employed by the council—including the plaintiff—were thereafter considered as foreshadowed in the above report, but no sufficient reason was found in her case to satisfy the education committee or council that her engagement should be continued, and thus on July 1, 1924, the council decided that notice to determine her engagement should be given. Accordingly, it was given on July 30, 1924, and received by the plaintiff as already stated. The writ in this action was thereupon issued on Aug. 19, 1924.

G At the trial, counsel for the plaintiff put in evidence a letter written to the managers of the non-provided schools, dated May 19, in pursuance of the decision of the council of May 6 already stated. As this letter is relied upon as containing the evidence for the plaintiff at its high-water mark, I set it out in full:

H "Town Clerk's Office, Poole, May 19, 1924. Dear Sir, The education committee have had under consideration the desirability of continuing the employment, in the public elementary schools in the borough, of married women teachers, and they have decided that, so far as the council schools are concerned, the engagement of all such teachers will be terminated unless in any particular case some sufficient reason exists for the engagement being continued, and that, unless a satisfactory reason is given, the engagement will be terminated at the end of three months. The committee were led to this decision for the following reasons: (i) They consider the duty of the married woman is primarily to look after her domestic concerns, and they regard it as impossible for her to do so and to effectively and satisfactorily act as a teacher at the same time; (ii) that it is unfair to the large number of young unmarried teachers who are at present seeking situations that the positions should be occupied by married women who presumably have husbands capable of maintaining them. With regard to teachers engaged in non-provided

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schools, it appears that the right to terminate the engagement rests with the managers, and it is doubtful whether the local education authority, in relation to such teachers, are in a position to direct managers to act in accordance with the decision above referred to with regard to teachers in council schools ; but they instruct me to express the hope that the managers will take the same view of the circumstances as both the education committee and the council have done, and will, with regard to the married women teachers in their schools, take similar action."

The corporation do not contest the proposition that where an authority is constituted under statute to carry out statutory powers with which it is entrusted there are cases which show that if an attempt is made to exercise those powers corruptly—as under the influence of bribery, or mala fide—for some improper purpose, such an attempt must fail. It is null and void: see *R. v. Governors of Darlington School* (12) (6 Q.B. at p. 715). So also an attempt to act ultra vires: see *R. v. Board of Education* (9). But these same cases indicate that where the tribunal has exercised the discretion entrusted to it bona fide not arbitrarily or illegally, the courts cannot interfere. No doubt, where a discretion is given to justices or other local bodies, it must be exercised and not refused: see *R. v. Adamson* (6), *R. v. Vestry of St. Pancras* (7), *R. v. L.C.C., Ex parte Corrie* (10). But where it is exercised the courts are slow to interpret their action as invalid, as explained by LORD RUSSELL OF KILLOWEN, C.J., in *Kruse v. Johnson* (13) ([1898] 2 Q.B. at pp. 99, 100). The corporation contend, first, that, except as above—that is, when corruption or mala fides is proved, or the act is ultra vires—the action of the council in giving notice to determine the contract cannot be challenged, and, secondly, that on the facts of the present case there is no such proof established. On the contrary, they claim that the council acted strictly with a view to educational ends. To this it is answered that in the present case the council made a broad rule not to employ married women as teachers, and if and so far as they examined individual cases they did so, as in the case of the plaintiff, to ascertain what were the economic conditions of the teacher's home—how far her husband could, and did, support her ; and they came to their decision to send the notice of July 30 on these grounds and not upon consideration of the fitness of the married woman to act as a teacher, or her competence to continue her educational work.

The evidence, and particularly the letter of May 19, does not, in my judgment, found a basis for this argument. It is clear that the council were considering the desirability of continuing the employment of married women teachers, and the two reasons set out later in the letter deal with her effectiveness as a teacher, and the problem of securing a due supply of teachers necessary to fill the gaps caused by time and wastage. The letter is to be read fairly without any sinister bias, and, so read, the first reason appears to me to refer to the incidence of domestic duties which may be presumed to fall with greater weight upon a married woman than upon a single woman ; and the second reason appears to me to refer to the problem, always an anxious one, whether a due succession and supply of teachers can be obtained and is likely to be maintained, or whether the zeal of intending applicants will be dissipated by long delay and consequent abandonment of the teaching profession. At the least, this is a possible interpretation of the letter. It is not suggested that the council acted otherwise than with bona fides ; and if the interpretation of the letter and the conduct of the council, as explained therein, is doubtful, it is not right to exclude the view that I have expressed in weighing the evidence placed before the court. If the effect of the evidence be such as I hold it is, there is no proof that the council have taken into account matters other than those which belong to their educational sphere. I agree that if the evidence led to a different conclusion, the council could not cure the mischief of their adherence to a general rule, not of educational import, by reference to the domestic position and concerns of particular teachers. The true view, however, is, in my judgment, that the council dealt with the matter from an

A educational standpoint; and the inquiries made in the individual cases were made only to see if it were possible, on balancing the advantages and disadvantages, to mitigate the hardship even if at some sacrifice of educational efficiency. The fact that their decision was communicated to the non-provided schools in the terms used in the letter does not justify a sinister interpretation being put upon it.

B It is necessary to add a few words about the cases, because it is said that in some of them alien or irrelevant or collateral or extraneous grounds are treated as equivalent to, or evidence of, the fact that a public body has misused its powers, and that such conduct is proved in the present case. Such words are to be found in *Hayman v. Governors of Rugby School* (1) (L.R. 18 Eq. at p. 85) and *R. v. Board of Education* (9) ([1910] 2 K.B. at p. 179), and other cases cited to us. **C** LORD SUMNER dealt with them in *Roberts v. Hopwood* (8) ([1925] A.C. at p. 606), in quoting LORD CRANWORTH's observations in *Stockton and Darlington Rail. Co. v. Brown* (14). LORD CRANWORTH's words are (9 H.L. Cas. at p. 256):

"Provided only that they take the lands bona fide with the object of using them for the purposes authorised by the legislature, and not for any sinister or collateral purpose."

D It is clear that LORD CRANWORTH uses the words in contrast to what is authorised by the legislature, and LORD SUMNER so interprets them in his application of them to the case before him, when he held the action questioned to fall outside the realm of discretion. It may be well to quote the words of LORD RUSSELL OF KILLOWEN, C.J., in his judgment in *Kruse v. Johnson* (13) already cited, where he was considering by what test the question whether certain by-laws were **E** unreasonable or not was to be decided. He says:

"But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the court might well say: 'Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires.' But it is in this sense only, as I conceive, that the question of unreasonableness can be properly regarded."

G I do not find any case where "collateral or alien" has been held to be a test of action which falls rightly within the discretion of the authority and has been bona fide exercised. It may well be that some expressions of opinions may be given in a council chamber, which to some members present, or to many outside, may appear collateral or alien to the matter discussed. But, as LORD SUMNER adds:

H "There are many matters which the courts are indisposed to question. Though they are the ultimate judges of what is lawful and what is unlawful to borough councils, they often accept the decision of the local authority simply because they are themselves ill-equipped to weigh the merits of one solution of a practical question as against another."

I Where a discretion is given to the local authority, it is for that authority to exercise it, provided that its action is not ultra vires, nor its powers exercised corruptly or mala fide. Where the exercise of the discretion is challenged, it is for the plaintiff to prove that there is a duty in the courts to interfere upon the grounds already stated. In my judgment, no such proof has been established in the present case. The authority may appear to be right or may appear to be wrong in the course they have adopted, according as that course may be subjected to criticism from one point of view or another. Upon such discussion and criticism it is not for the courts to pronounce. So long as the discretion has been exercised and the limits of discretion are not passed, the decision rests with the local authority.

In my judgment, the plaintiff has failed to make out a case for the interference of the courts. The appeal will be allowed with costs here and below. A

WARRINGTON, L.J.—The question in this appeal from a judgment of **ROMER, J.**, is whether a notice terminating the engagement of the plaintiff as an assistant mistress under the defendants as the local education authority of the borough of Poole is valid and operative and had the effect of terminating her engagement. B
The learned judge has held that the notice is invalid and inoperative, and that the engagement of the plaintiff is still subsisting. The defendants appeal. [His LORDSHIP stated the facts and continued:] It is admitted that the plaintiff performed her duties satisfactorily, and no complaints or adverse reports have been made with respect to her efficiency as a teacher. She married her present husband in 1921. She has no children. On the other hand, it is admitted that the notice terminating her engagement was given bona fide, and that there is no irregularity in the notice itself or in its service on the plaintiff, or in the proceedings of the council or its education committee in relation thereto. The learned judge came to the conclusion that the defendants were attempting to dismiss the plaintiff in pursuance of motives in no way connected with the efficient maintenance of the school or of education in their district, but for motives alien and irrelevant to the discharge of their statutory duties, and on this ground declared the notice invalid and inoperative. Was he justified on these grounds? No others are suggested in pronouncing the judgment appealed from. C D

In the case of an individual employer under a contract with an employee, such as existed in the present case, the motives of the employer in giving the notice would be wholly immaterial, and provided the notice in itself complied with the terms of the contract the employment would be duly determined by it. Is the position of a public body such as the defendants in the present case in any, and, if so, in what, respect different from that of an individual? In my opinion, it is different only in this, that being established by statute for certain limited purposes, no act purporting to be that of the public body can have any operation as such if the individuals purporting to exercise the functions of the public body have, in performing the act in question, transcended the limits of the authority conferred upon it. If they have done so, and this fact is proved affirmatively by the person who complains of their action and seeks to have it declared invalid and inoperative, then, and then only, has the court, in my opinion, jurisdiction to interfere. Thus, no public body can be regarded as having statutory authority to act in bad faith or from corrupt motives, and any action purporting to be that of the body, but proved to be committed in bad faith or from corrupt motives, would certainly be held to be inoperative. E F G

It may be also possible to prove that an act of the public body, though performed in good faith and without the taint of corruption, was so clearly founded on alien and irrelevant grounds as to be outside the authority conferred upon the body, and therefore inoperative. It is difficult to suggest any act which would not be held ultra vires under this head, though performed bona fide. To look for an example germane to the present case I suppose if the defendants were to dismiss a teacher because she had red hair, or from some equally frivolous and foolish reason, the court would declare the attempted dismissal to be void. H

My view, then, is that the only case in which the court can interfere with an act of a public body which is, on the face of it, regular and within its powers, is when it is proved to be in fact ultra vires and that the references in the judgments in the several cases cited in argument to bad faith, corruption, alien and irrelevant motives, collateral and indirect objects, and so forth, are merely intended when properly understood as examples of matters which, if proved to exist, might establish the ultra vires character of the act in question. It is remarkable that in not one of the cases cited in argument in which the questions really like those as the present have been raised have the court thought fit to interfere. I

A I now turn to the facts of the present case. There can be no question that the notice to the plaintiff was given in accordance with the opinion of the defendant authority, arrived at after careful consideration, that it is as a general rule inadvisable to retain married women as teachers in the public elementary schools. I can see nothing in this view alien or irrelevant to the making and keeping efficient the public elementary schools. I do not know, and if I did I should have no right to criticise favourably or unfavourably, the arguments on which such an opinion was formed. With the question whether a particular policy is wise or foolish the court is not concerned; it can only interfere if to pursue it it is beyond the powers of the authority. Dealing with the present matter from this point of view, a determination to employ as far as possible women who are devoting their lives and energies entirely to the business of teaching, without assuming the privilege and the burden of domestic ties, cannot, in my judgment, be irrelevant to the maintenance of the efficiency of the schools or the cause of education in the district. So also, if the adoption of the policy in question resulted from a desire that single women might be encouraged to undergo training with a fair hope of employment, it would not, as I think, be irrelevant to the question of efficiency or to the cause of education. Unless, therefore, some positive fact has been proved from which it may be inferred that what, on the face of it and on the avowed motives of the defendants, appears to have been properly done was really outside the powers of the defendants, I should be of opinion that the appeal ought to succeed. Has any such fact been proved? In my opinion, it has not. The plaintiff and the learned judge lay stress on the fact that the defendants have in some cases, and particularly where the woman was the pecuniary mainstay of her household, abstained from acting on their general resolution. In my opinion, the facts in this respect only amounts to this, that the defendants, while seeking as an ideal to attain to the exclusive employment of single women, have abstained from giving effect to their views in cases in which grievous hardship would be caused. I cannot see how this concession can affect their action in other cases in which they considered that their object could fairly be attained. But, in truth, there is no evidence beyond that contained in the report of the education committee, adopted by the council, of the motives of the latter in adopting the course they pursued. Unless such motives are expressed in a resolution or can be inferred from the nature of the policy itself, I see great difficulty in seeing how they are to be ascertained so as to afford a ground for interference by the court. Certainly the reasons for the views of the education committee as expressed in the letter of the town clerk cannot be accepted as those of the council as a whole. But even if this letter be accepted as evidence of the council's motives, I can see nothing in them alien or irrelevant to the matters which it was their duty to consider. With all respect to the learned judge, I think he has dealt with the matter from too restricted a point of view. He has, I think, regarded the province of the defendants as concerned only with the efficiency of a particular teacher, whereas, in my opinion, it is clearly their duty and within their province to consider whether a certain policy will or will not be a benefit to the cause of education generally in their district. On the whole, I think the judgment of the learned judge was erroneous and ought to be reversed and the action dismissed with costs here and below.

I **SARGANT, L.J.**—In order to succeed here the plaintiff obviously had a heavy load to discharge. Under the statute creating the defendants the local education authority for their district all teachers appointed by them were to hold office during the defendants' pleasure. The plaintiff was appointed on these terms, and has received a notice terminating her engagement in accordance with her contract. It is, therefore, necessary for her to establish that this notice was a nullity and accordingly that her engagement is still in existence. Nothing short of this can avail her.

It is clear that the termination of the plaintiff's engagement is due, not to any

individual default on her part, but solely on the adoption by the defendants of a general policy against the employment of married women teachers, and the question, therefore, arises whether, in adopting this general policy, the defendants have so conducted themselves that the court is justified in holding their action outside the limits of their authority, and, therefore, null and void. In determining this question it is vital to bear in mind that when the charge of elementary education in particular districts is entrusted by Parliament to local authorities in those districts, and especially to popularly elected authorities, a very wide discretion is necessarily vested in them; and it must have been contemplated that a considerable diversity would arise in the methods adopted by different authorities in the course of carrying out their duties. Further, the normal critics of these methods would be, not the courts, but the body of electors by whom the local authorities had been chosen and to whom they would ultimately have to render an account of their stewardship. Nevertheless, there are certain cases in which it is admitted that the assistance of the courts may properly be invoked. If it were proved that the local authority had acted corruptly or *mala fide*, that is, for a purpose other than that for which their powers were entrusted to them, then the courts would be entitled, and indeed bound, to hold that the action so taken was outside their statutory powers and was void. And it may be, though it is difficult to imagine an example that the action of a local authority was on the face of it so frivolous, arbitrary, or vexatious that the court would infer *mala fides*. But I doubt whether there is any other case in which the courts would interfere. There has not, I think, been interference in any decided case in which there has not been corruption, *mala fides*, or a clear excess of authority.

A mere decision to discontinue the employment of married women teachers, or of any women teachers at all, or a decision to employ women teachers only, could not, in my judgment, be interfered with by the courts, however mistaken such a decision might appear to be. It is quite conceivable that the majority of a popularly elected body might genuinely consider that such a policy was beneficial. It would be for the electors, if they thought fit, to alter the policy by changing their representatives at the next election. This general proposition was not, I think, seriously contested by counsel for the plaintiff. Their argument was mainly, if not entirely, devoted to proving that the corporation had in fact acted, not for the purpose of carrying out their duties as the education authority, but for a different purpose or purposes, such as, for instance, to secure that married women should devote their full energies to their domestic duties, or to prevent married women whose husbands were capable of supporting them from competing in the educational employment market. To prove that the real purpose of the corporation was something other than the due discharge of their educational duties the plaintiff's counsel relied on two facts or circumstances—namely, first, a letter from the town clerk to the managers of non-provided schools in the district; and, secondly, the inquiries made by or by the direction of the corporation in the course of ascertaining whether exceptions to the general rule of dismissal should be made in certain cases of special hardship. The town clerk's letter does not purport to represent the views of anyone but the education committee, and cannot, I think, be held to bind even the members of that committee. Still less can it be taken to reflect accurately the reasons which actuated the general body of the council of the corporation. It cannot be properly used against the corporation as being of the nature of an admission. But, even if this were the case, it does not, in my judgment, indicate, still less prove, that the corporation acted *mala fide* or for purposes foreign to their duties. How does the matter stand as regards the inquiries made as to cases of special hardship? Because a number of particulars were sought for in order to ascertain whether certain teachers should be excepted from the general rule, it is argued that the nature of the particulars demanded indicated the reasons for which the general rule was adopted. This argument is quite unconvincing. A general rule may be perfectly sound, and yet reasons entirely

A unconnected with the adoption of the general rule may render it inexpedient to apply it forthwith in a particular case where it would cause very special hardship. The course which the corporation have pursued in this respect is, in my judgment, a thoroughly reasonable one, and affords no indication at all of mala fides or disregard of their duties towards education. It is notoriously difficult to establish the state of a person's mind, though this may sometimes be done, as in such cases as that of *Edgington v. Fitzmaurice* (15). And the difficulty is increased when it is sought to prove that a public body, apparently acting in the legitimate exercise of their duty, and within the ambit of their powers, have in fact been acting mala fide in the sense of pursuing an illegitimate aim. In my judgment, the plaintiff has failed to overcome this difficulty, and this appeal should be allowed.

Appeal allowed.

C Solicitors: *Peacock & Goddard*, for *W. H. Curtis*, Poole; *Eric G. Floyd*.

[Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.]

D

E

Re HARDYMAN. TEESDALE v. McCLINTOCK

[CHANCERY DIVISION (Romer, J.), January 15, 16, February 4, 1925]

[Reported [1925] Ch. 287; 94 L.J.Ch. 204; 133 L.T. 175]

F Will—Codicil—Republication of will—Gift to "wife of M."—Death of wife living at date of will—Testatrix aware of death—Re-marriage of M. after death of testatrix—Right of second wife to gift.

G By her will, dated Feb. 25, 1898, the testatrix, gave a legacy of £5,000 to be held "in trust for my cousin W. G. W. M. his children and his wife failing his children upon his death and that of his wife or until she marries again" upon the trusts therein mentioned. At the date of the will W. G. W. M. had a wife living. She died on Jan. 23, 1901. After the death of the wife, the testatrix, who knew of her death, made a codicil to her will in the following terms: "This is the codicil of me C. J. H. to the said will bearing date of February the 25th, 1898. I give and bequeath to . . ." The codicil contained no further reference to the will, except that the legatee referred to therein was appointed residuary legatee. The testatrix died on Dec. 1, 1901. In 1903 W. G. W. M. married again. He died in 1924, leaving no issue.

H Held: where a benefit was bequeathed to the wife of a named person eo nomine, and there was a wife living at the date of the will, that wife and no other would take under the bequest; the effect of the republication of the will by the codicil was to bring the will down to the date of the codicil and effect the same disposition of the estate as if a new will had at that date been made in the same terms as the original will; that rule was to be applied with good sense and discrimination for the purpose of effectuating the intention of the testator, and, so applied, the second wife of W. G. W. M. took an interest in the gift for her life or until she re-married.

I Notes. Followed: *Re Reeves, Reeves v. Pawson*, [1928] All E.R. Rep. 342. Considered: *Re Harvey, Public Trustee v. Hoskin*, [1947] 1 All E.R. 349; *Re Heath's Will Trusts, Hamilton v. Lloyd's Bank, Ltd.*, [1949] 1 All E.R. 199.

Referred to: *Re Tredgold, Midland Bank Executor and Trustee Co. v. Tredgold*, **A** [1943] 1 All E.R. 120.

As to republication of a will by a codicil see 34 HALSBURY'S LAWS (2nd Edn.) 98-102, and for cases see 44 DIGEST 370 et seq.

Cases referred to:

- (1) *Anderson v. Anderson* (1872), L.R. 13 Eq. 381; 41 L.J.Ch. 247; 26 L.T. 12; 20 W.R. 313; 44 Digest 275, 1082. **B**
- (2) *Barnes v. Crowe* (1792) 1 Ves. 485; 4 Bro. C.C. 2; 29 E.R. 747; 44 Digest 374, 2086.
- (3) *In the Goods of Lady Truro* (1866), L.R. 1 P. & D. 201; 35 L.J.P. & M. 89; 14 L.T. 893; 14 W.R. 976; 44 Digest 389, 2229.
- (4) *Radford v. Willis* (1871), 7 Ch. App. 7; 41 L.J.Ch. 19; 25 L.T. 720; 20 W.R. 132, L.J.J.; 44 Digest 875, 7313. **C**
- (5) *Re Blackburn, Smiles v. Blackburn* (1889), 43 Ch.D. 75; 59 L.J.Ch. 208; 38 W.R. 140; 44 Digest 376, 2103.
- (6) *Re Smith, Bilke v. Roper* (1890), 45 Ch.D. 632; 60 L.J.Ch. 57; 63 L.T. 448; 39 W.R. 93; 6 T.L.R. 484; 44 Digest 370, 2042.
- (7) *Re Champion, Dudley v. Champion*, [1893] 1 Ch. 101; 62 L.J.Ch. 60, 372; 67 L.T. 344, 694; 2 R. 162, C.A.; 44 Digest 372, 2068. **D**
- (8) *Re Rayer, Rayer v. Rayer*, [1903] 1 Ch. 685; 72 L.J.Ch. 230; 87 L.T. 712; 51 W.R. 538; 44 Digest 374, 2081.
- (9) *Re Fraser, Lowther v. Fraser*, [1904] 1 Ch. 726; 73 L.J.Ch. 481; 91 L.T. 48; 52 W.R. 516; 20 T.L.R. 414; 48 Sol. Jo. 383, C.A.; 44 Digest 376, 2102. **E**
- (10) *Re Moore, Long v. Moore*, [1907] I.R. 315; 41 I.L.T. 150; 8 Digest (Repl.) 380, *224.

Adjourned Summons.

The testatrix, by her will dated Feb. 25, 1898, gave a legacy of £5,000 which she directed to be held **F**

"in trust for my cousin Col. William Graham Waugh McClintock his children and his wife failing his children upon his death and that of his wife or until she marries again the said sum of £5,000 to be divided between"

certain other persons. At the date of the will Col. McClintock had a wife living, but she died in the lifetime of the testatrix, namely, on Jan. 23, 1901, a fact of which the testatrix was well aware. With that knowledge, on Nov. 5, 1901, she made a codicil in these terms: **G**

"This is the codicil of me Charlotte Jeannette Hardyman . . . to the said will bearing date of February the 25th, 1898. I give and bequeath after the death of my sister . . ."

a certain sum of stock. She does not otherwise refer to her will except that she appoints her sister, whom she has mentioned in the codicil, her residuary legatee. After the death of the testatrix on Dec. 1, 1901, i.e., in January, 1903, Col. McClintock married again. He died in 1924, leaving no issue. The question raised by the summons was whether the second wife was entitled to take under the gift in the will of £5,000 "in trust for my cousin Colonel William Graham Waugh McClintock his children and his wife." **H**

Hodge for the trustees.

Dighton Pollock for the first defendant, the second wife of Col. McClintock.

Swords for other defendants who claimed to be interested in the gift on the death or re-marriage of Mrs. McClintock. **I**

The following cases were referred to: *Anderson v. Anderson* (1), *Barnes v. Crowe* (2), *In the Goods of Truro* (3), *Radford v. Willis* (4), *Re Blackburn, Smiles v. Blackburn* (5), *Re Smith, Bilke v. Roper* (6), *Re Champion, Dudley v.*

A *Champion* (7), *Re Rayer*, *Rayer v. Rayer* (8), *Re Fraser*, *Lowther v. Fraser* (9), *Re Moore*, *Long v. Moore* (10).

Cur. adv. vult.

B Feb. 4. ROMER, J., read a judgment in which he stated the facts and continued: It has been decided by cases that are binding upon me that where a testator bequeathes a legacy to the wife of a named person eo nomine, and there is a wife living at the date of the will, that wife, and no other person, can take under the bequest. One sees every reason why that should be so; but that has been extended by authorities binding upon me not only to cases where a benefit has been given to the wife of a named person, but also where a benefit is given to a class, consisting of a named person, his wife, and his children, whether in succession or altogether. Even in that case it has been held that if there be a wife of the named person living at the date of the will, that wife takes and no other—a curious result, because no one will ever dispute, or could dispute, that the children of the named person, whenever born, and by any wife, would take under the gift. However, there it is. If, therefore, the testatrix had died without having made a codicil, there can be no question, having regard to the state of the authorities, but that the second wife of Col. McClintock, whom he married after the death of the testatrix, would not have taken. It is, however, admitted that the effect of the codicil is to republish the will; it is a republication of the will as at the date of the codicil, and the effect of such a republication has been considered in several cases which have been cited to me.

E In *Re Fraser*, *Lowther v. Fraser* (9) which is a decision of the Court of Appeal, such a question had to be considered, and in the judgment of the court, delivered by STIRLING, L.J., the effect of republication is described in these words:

F “The effect of [confirmation by a codicil of a previous will] is to bring the will down to the date of the codicil and effect the same disposition of the testator’s estate as if the testator had at that date made a new will, containing the same dispositions as the original will but with the alterations introduced by the various codicils.”

G In accordance with that principle recognised by the Court of Appeal in *Re Fraser*, *Lowther v. Fraser* (9) it had been held in an old case of *Barnes v. Crowe* (2), decided before the Wills Act, 1837, that the effect of the republication of a will was to include within the devise of real estate contained in the will land acquired after the date of the will. In *Re Champion*, *Dudley v. Champion* (7) the principle was again applied by NORTH, J., and the Court of Appeal. In that case a testator by a will made in April, 1873, devised a freehold cottage with all the land thereunto belonging, described as “now in my own occupation.” In September, 1873, he purchased two fields adjoining the cottage and occupied them with the cottage until his death. In 1877 he made a codicil by which he appointed certain persons as trustees and executors of his will, and confirmed his will in other respects. NORTH, J., came to the conclusion that the two fields passed under the will, even apart from the republication of the will by the codicil, but, after referring to *Barnes v. Crowe* (2) and other cases, he added ([1893] 1 Ch. at p. 111):

H “By these cases it seems to me perfectly well settled that, if there were nothing else in favour of the plaintiffs, the codicil makes the will take effect as if it had been executed at the date of the codicil . . .”

I This decision was affirmed by the Court of Appeal. LINDLEY, L.J., after referring to the facts, said ([1893] 1 Ch. at p. 115):

“This codicil having been made after the purchase of the two fields, what is its effect upon the devise contained in the will? In my opinion, it is quite clear that the two fields, which as well as the cottage were in his own occupation when he made the codicil, passed. . . .”

It is, however, clear that the effect of republication is not such that one must

necessarily construe the will for all purposes as though it had been made at the date of the codicil. That that was so was pointed out by BARTON, J., in an Irish case of *Re Moore, Long v. Moore* (10), and I am told that EVE, J., in a recent case which is unreported, has also taken the view that that is not necessarily the effect of republication. It is not right to say that the effect of republication of a will is that you must necessarily and for all purposes construe the will as though it had been made at the date of the codicil. BARTON, J., in *Re Moore, Long v. Moore* (10), in my opinion, accurately sums up the law on the subject when he says ([1907] 1 I.R. at p. 318):

"The authorities which have been cited lead me to the conclusion that the courts have always treated the principle that republication makes a will speak as if it had been re-executed at the date of the codicil not as a rigid formula or technical rule, but as a useful and flexible instrument for effectuating a testator's intentions, by ascertaining them down to the latest date at which they have been expressed. A glance at a few of the best known cases will, I think, support this view of the effect of republication. The court has, by regarding a will as re-executed by republication, been enabled to validate a legacy to a witness to the original will—*Anderson v. Anderson* (1)—to add to the will unattested papers which were sufficiently referred to in the will for the purposes of identification and incorporation, but were not written and signed until after its execution—*Truro's Case* (3)."

He then refers to, among others, *Barnes v. Crowe* (2), although not by name, by saying that the court, by regarding a will as re-executed by publication, has been enabled

"to include in a number of cases under the old law, after-acquired lands in a devise, from which they would otherwise have been excluded; and since the Wills Act, to ascertain, whenever it is necessary to do so, intention as regards after-acquired property by reference to both will and codicil."

After referring to *Re Champion, Dudley v. Champion* (7) and *Re Blackburn, Smiles v. Blackburn* (5), he refers to *Re Rayer, Rayer v. Rayer* (8), and says:

"Where a legacy was given subject to legacy duty, and a subsequent statute substituted succession duty for legacy duty, republication after the passing of the statute enabled the court to give effect to the presumed intention of the testator that the legacy should be subject to the substituted duty."

In other words, the court, for the purpose of ascertaining the intention of the testator, would regard the republication of the will by the codicil as an expression of the testator's intention as at that date. When, therefore, the testator, at the date of his codicil, by which time legacy duty had been replaced by succession duty, expressed a wish that the legacy duty on the particular legacy should be paid, the court was able to arrive at the conclusion that the testator intended to refer to succession duty. Then BARTON, J., goes on to point out:

"On the other hand, the courts have never allowed the republication of a will to contradict the acts or frustrate the intention of a testator."

He refers to certain other authorities, and sums the matter up as follows:

"In short, the aim of the court has always been to apply the rules as to republication with good sense and discrimination for the purpose of as far as possible effectuating up to date the intentions of testators."

It appears to me in the circumstances, and having regard to the authorities, that I must construe the present will in light of the fact that by republication the testatrix has said to me: "This will expresses my intentions at this date"—that is, the date at which this codicil was made—and that I must not disregard that fact. But counsel on behalf of those interested in contesting the claim of

A Col. McClintock's second wife has asked me to pursue the following line of reasoning. He says that I must take the will first of all and substitute for the word "wife" the Christian name of Col. McClintock's first wife, and then, he says, having done that, the testatrix has by her codicil only republished a will in which she has given a benefit to his first wife by name, and that as the first wife pre-deceased the testatrix, the second wife cannot possibly take under that devise. It appears

B to me that to adopt such a course would not be to apply the rules as to republication "with good sense and discrimination," but that to do so would be to construe the will as though it had not been republished. I cannot substitute the Christian name of the first wife for the word "wife" unless I disregard the fact of the republication of the will, and construe the will as though there had been no republication. What I have to construe is a will which has been republished,

C and which, as I say, is a will which the testatrix tells me expressed her wishes as they were at the date of her first codicil. Approaching the document in that light, I find that the testatrix, knowing full well that Col. McClintock's first wife was dead, has directed that this legacy of £5,000 shall be held for the benefit of Col. McClintock, his wife and children. Now, he had no wife at that time; therefore, if those were the testatrix's wishes at the date of the codicil, the only

D person who could take under that provision would be, and is, the lady whom Col. McClintock married after the testatrix's death in 1903. It appears to me, therefore, that I ought to answer the questions that have been asked by the summons by declaring that, according to the true construction of the will and codicil, and in the events which have happened, the above-named defendant Isabel Margaret McClintock has an interest for her life, or until she shall re-marry, in the sum of £5,000. This decision is, of course, without prejudice to the question of what would happen if she were to re-marry.

Solicitors: *Maples, Teesdale & Co.*

[Reported by J. S. SCRIMGEOUR, Esq., Barrister-at-Law.]

F

G

LORD STRATHCONA STEAMSHIP CO., LTD. v. DOMINION COAL CO., LTD.

H

[PRIVY COUNCIL (Viscount Haldane, Lord Shaw, Lord Wrenbury, Lord Carson and Lord Blanesburgh), June 22, 23, 25, 30, July 2, November 17, 1925]

[Reported [1926] A.C. 108; 95 L.J.P.C. 71; 134 L.T. 227; 42 T.L.R. 86;
16 Asp. M.L.C. 585; 31 Com. Cas. 80]

I

Shipping—Charterparty—Frustration—Requisition of ship—Vessel restored in good sailing order—Substantial part of charter period remaining—Injunction to restrain breach of charter—Sale of ship—Notice to purchaser of terms of charter—Obligation to observe.

By a charterparty dated July 24, 1914, a steamship was chartered by the owners to the respondents for ten consecutive St. Lawrence seasons with an option of continuing the charter for a further eight seasons. Between 1916 and 1919 the vessel was under requisition by the British government. The ownership of the vessel was changed four times between 1917 and 1920 when she was acquired by the appellants with notice of the charter and, as the Board found, an acceptance by them of the obligations arising on its terms.

Held: (i) frustration of a contract could only be successfully pleaded when the events and facts on which it was founded had destroyed the subject-matter of the contract, or, by an interruption of its performance so critical or protracted as to bring to an end in a full and fair sense the contract as a whole, so superseded the contract that it could be truly affirmed that no resumption of its performance was reasonably possible; in the present case the interruption of the charter contract had been concluded, the vessel had been restored in good sailing order, a long balance of time remained during which the contract could be effectively carried on, and the charterers had resumed the use of the vessel; therefore, there had been no frustration of the charter contract.

(ii) if a person acquired from another rights in a ship which was already under charter, with notice of rights which required the ship to be used for a particular purpose, he was in the position of a constructive trustee with obligations which a court of equity would not permit him to violate; the remedy was not by way of an order for specific performance, but by an injunction against acts inconsistent with the provisions of the charter; and such an injunction had been properly granted in the present case.

Tulk v. Moxhay (1) (1848), 2 Ph. 774 and *De Mattos v. Gibson* (2) (1859), 4 De G. & J. 276, applied.

Notes. Distinguished: *Ontario Jockey Club v. McBride*, [1927] A.C. 916. Referred to: *Torrey Hotel v. Jenkins*, [1927] 2 Ch. 225; *The Edison*, [1933] All E.R. Rep. 144; *Clore Theatrical Properties Ltd. and Westby & Co.*, [1936] 3 All E.R. 483; *Warner Bros. Pictures, Incorporated v. Nelson*, [1936] 3 All E.R. 160; *Greenhalgh v. Mallard*, [1943] 2 All E.R. 234.

As to frustration of contract see 8 HALSBURY'S LAWS (3rd Edn.) 185-194, and as to injunctions to protect contractual rights see *ibid.*, vol. 21, p. 379 et seq. For cases see 12 DIGEST (Repl.) 436 et seq. and 28 DIGEST (Repl.) 818 et seq.

Cases referred to:

- (1) *Tulk v. Moxhay* (1848), 2 Ph. 774; 1 H. & Tw. 105; 18 L.J.Ch. 83; 13 L.T.O.S. 21; 13 Jur. 89; 41 E.R. 1143, L.C.; 40 Digest (Repl.) 342, 2774.
- (2) *De Mattos v. Gibson* (1859), 4 De G. & J. 276; 28 L.J.Ch. 498; 34 L.T.O.S. 36; 5 Jur. N.S. 555; 7 W.R. 514; 45 E.R. 108, L.C.; 28 Digest (Repl.) 832, 740.
- (3) *Keppell v. Bailey* (1834), 2 My. & K. 517; Coop. temp. Brough 298; 39 E.R. 1042, L.C.; 31 Digest (Repl.) 240, 3746.
- (4) *London and South-Western Rail. Co. v. Gomm* (1882), 20 Ch.D. 562; 51 L.J.Ch. 530; 46 L.T. 449; 30 W.R. 620; 40 Digest (Repl.) 331, 2716.
- (5) *Haywood v. Brunswick Building Society* (1881), 8 Q.B.D. 403; 51 L.J.Q.B. 73; 45 L.T. 699; 46 J.P. 356; 30 W.R. 299, C.A.; 40 Digest (Repl.) 331, 2714.
- (6) *Catt v. Tourle* (1869), 4 Ch. App. 654; 38 L.J.Ch. 665; 21 L.T. 188; 33 J.P. 659; 17 W.R. 939, L.J.J.; 40 Digest (Repl.) 359, 2879.
- (7) *Earl of Zetland v. Hislop* (1882), 7 App. Cas. 427, H.L.; 31 Digest (Repl.) 172, 3061.
- (8) *Wolverhampton and Walsall Rail. Co. v. London and North-Western Rail. Co.* (1873), L.R. 16 Eq. 433; 43 L.J.Ch. 131, L.C.; 28 Digest (Repl.) 830, 773.
- (9) *L.C.C. v. Allen*, [1914] 3 K.B. 642; 83 L.J.K.B. 1695; 111 L.T. 610; 78 J.P. 449; 12 L.G.R. 1003, C.A.; 40 Digest (Repl.) 328, 2698.
- (10) *Formby v. Barker*, [1903] 2 Ch. 539; 72 L.J.Ch. 716; 89 L.T. 249; 51 W.R. 646; 47 Sol. Jo. 690, C.A.; 40 Digest (Repl.) 333, 2727.
- (11) *Lumley v. Wagner* (1852), 1 De G.M. & G. 604; 21 L.J.Ch. 898; 19 L.T.O.S. 264; 16 Jur. 871; 42 E.R. 687, L.C.; 28 Digest (Repl.) 829, 726.

Appeal from an order of the Supreme Court of Nova Scotia, affirming the judgment of MELLISH, J., in the Supreme Court of Nova Scotia.

A The respondents, charterers of the steamship *Lord Strathcona* of which the appellants had become owners in 1920, claimed from the appellants a declaration that the appellants must carry out the terms of the charterparty under which the vessel was originally chartered to the respondents, and an injunction to restrain the appellants from using the vessel in any way inconsistent with the rights of the respondents under the charter. The appellants contended that the charter contract

B had been frustrated and terminated when the ship was requisitioned by the Government from 1916 to 1919, and that in any case there was no priority of contract between them and the respondents. MELLISH, J., held that the respondents were entitled to the declaration and injunction claimed, and a declaration was made that the charterparty was a valid and subsisting contract and that the respondents were entitled to its full performance by the appellants, together with an injunction

C restraining the appellants from employing the vessel in any way inconsistent with the use provided in the charterparty. That decision was affirmed by the Supreme Court (RUSSELL, CHISHOLM, and MCKENZIE, JJ.). The appellants appealed to His Majesty in Council.

Le Quesne, K.C., and *D. N. Pritt* for the appellants.

Sir Leslie Scott, K.C., *F. Hinde*, and *F. L. Moss* for the respondents.

Nov. 17. **LORD SHAW.**—This is an appeal from a judgment and order of the Supreme Court in Appeal of Nova Scotia which affirmed a judgment and order of MELLISH, J., in the Supreme Court of Nova Scotia. The questions involved in the case depend upon a consideration of the charterparty about to be mentioned and of the actings of parties under and in reference to that contract.

E The charter was dated April 20, 1914, corrected to July 24, 1914. It was made between the Lord Curzon Steamship Co., Ltd., as the owners of the steamship *Lord Strathcona*, and the respondents as charterers thereof. The charter was a long-term charter, namely, for ten consecutive St. Lawrence seasons, commencing with the year 1915, with the option to the respondents of continuing the charter for a further period of five more seasons and a still further option of three

F more seasons thereafter. Should these options be exercised by the respondents as charterers the period of the contract thus extended to eighteen years. The St. Lawrence season referred to was to commence, except as to the first season 1915, five days prior to the opening of navigation to Montreal and not later than May 15 in each year. The re-delivery to the owners of the steamship was to be between Nov. 15 and Dec. 15 in each year. The ship went

G into the service of the respondents in 1916. She was delivered, or commenced service, on July 10, and she continued during the St. Lawrence season, namely, until Dec. 14, 1916, being used by the respondents for their trade purposes under the charterparty. The British government, which had previously intimated that the vessel would be required for the purposes of war in 1915, when she was ready for

H the year, abandoned this position and allowed the use of the vessel under the charter for the season 1916 as stated. They made, however, an effective requisition of the vessel at the close of the 1916 season, and the vessel remained under requisition for 1917 and 1918 by the British government. She came on service again by the withdrawal of the government requisition on July 2, 1919, and remained on service till the end of the season, namely, December, 1919. Shortly put, the vessel was thus under requisition for some two and a half years, namely, from the end of the 1916 season until early in July, 1919. During the course of these years various changes, to be afterwards referred to, were made in the ownership of the vessel.

I There are three questions which arise in the appeal. These are, first, whether the contract under the charterparty was frustrated by the action of the government, as just described. Second, whether any rights of the Dominion Coal Co., as charterers of the vessel, existed as against the appellants, the Lord Strathcona Steamship Co., as owners thereof, there having been no direct privity of contract

between those parties. The third question has reference to an order upon the appellants to repay a portion of the hire of the *Lord Strathcona* under an agreement made without prejudice. The questions will be dealt with in their order. A

1. On the question of frustration their Lordships are clearly of opinion that this doctrine, which has been much developed and commented upon in recent years, cannot be applied to the facts of the present case. Put shortly, frustration can only be pleaded when the events and facts on which it is founded have destroyed the subject-matter of the contract, or have, by an interruption of performance thereunder so critical or protracted as to bring to an end in a full and fair sense the contract as a whole, so superseded it that it can be truly affirmed that no resumption is reasonably possible. It is a mistake to say that the doctrine of frustration is a hard and fast doctrine which can be applied as a general principle in a definite measure to all cases alike. The facts and circumstances of each particular contract as well as the nature and duration of the interruption to performance must all be taken into account. Shipping cases afford easy illustrations of the variety of circumstances alluded to. A voyage is arranged to be made during fixed dates. The substantial interruption of such a voyage almost necessarily concludes the question of frustration in the affirmative. Or, again, a charter is for a short term and into that term such an interruption is projected as to preclude business arrangements being readjusted so as to suit limited and disjointed periods of time. Then, again, it becomes well nigh clear that frustration has resulted. In the present case there is a seasonal charter extending over a long period of possibly eighteen years. The interruption has been concluded and the vessel has been restored in good sailing order after a period of use by the government of, say, three seasons. Upon these facts then, in truth, the question has really settled itself in the sense that a long balance of time and season remains during which, after resumption, the contract can be effectively carried on. It happens in the present case that, after the government interruption had ceased, the parties did resume the practice of running the vessel as owners and charterers. The range of business has not been lost, the suitability of the vessel for performance had not been impaired. In these circumstances their Lordships are clear that the judgments of the courts below upon this topic are right and that frustration of the contract contained in the charterparty did not occur. Had the question accordingly arisen between the original charterers of the vessel, the *Lord Curzon Steamship Co.*, as owners, and the respondents, as charterers, the case would have been at an end. B C D E F

2. Upon the point of privity of contract and the nature of the right or remedy still open to the charterers of the vessel the following facts and dates have to be kept in view. The writ was issued by the respondents on July 31, 1920. It was directed against the appellants as present owners and against the *Lord Curzon Steamship Co.* as parties to the charterparty and it certainly claimed a declaration and made demands which are of a wide character and have been exposed to considerable criticism. Generally speaking, their Lordships look upon the writ as an attempt to substitute the appellants in the entirety of the obligations resting upon the *Lord Curzon Steamship Co.* as the original owners. A declaration was claimed by the respondents under the charterparty, under which the appellants could be called upon as in an action of specific performance to perform the obligations under the charter in the same sense and degree as the original owners, the *Lord Curzon Steamship Co.* It will be necessary to see whether, under the principles of English jurisprudence this demand can be justified as stated, or whether under the other claims made in the writ English equity is able to afford to the charterers against the present owners, the appellants, any remedy for the wrong arising to them by the threatened loss of their rights under the charterparty. G H I

The charterparty is dated April 20, 1914, corrected to July 24, 1914. The ship had been built in England for the *Lord Curzon Steamship Co.* under plans provided by the *Dominion Coal Co.*, and it was agreed that, when complete, she should be chartered to the respondents, and this was done by the charterparty mentioned.

A Then occurred a series of transmissions of title to the ship. The dates are:—Dec. 14, 1917: Bill of Sale: Lord Curzon Co. to the Century Shipping Co. Feb. 25, 1919: Bill of Sale: Century Shipping Co. to Lord Lathom Co. Dec. 18, 1919: Bill of Sale: Lord Lathom Co. to Lord Strathcona Co. (No. 1). June 22, 1920: Bill of Sale: Lord Strathcona Co. (No. 1) to Lord Strathcona Co. (incorporated in 1920). So far as the knowledge of the existence of the charterparty was concerned their Lordships are clearly of opinion that all these successive owners were well aware of it, and this knowledge was, by notice, passed very clearly and properly on from each owner to the successor. It was only very late in the day when any flaw on this point was attempted to be taken. An important document in the case is that of Sept. 1, 1919, namely a memorandum of agreement by which the Lathom Co. agreed with the Strathcona Co. about to be formed, which contained the following clause:—

B The steamer is chartered to the Dominion Coal Co. as per charterparty dated New York, April 20, 1914, corrected to July 24, 1914, which charter the buyers undertake to perform and accept all responsibilities thereunder as from date of delivery in consideration of which the buyers shall receive from date of delivery all benefits arising from the said charter. All liabilities up to date of delivery to buyers to be for account of sellers.

D In the opinion of the board the appellants thoroughly understood that the charterparty and its responsibilities and obligations thereunder were to be respected. This is not a mere case of notice of the existence of a covenant affecting the use of the property sold, but it is the case of the acceptance of their property expressly sub conditione. The position of the case, accordingly, is that the appellants are possessed of a ship with regard to which a long running charterparty is current, the existence of which was fully disclosed, together, indeed, with an obligation which the appellants appear to have accepted to respect and carry out that charterparty. The proposal of the appellants and the arguments submitted by them is to the effect that they are not bound to respect and carry forward this charterparty either in law or in equity but that, upon the contrary, they can, in defiance of its terms, of which they had knowledge, use the vessel at their will in any other way. It is, accordingly, when the true facts are shown, a very simple case raising the question whether an obligation affecting the user of the subject of sale, namely, a ship, can be ignored by the purchaser so as to enable that purchaser, who has bought a ship notified to be not a free ship but under charter, to wipe out the condition of purchase and use the ship as a free ship. It was not bought or paid for as a free ship, but it is maintained that the buyer can thus extinguish the charterer's rights in the vessel, of which he had notice, and that the charterer has no means, legal or equitable, of preventing this in law.

G In the opinion of the board the case is ruled by *De Mattos v. Gibson* (2) also a shipping case, the case of the user of a piece of property by a third person (e.g., the respondent company in this case) of "the property for a particular purpose in a specified manner." Their Lordships think that the judgment of KNIGHT BRUCE, L.J., plainly applies to the present case:

H "Reason and justice seem to prescribe that, at least as a general rule, where a man, by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully and for valuable considerations made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller."

I A principle, not without analogy, had previously been laid down in reference to the user of land. In the opinion of their Lordships the case of *De Mattos v. Gibson* (2), still remains, notwithstanding many observations and much criticism of it in subsequent cases, of outstanding authority.

The general character of the principle on which a court of equity acts was explained in *Tulk v. Moxhay* (1). The plaintiff there was owner in fee of Leicester Square, and several houses forming the square. He sold the property to one Elms in fee, and the deed of conveyance contained a covenant obliging Elms, his heirs and assigns, to

"keep and maintain the said piece of ground and square garden . . . in its then form . . . an open state, uncovered with any buildings."

Elms sold to others, and the property came into the hands of the defendant, who admitted that he had purchased with notice of the covenant. The defendant, "having manifested an intention to alter the character of the square garden, and asserted a right, if he thought fit, to build upon it," the plaintiff, who still remained owner of several houses in the square, filed a bill for an injunction. All this is familiar knowledge, but it appears to have been sometimes forgotten what was the nature of the argument for the defendant. He contended that the covenant did not run with the land so as to be binding upon him as a purchaser, and Sir Roundell Palmer on his behalf, relied on the dictum of LORD BROUGHAM, L.C., in *Keppell v. Bailey* (3) (2 My. & K. at p. 547), to the effect that

"notice of such a covenant did not give a court of equity jurisdiction to enforce it by injunction against such purchaser, inasmuch as 'the knowledge by an assignee of an estate, that his assignor had assumed to bind others than the law authorised him to affect by his contract—had attempted to create a burthen upon property which was inconsistent with the nature of that property, and unknown to the principles of the law—could not bind such assignee by affecting his conscience'."

No reply was called for to this argument and the Lord Chancellor said that LORD BROUGHAM never could have meant to lay down the doctrine

"that this court would not enforce an equity attached to land by the owner unless under such circumstances as would maintain an action at law. If that be the result of his observations, [LORD BROUGHAM] I can only say that I cannot coincide with it."

It has sometimes been considered that *Tulk v. Moxhay* (1) and *De Mattos v. Gibson* (2) carried forward to and laid upon the shoulders of an alienee with notice the obligation of the alienor, and, therefore, that the former is liable to the covenantee in specific performance as by the law of contract, and under a species of implied privity. This is not so; the remedy is a remedy in equity by way of injunction against acts inconsistent with the covenant, with notice of which the land was acquired. The former was the view of KAY, J., in *London and South-Western Rail. Co. v. Gomm* (4); but it was corrected by the Court of Appeal substantially in the sense above stated. So confined, that is, to a remedy in equity by injunction against the violation of restrictive covenants, the application of the principle of *Tulk v. Moxhay* (1) was affirmed. The same result had been reached in *Haywood v. Brunswick Building Society* (5), and other decisions have followed in a like sense. The cases on this branch of the law are legion, but following the leading authorities just cited there may be specially mentioned *Catt v. Tourle* (6), in which SELWYN, L.J., affirms with precision the principles of *Tulk v. Moxhay* (1) and *De Mattos v. Gibson* (2).

But *Tulk v. Moxhay* (1) is important for a further and vital consideration, namely, that it analyses the true situation of a purchaser who, having bought upon the terms of the restriction upon free contract existing, thereafter when vested in the lands, attempts to divest himself of the condition under which he had bought.

"It is said that, the covenant being one which does not run with the land, this court cannot enforce it; but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and

A with notice of which he purchased. Of course, the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken."

B In the opinion of the Board these views, much expressive of the justice and good faith of the situation, are still part of English equity jurisprudence, and an injunction can still be granted thereunder to compel, as in a court of conscience, one who obtains a conveyance or grant sub conditione from violating the condition of his purchase to the prejudice of the original contractor. Honesty forbids this ; and a court of equity will grant an injunction against it.

C It may be mentioned that essentially the same principle has been applied by the House of Lords in the Scottish case of the *Earl of Zetland v. Hislop* (7), in which the superior of land (according to law holding the dominium directum thereof and, therefore, of course, having a continuing patrimonial interest therein) granted contracts of feu to various vassals holding the dominium utile of the land under that permanent tenure. By these contracts the vassal, his heirs and assignees and their tenants were prohibited from using the property for carrying on the trade of a publican. Various transactions of sale and transfer of the property had occurred : four of the purchasers asserted their right to carry on a publican's business, and the Earl of Zetland asked interdict (or injunction) against such a violation of the restrictions contained in the feu charter. In the House of Lords, as stated, the patrimonial interest of the superior was affirmed and also his right to interdict unless (which was alleged and which was made the subject of a remit for probation) he was precluded from this remedy by acquiescence and waiver.

E It has been said—it was strongly urged for the appellant in this case—that a remedy by way of injunction against the owners not disposing of their ship in any other way than under the charterparty could not be granted because there was no such negative covenant to enforce by injunction. LORD SELBORNE, in *Wolverhampton and Walsall Rail. Co. v. London and North-Western Rail. Co.* (8) (L.R. 16 Eq. at p. 440), disposed of such an argument thus, in language which still remains unimpaired in force :

G "The technical distinction being made, that if you find the word 'not' in an agreement—'I will not do a thing'—as well as the words 'I will,' even although the negative term might have been implied from the positive, yet the court, refusing to act on an implication of the negative, will act on the expression of it. I can only say, that I should think it was the safer and the better rule, if it should eventually be adopted by this court, to look in all such cases to the substance and not to the form. If the substance of the agreement is such that it would be violated by doing the thing sought to be prevented, then the question will arise, whether this is the court to come to for a remedy.

H If it is, I cannot think that ought to depend on the use of a negative rather than an affirmative form of expression."

I A perusal of the numerous decisions on this branch of the law shows that much difficulty has been caused by the attempt to extend these principles to cases to which they could not, by the nature of the case, have been meant to apply. It has been forgotten that—to put the point very simply—the person seeking to enforce such a restriction must, of course, have and continue to have, an interest in the subject-matter of the contract. For instance, in the case of land he must continue to hold the land in whose favour the restrictive covenant was meant to apply. That was clearly the state of matters in *Tulk v. Moxhay* (1) applicable to the possession of real estate in Leicester Square. It was also clearly the case in *De Mattos v. Gibson* (2), in which the person seeking to enforce the injunction had an interest in the user of the ship. In short, in regard to the user of land or of any chattel, an interest must remain in the subject-matter of the covenant before

a right can be conceded to an injunction against the violation by another of the covenant in question. This proposition seems so elementary as not to require to be stated, and it is only mentioned because in numerous decisions, as is clearly brought out in the judgment of BUCKLEY, L.J., in *L.C.C. v. Allen* (9) ([1914] 3 K.B. at pp. 656-658) it was necessary to shear away this misapplication or improper extension of the equitable principle. As ROMER, L.J., said in *Formby v. Barker* (10) ([1908] 2 Ch. at p. 554):

"If restrictive covenants are entered into with a covenantee, not in respect of or concerning any ascertainable property belonging to him, or in which he is interested, then the covenant must be regarded, so far as he is concerned, as a personal covenant, that is as one obtained by him for some personal purpose or object."

Applying that to the case of land and referring to numerous cases upon the subject, BUCKLEY, L.J., says in *L.C.C. v. Allen* (9):

"Inasmuch as at the date when the covenant was taken the covenantee had no land to which the benefit of the covenant could be attached, it was held that the benefit of the restrictive covenant could not enure against a derivative owner even where he took with notice."

The Board notes the observations made by SCRUTTON, L.J., in *L.C.C. v. Allen* (9), in which, alluding to various decisions, the learned judge puts this point as to the possible inconvenience, not only private but public, which may result from a strict adherence to the principle that the enforcement of a restrictive covenant must be confined to those having patrimonial interests in the subject-matter. His Lordship takes the not unfamiliar case of restrictive covenants imposed by an owner of a large block of land in the terms of conveyance of the various fractions in which it may be split up for private use, and he observes:

"I regard it as very regrettable that a public body should be prevented from enforcing a restriction on the use of property imposed for the public benefit against persons who bought the property knowing of the restriction, by the apparently immaterial circumstance that the public body does not own any land in the immediate neighbourhood. But, after a careful consideration of the authorities, I am forced to the view that the later decisions of this court compel me so to hold."

The question here alluded to may subsequently arise, and their Lordships are unwilling, because it is unnecessary in the present case, to make any pronouncement upon it, for the present is, as has been seen, a case as to the user of a ship, with regard to the subject-matter of which, namely, the vessel, the respondent has, and will have during the continuance of the period covered by the charterparty, a plain interest so long as she is fit to go to sea. Again, to adopt the language of KNIGHT BRUCE, L.J., in *De Mattos v. Gibson* (2):

"Why should it [the court] not prevent the commission or continuance of a breach of such a contract, when, its subject being valuable, as for instance a trading ship or some costly machine, the original owner and possessor, or a person claiming under him, with notice and standing in his right, having the physical control of the chattel, is diverting it from the agreed object, that object being of importance to the other? A system of laws in which such a power does not exist must surely be very defective. I repeat that, in my opinion, the power does exist here."

In considering the character of the doctrines of equity in a case like the present it is essential to remember that these doctrines are of several kinds and fall partly, though not exclusively under different heads. If this is not borne in mind uncertainty and confusion are apt to arise. Dicta of eminent judges which apply under one principle get to be regarded as though they illustrated a principle which is in reality different. Equity has, in addition to the concurrent jurisdiction,

A auxiliary and exclusive jurisdiction. The enforcement of trusts is in the main an illustration of the exclusive jurisdiction. The scope of the trusts recognised in equity is unlimited. There can be a trust of a chattel or of a chose in action, or of a right or obligation under an ordinary legal contract, just as much as a trust of land. A shipowner might declare himself a trustee of his obligations under a charterparty, and, if there were such a trust, an assignee, although he could not

B enforce specific performance of the obligation, would fail to do so only on the broad ground that the court of equity had no machinery by means of which to enforce the contract. Subject to this an assignee of the charterer could enforce his title to the chose in action in equity, even though he could not have done so at law. There are cases of a different type in which equity is proceeding, not on the footing of trust, but of following, by the exercise of concurrent and auxiliary

C jurisdiction, the analogy of the common law. Such are the cases of so-called equitable easements. This was explained by the Court of Appeal in *L.C.C. v. Allen* (9). There it was held that an owner of land, deriving title under a person who had entered into a restrictive covenant concerning the land, which covenant did not run with the land at law, was not bound by the covenant although he took the land with notice of it, if the covenantee were not in possession of or interested in land for the benefit of which the covenant was entered into. In the judgments it was pointed out that such a covenant did not run with the land at law, and that there was a series of authorities which showed that in the case of land mere purchase with notice was not sufficient. The reason was that under this head of its jurisdiction equity had followed law except to the extent of recognising a negative covenant as capable of operating for the benefit of a dominant tenement.

E The principle proceeded on the analogy of a covenant running with the land or of an easement, as explained by JESSEL, M.R., in *London and South-Western Rail. Co. v. Gomm* (4). This restriction of the principle on the analogy of easements at law rendered mere notice insufficient, and cut down the jurisdiction from the wider principle stated by KNIGHT BRUCE, L.J., in *De Mattos v. Gibson* (2) to the narrower head established in order to accord with the legal analogy in the case

F of land. But in no other regard does this or any other decision of commanding importance seem to affect the general principle which BRUCE, L.J., laid down. If a man acquires from another rights in a ship which is already under charter, with notice of rights which required the ship to be used for a particular purpose and not inconsistently with it, then he appears to be plainly in the position of a constructive trustee with obligations which a court of equity will not permit him

G to violate. It does not matter that this court cannot enforce specific performance. It can proceed, if there is expressed or clearly implied a negative stipulation. The judgment of LORD ST. LEONARDS, L.C., in *Lumley v. Wagner* (11) appears to be conclusive of the principle. That very eminent judge said (at p. 619):

H "Wherever this court has not proper jurisdiction to enforce specific performance, it operates to bind men's consciences, as far as they can be bound, to a true and literal performance of their agreements; and it will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give."

I For the reasons already fully set forth the Board is of opinion that the injunction granted by MELLISH, J., in his order of June 20, 1922, was correct, and was properly affirmed by the Supreme Court for the reasons set forth by CRISHOLM, J. The fundamental point indicated is thus determined. The consequences of this decision, both as to the future use of the vessel and as to damages, will be applied in the court below. It is incredible that the owners will lay up the vessel rather than permit its use under the contract, of which they were notified, and the provisions of which it is now determined they ought to respect. The resumption of use under the charterparty will thus simplify the ascertainment of damages. An

interlocutory judgment has already been pronounced against the other defendant, the Lord Curzon Steamship Co., and the court below will determine the working out of the point of damages in view of these circumstances. It is to be hoped that now the question of principle has been determined the parties may work out without further appeal to courts of law the consequential details. Their Lordships will, therefore, humbly advise His Majesty that the appeal be allowed for the purpose of variation of MELLISH, J.'s order. The cause should be remitted to the court below to deal with the question of damages. There will be no costs of this appeal, the order as to costs in the court below to stand.

Solicitors: *Ince, Colt, Ince & Roscoe; William A. Crump & Son.*

[Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.]

CAVENDISH v. CAVENDISH

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merrivale, P.), November 9, 16, 1925]

[Reported [1926] P. 10; 95 L.J.P. 18; 134 L.T. 414; 42 T.L.R. 134]

Divorce—Discovery—Subpoena duces tecum—Respondent directed to attend hearing and produce documents if he gave evidence—Validity.

A subpoena duces tecum and ad testificandum directing a respondent in a divorce suit to attend the hearing and produce documents on which, if he gave evidence denying charges of adultery made against him, he could properly be cross-examined cannot be issued, for it would infringe the principle that a person cannot be compelled to discover that which would tend to incriminate him. If such a subpoena is issued, it will be set aside as being unwarrantable.

Notes. Distinguished: *Campbell v. Campbell*, [1939] 4 All E.R. 529. Applied: *Macintyre v. Macintyre and Moppett*, [1946] 1 All E.R. 121. Considered: *Tilley v. Tilley*, [1948] 2 All E.R. 1113.

As to discovery in matrimonial causes see 12 HALSBURY'S LAWS (3rd Edn.) 361-363, and for cases see 27 DIGEST (Repl.) 510-512.

Cases referred to:

- (1) *Redfern v. Redfern*, [1891] P. 139; 60 L.J.P. 9; 64 L.T. 68; 55 J.P. 37; 39 W.R. 212; 7 T.L.R. 157, C.A.; 27 Digest (Repl.) 267, 2147.
- (2) *King v. King* (1850), 2 Rob. Eccl. 153; 7 Notes of Cases, 396; 14 Jur. 276; 163 E.R. 1275; 27 Digest (Repl.) 512, 4544.
- (3) *Hooke v. Hooke* (1858), 4 Sw. & Tr. 236; 28 L.J.P. & M. 29; 164 E.R. 1506; 27 Digest (Repl.) 526, 4685.

Motion by a husband respondent in a wife's suit for dissolution of marriage to set aside a subpoena duces tecum and ad testificandum which had been served upon him on behalf of the wife.

Acton Pile for the husband.

T. A. Bucknill for the wife.

Cur. adv. vult.

Nov. 16. **LORD MERRIVALE, P.**, read the following judgment.—This was a motion of the respondent in a suit for divorce on the ground of adultery to set aside a subpoena ad testificandum and duces tecum which had been served upon him by or on behalf of the petitioner in the suit.

A The only issue of fact in the suit is whether the respondent husband has been guilty of adultery. The subpoena which was served is a witness subpoena in common form to give evidence and to produce documents, and a schedule is attached to the subpoena which describes a variety of documents in more or less specific terms, but in particular requires the production of correspondence between the respondent and three named persons. The subpoena also requires production
B at the hearing of the diaries of the respondent. Counsel for the respondent moved to set aside the subpoena on the ground that, inasmuch as the respondent is not a compellable witness, the subpoena ad testificandum to him was unwarranted, and on the ground that the subpoena duces tecum in its express terms was an abuse of the process of the court. The application was founded on the familiar principle that a party charged with adultery may not be called upon by compulsory
C process to provide evidence in support of the charge. Counsel cited to me a very familiar case, now of long standing, of *Redfern v. Redfern* (1), in which it was established in the Court of Appeal, in the year 1891, that a party in a suit in this Division in which the issue is the issue of adultery may not be required to answer interrogatories and may not be required to make discovery. Counsel contended that the grounds of that decision in the Court of Appeal involved the conclusion that a party alleging adultery may not provisionally require the opposing
D party to produce documents in the event that that party should become voluntarily a witness in the cause. Counsel for the petitioner, on the other hand, contended that under the general practice of the High Court he was entitled, in anticipation of the possibility that the respondent, being a competent witness, would give evidence, to require by subpoena that the respondent should have available in
E the court for the purposes of cross-examination, documents, if any, in the respondent's possession or control, which would, by reason of the evidence of the respondent, become proper subject for cross-examination. It was not contended that there was any authority dealing directly with the matter, and learned counsel on both sides left it very much upon the footing of the general considerations of the principle which govern the procedure of the court.

F I do not think the governing principle could be more perfectly expressed than it is found expressed in the judgment of BOWEN, L.J., in *Redfern v. Redfern* (1). It is a class of matter which necessarily must from time to time engage the attention of the judge sitting here, and has from time to time engaged my attention, but I regard the judgment of BOWEN, L.J., as probably as perfect a statement of the principle as it is applied here as could be devised. The lord justice
G said this :

"It is one of the inveterate principles of English law that a party cannot be compelled to discover that which, if answered, would tend to subject him to any punishment, penalty, forfeiture or ecclesiastical censure."

H The learned judge went on to point out the disappearance of those terrors of ecclesiastical law which a hundred years ago were real terrors and real perils to parties who might become subject to the jurisdiction of the ecclesiastical courts.

I "In these days, when the thunders of the Church have become less formidable, the rule, so far as it relates to ecclesiastical censure, seems to wear an archaic form ; but adultery is a charge of such gravity as to render it not unnatural that we should find that the doctrine that no one is bound to incriminate himself should be still applicable to it. Based upon the traditions of a law belonging to an earlier age, and a fear of ecclesiastical monitions which is now technical and obsolete, the privilege in such a case has never been abrogated. The principle has been recognised as governing similar subject-matter by common law and equity alike. . . . The ecclesiastical courts have dealt with the question in a like manner."

The lord justice then cited the decision of DR. LUSHINGTON in the ecclesiastical court (*King v. King* (2)), in which it had been held that the rigorous compulsory

process of the ecclesiastical courts was not available to enforce an answer to a libel which alleged adultery. Learned counsel, on behalf of the petitioner, did not question the scope of the decision, but he said it had never been decided that the court may not require a party who gave evidence to produce documents which became material in course of the evidence, and claimed that it was a reasonable thing that a litigant who was confronted with the possibility of opposing evidence on the part of his opponent should be in a position at that time to make effectual cross-examination. A B

On general grounds there is a good deal to be said for that view, but the question is whether there is a right to require that opposing party to attend to and to produce documents relating to a charge of adultery. There can be no sort of question that at the time this subpoena was served, and at the present time, there is no ground upon which such a subpoena could be treated as an effectual subpoena. C The petitioner has no right to require the respondent to be here to give evidence at the petitioner's instance upon her charge of adultery against the respondent, and the petitioner has no right in anticipation of the trial to require the respondent to furnish himself with documents which might tend to support the petitioner's charge against him, and to have them here in case he goes into the box and becomes subject to cross-examination. So that, obviously, on the face of it, the subpoena is bad, and that was apparent at the hearing of the motion, but counsel referred to the apparent convenience of requiring a party who might elect to give evidence to be in a position to be effectually cross-examined, and I thought it worth while to determine upon consideration whether a *primâ facie* answer to the claim of right to serve a subpoena was an absolute answer. I have come to the conclusion that the *primâ facie* answer must be an absolute answer. The principle is clearly that enunciated in the judgment of BOWEN, L.J., in *Redfern v. Redfern* (1), and it is easy to observe, in the progress of the law by means of which parties to legal proceedings have become competent to give evidence, the marked solicitude of the courts in all the branches of judicature in this country lest the power to give evidence and to require the giving of evidence should infringe upon that great principle of the common law of the country that a party might not be required by evidence to incriminate himself or herself. D E F

The utmost care has been taken in that way. It was taken when the Evidence Act, 1851, was passed. It was taken when the Matrimonial Causes Act, 1857, was passed. It is remarkable that in the Matrimonial Causes Act, 1857—the Act which established the jurisdiction now exercised in this court—it is directed that the procedure should be that of the superior courts of law at Westminster, trial in open court, and trial by jury and, with regard to the power to require the presence of parties, that the petitioner might be required by the court to attend at the hearing [see s. 43] and significantly omitted any direction that the accused party might be required to appear. That, of itself, is a very significant fact. When the latest of the Evidence Acts, upon which the matter now depends was passed (Evidence Further Amendment Act, 1869), it was made clear that a respondent in divorce was not a compellable witness [see s. 3], so that the principle to which I have referred was maintained there. Since that time it has been common form in the High Court to issue subpoenas in suitable cases, and the general process of subpoena has been used in this court, and parties are subpoenaed, whenever it is practical, to produce documents at the hearing, very often no doubt by way of precaution; but no instance was cited to me in which the court had sanctioned the issue of a subpoena to an accused party in a case involving adultery to be present to produce documents. The question did arise long ago in the experience of the Divorce Courts in *Hooke v. Hooke* (3) in 1858. SIR CRESSWELL CRESSWELL had before him the question whether under the divorce jurisdiction it was competent to require the attendance of an accused party for the purpose of confrontation with witnesses. In the ecclesiastical courts it is quite clear to any observer who examines the procedure of the ecclesiastical courts that the right of confrontation was a valid right in the G H I

A procedure in matrimonial cases, and that it was enforced by those stringent means by which the ecclesiastical courts enforced their decrees, and submissions of the petitioner in *Hooke v. Hooke* (3) that the respondent, who was charged with adultery, should attend for the purpose of confrontation with the petitioner's witnesses in accordance with the former practice of the ecclesiastical courts apply a touchstone to the suggested right of the petitioner in this case. Dr. Spinks, who was of counsel for the petitioner, said (*Hooke v. Hooke* (3) 28 L.J.P. at p. 80):

"This is not a motion under the provisions of the Divorce Act, but to exercise a power which was vested in the ecclesiastical courts. It was the practice of those courts in cases like this to make what was called a decree of confrontation, ordering that a party should attend, that he or she might be confronted with the witnesses for the purpose of identification."

SIR CRESSWELL CRESSWELL said:

"The practice of the ecclesiastical courts to decree confrontation does not apply to a suit for dissolution. By giving the court, under s. 43 of 20 & 21 Vict. c. 85 [the Matrimonial Causes Act, 1857], express power to order the petitioner to attend at the hearing, the legislature seems to have assumed that without express power the court could not compel the attendance of the parties. It might have given a similar power to compel the attendance of the respondent, but it has not done so."

Nobody who considers the matter can doubt that the legislature had not infringed the common law rule with regard to the immunity of accused parties, because its intention was not to infringe the common law rule.

The conclusion of SIR CRESSWELL CRESSWELL so long ago as 1858 seems to me a most cogent conclusion with regard to this matter. The rules of the common law were identical with those of the civil courts and the criminal courts, and it is interesting now, when procedure has been, by progressive Acts, moulded to meet a state of things in which a defendant party is competent, and in some cases compellable, to give evidence, to see what has happened in the criminal courts, where just as is here the case, the party is competent to give evidence upon any charge, but not compellable. Really it is illuminating to refer to ARCHBOLD'S CRIMINAL PRACTICE AND PROCEDURE of the period forty years ago when the defendant in a criminal case was neither competent nor compellable to give evidence, and then to ARCHBOLD'S CRIMINAL PRACTICE now in use, when the defendant in a criminal case is competent but not compellable. I had the curiosity to make the comparison. In 1886 the young practitioner who furnished himself with ARCHBOLD found the law stated in this way with regard to subpoena duces tecum in criminal cases:

"If any person (not being the defendant) have in his possession a written instrument which may be requisite as evidence in the cause, then, instead of the common subpoena, you must serve him with a subpoena duces tecum, commanding him to bring it with him and produce it at the trial": ARCHBOLD'S PLEADING AND EVIDENCE IN CRIMINAL CASES (20th Edn.), at p. 337.

The vital words there are: "not being the defendant." In 1898 the Criminal Evidence Act was passed which made the defendant a competent witness. In ARCHBOLD'S CRIMINAL PRACTICE AND PROCEDURE now, the passage quoted is rewritten in a very interesting form. The statement as to requiring a person, not being the defendant, by subpoena to produce a document at the hearing is reproduced, but the learned editors add at the foot of the passage which is reproduced from the older editions:

"A subpoena duces tecum may not be served on a defendant in a criminal case. Notice to produce a document must be given instead": ARCHBOLD'S PLEADING, EVIDENCE AND PRACTICE IN CRIMINAL CASES (26th Edn.), 1922, p. 482.

I have examined the matter because it is essential to bear in mind the broad principles upon which the jurisdiction in which divorce for adultery is exercised. It

is, of course, most proper that the parties should be given every facility for arriving with certainty, as far as may be, at the truth, where charges are the subject of conflicting evidence. But, as it seems to me, it is beyond doubt, as I have indicated before, and as I said just now, that this subpoena is an unwarrantable subpoena, and must be set aside.

Subpoena set aside.

Solicitors: *Webster & Webster; C. R. A. Edwards.*

[Reported by HERBERT ROLFE, Esq., Barrister-at-Law.]

RUSSOFF v. LIPOVITCH

[COURT OF APPEAL (Bankes, Scrutton and Atkin, L.J.J.), January 20, 1925]

[Reported [1925] 1 K.B. 628; 94 L.J.K.B. 355; 132 L.T. 789;

41 T.L.R. 278; 23 L.G.R. 230]

Rent Restriction—Possession—Jurisdiction of county court—Rent of controlled premises more than limit of ordinary jurisdiction—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 17 (2).

A claim by a landlord against a statutory tenant for possession of a dwelling-house within the Rent Restriction Acts is a "claim or other proceedings arising out of" those Acts, and, therefore, under s. 17 (2) of the Rent Restriction Act, 1920, the county court has jurisdiction to deal with it notwithstanding that by reason of the amount of the rent [now the net annual value for rating: see the County Courts Act, 1955, s. 2 (1)] of the dwelling-house the case would not fall within the ordinary jurisdiction of the county court.

Notes. Distinguished: *Smith & Co. v. Kirby*, [1947] 1 All E.R. 459. Considered: *Jaslowitz v. Burnstein*, [1948] 1 All E.R. 40. Referred to: *Lee v. K. Carter, Ltd.*, [1948] 2 All E.R. 690; *Wolfe v. Hogan*, [1949] 1 All E.R. 570; *Tideway Investment and Property Holdings, Ltd. v. Wellwood*, [1952] 2 All E.R. 514; *Drive Yourself Hire Co. (London), Ltd. v. Strutt*, [1955] 1 All E.R. 1036.

As to cases in the county court for possession of premises within the Rent Restriction Acts see 23 HALSBURY'S LAWS (3rd Edn.) 831 et seq., and for cases see 31 DIGEST (Repl.) 720-724. For Rent Restriction Act, 1920, see 13 HALSBURY'S STATUTES (2nd Edn.) 981.

Cases referred to:

- (1) *Wolff v. Smith*, [1923] 2 Ch. 393; 92 L.J.Ch. 635; 130 L.T. 154; 67 Sol. Jo. 766; 31 Digest (Repl.) 720, 8035.
- (2) *Barton v. Fincham*, [1921] 2 K.B. 291; 90 L.J.K.B. 451; 124 L.T. 495; 85 J.P. 145; 37 T.L.R. 386; 65 Sol. Jo. 326; 19 L.G.R. 185, C.A.; 31 Digest (Repl.) 701, 7912.
- (3) *Epsom Grand Stand Association, Ltd. v. Clarke* (1919), 35 T.L.R. 525; 63 Sol. Jo. 642, C.A.; 31 Digest (Repl.) 704, 7935.
- (4) *Gill v. Luck* (1923), 93 L.J.K.B. 60; 130 L.T. 331; 40 T.L.R. 38; 68 Sol. Jo. 100; 22 L.G.R. 292, C.A.; 31 Digest (Repl.) 720, 8037.
- (5) *Gunter v. Davis*, [1925] 1 K.B. 124; 94 L.J.K.B. 352; 132 L.T. 538; 69 Sol. Jo. 841; 31 Digest (Repl.) 723, 8066.

Appeal from the decision of McCARDIE, J.

The plaintiff, the landlord, brought an action in the High Court claiming to recover possession of a dwelling-house, No. 392, Mile End Road, E., of which the

A defendant was the tenant holding over under the protection of the Rent Restriction Acts. The rent of the dwelling-house was £2 6s. a week, which amounted to more than £100 a year. By his writ the landlord claimed possession of the house, £36 16s. arrears of rent at £2 6s. a week, and mesne profits. The landlord having applied for final judgment under Ord. 14, the tenant denied that he owed the amount claimed, and alleged that he had been charged rent in excess of what was due from him. The master made an order giving the tenant leave to defend, and remitting the action to the county court for trial. Upon appeal to the judge in chambers against the order of the master on the ground that the master had no jurisdiction to order that the action should be remitted to the county court because the rent of the dwelling-house exceeded £100, McCARDIE, J., held (i) that ss. 59, 138, and 139 of the County Courts Act, 1888, did not give the county court jurisdiction to hear such an action where the rent or annual value of the premises exceeded £100 per annum; and (ii) that the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, conferred no jurisdiction on the county court in actions of ejectment or recovery of possession, but only limited that which might be exercised under the County Courts Acts; the landlord's right to recover possession was a common law right; s. 17 (2) of the Act of 1920 only referred to matters which sprang from the Rent Restrictions Acts, e.g., a claim for overpayment of rent, a right which could not exist at all apart from the Rent Restrictions Acts; there was, therefore, no power to remit the action to the county court. The tenant appealed.

The County Courts Act, 1888, as amended by the s. 3 of the County Courts Act, 1903, provided as follows:

E "All actions of ejectment, where neither the value of the lands, tenements, or hereditaments, nor the rent payable in respect thereof, shall exceed the sum of £100 by the year, may be brought and prosecuted in the court of the district in which the lands, tenements, or hereditaments are situate; provided that the defendant in any such action of ejectment, or his landlord, may within one month from the day of service of the summons apply to a judge of the High Court at chambers for a summons to the plaintiff to show cause why such action should not be tried in the High Court on the grounds that the title to lands or hereditaments of greater annual value than £100 would be affected by the decision in such action; and on the hearing of such summons, the judge of the High Court, if satisfied that the title to other lands would be so affected, may order such action to be tried in the High Court, and thereupon all proceedings in the court in such action shall be discontinued.

G Section 138: When the term and interest of the tenant to any corporeal hereditament, where neither the value of the premises nor the rent payable in respect thereof shall have exceeded £100 by the year . . . shall have expired, or shall have been determined either by the landlord or the tenant by notice to quit, and such tenant, or any person holding or claiming by, through, or under him, shall neglect or refuse to deliver up possession accordingly, the landlord may enter a plaint, at his option, either against such tenant or against such person so neglecting or refusing, in the court of the district in which the premises lie, for the recovery of the same. . . .

H Section 139: When the rent of any corporeal hereditament, where neither the value of the premises nor the rent payable in respect thereof exceeds £100 by the year, shall for one half-year be in arrear, and the landlord shall have right by law to re-enter for the non-payment thereof, he may, without any formal demand or re-entry, enter a plaint in the court of the district in which the premises lie, for the recovery of the premises. . . ."

I By the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 17 (2):

"A county court shall have jurisdiction to deal with any claim or other proceedings arising out of this Act or any of the provisions thereof, notwithstanding

that by reason of the amount of claim or otherwise the case would not but for this provision be within the jurisdiction of a county court, and, if a person takes proceedings under this Act in the High Court which he could have taken in the county court, he shall not be entitled to recover any costs."

H. G. Garland for the tenant.

J. P. Eddy for the landlord.

BANKES, L.J.—With great respect to the view expressed by McCARDIE, J., I am unable to agree with his conclusion. It is necessary to refer to the facts in this case and to emphasise one or two points. The parties were landlord and tenant, the landlord seeking to recover possession of a dwelling-house to which the Rent Restrictions Act applies, and the rent which was being paid for the house at the time of action brought was above £100. Therefore, if the matter turned upon the question whether the county court had jurisdiction under the County Courts Act to entertain the landlord's claim, there could not be any doubt whatever that the court had no jurisdiction at all, the rent paid at the time of action brought being in excess of £100. But, although the rent was in excess of £100 the dwelling-house was one to which the Rent Restrictions Act, 1920, applies. The letting had originally been under an agreement in writing made on July 27, 1917. Under that agreement the rent was £65, payable by equal weekly payments. The tenant, among other things, agreed that if any rent should be in arrear for seven days, or there should be any breach, the landlord might re-enter. That agreement expired in 1920, and from that date onwards the tenant occupied the premises as statutory tenant. The landlord, availing himself, as he said, but the tenant denied, of the rights given him by the Rent Restrictions Act, had increased the rent from a rent of £65 a year, payable by equal weekly payments, to a rent of £2 6s. a week, amounting to an annual payment of £119 12s. In those circumstances—the landlord alleging that the tenant had failed to make some payments of rent which were due, and the tenant denying that the rent claimed was a rent to which the landlord was entitled under the statute, and claiming to recover back some of the payments he had made—these proceedings were commenced.

The statement of claim is framed in this way. The landlord's claim is to recover possession of the house, occupation of which is being held by the tenant under the provisions of the Rent Restrictions Act, and for £36 16s. arrears of rent, at £2 6s. a week from May 26, 1924, to Sept. 15, 1924, and mesne profits until possession. I wish to point out that the landlord is taking advantage of and seeking the assistance of the Rent Restrictions Act in support of his claim to this extent. He is claiming £2 6s. a week instead of the original rent of £65 a year, because, as he alleges, it is a rent which he was entitled to claim under the provisions of the statute; and, secondly, he claims to be entitled to recover possession for non-payment of rent, which is a ground for recovery of possession only upon the assumption that the plaintiff is either relying upon s. 15 (1) of the Act of 1920, which provides that:

"A tenant who by virtue of the provisions of this Act retains possession of any dwelling-house to which this Act applies shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy . . ."

or on s. 5 (1) (a) [repealed: see now Rent, &c., Restrictions Act, 1933, s. 3 (1), Sched I, para. (a)] which provides that one statutory ground upon which a landlord may recover possession is non-payment of rent.

I think I might pause there to say that it seems to me impossible to distinguish this case from the decision of EVE, J., in *Wolff v. Smith* (1) where he said that if the proceedings in that case had been between anybody except landlord and tenant, that is to say, by a man who was claiming possession against a trespasser, it might very well be said that the proceedings were not within s. 17 (2) of the Act of 1920.

A "any claim or other proceedings arising out of this Act," yet, as the proceedings there were between landlord and tenant and the tenant was a statutory tenant, he could not be heard to say that it was not a claim or other proceeding arising out of the Act. I might confine my judgment by saying that, on the face of the landlord's own proceedings, it seems to me that he is claiming rent by virtue of the statute and possession by virtue of the statute. In those circumstances, in my
B opinion, the case is clearly one in which it is true to say and right to say that the claim or other proceeding is one arising out of the Act. But I am not content, after the argument which has been addressed to us, and the criticism which has been addressed to what has been said previously in this court, to rest my judgment there because I think it is necessary to consider the statute as a whole. Whether one
C thinks the statute is as well drafted as it might be is immaterial, one has to consider the meaning which the legislature has attached in this Act to "a statutory tenant" and the position of the landlord in regard to a dwelling-house to which the Act applies and the landlord's right to recover possession of those premises. I think that, in looking into the statute and the sections of the Act, it will be found that the legislature is treating actions by a landlord to recover possession of premises to which the Act applies as actions or proceedings under the Act, although it is
D quite true that the right to recover possession may be said to be in a sense independent of the Act, and existing because of the common law right of the landlord to bring an action of ejectment to recover possession. I do not know that it is of any use to employ figurative language in order to try to explain one's view of the statute ; but it does seem to me that the effect of the statute has been to surround a dwelling-house to which the Act applies with what I may describe as a double
E protecting wall. With regard to a tenant who occupies premises within those walls, his first wall is described in s. 15 as "by virtue of the provisions of the Act retains possession of any dwelling-house."

That matter was discussed in *Barton v. Fincham* (2). There this court pointed out the figurative nature of the language. A tenant does not retain possession of any dwelling-house by virtue of the provisions of the statute, using that language
F in its ordinary sense. He only does so because the statute has either, to use the figurative language I have just used, surrounded the dwelling with these protective walls, or, as I said in *Barton v. Fincham* (2), because the restriction was upon the action of the court, and the tenant was protected because the court was not permitted to turn him out except upon certain terms. I said ([1921] 2 K.B. at p. 295):

G "It appears to me that the legislature in reference to claims for possession has secured its object by placing the fetter, not upon the landlord's action, but upon the action of the court. The language used is so clear and precise that there is, in my opinion, no room for cutting down or restricting the operation of the section. The legislature has definitely declared that the court shall
H exercise its jurisdiction only in the instances specified in the section, and in no others."

It is for that reason that the legislature describes a tenant as a tenant retaining possession of any dwelling-house to which the Act applies. How does the Act treat the landlord ? There, again, adopting the illustration of the protecting walls,
I it seems to me that the landlord who attempts to enforce his common law right to recover possession of premises may show, as I think was shown in the case last referred to, that the person occupying premises is not a tenant at all, but a trespasser. It is said that in those circumstances the house is not surrounded by any protecting walls at all. I express no opinion about that ; but assuming the case is one in which protecting walls exist, it seems to me that the onus is upon the landlord to show that he can pierce the first wall on one or other of the grounds specified in s. 5 of the statute of 1920 [see now the Act of 1933, s. 3 (1), Sched. I], and also that he must pierce the second wall, because, even if he gets

through the first defence, he has to satisfy the judge that it is reasonable to make an order or give a judgment. That is the position. We have already laid down in *Epsom Grand Stand Association, Ltd. v. Clarke* (3) that the onus is on the landlord to satisfy the court that he is entitled to judgment, and that he brings his case within one or other of the grounds upon which alone a person seeking to establish his common law right is entitled to recover. That point has been further emphasised by r. 18 of the Increase of Rent, &c., Rules, 1920-1923, to which our attention has been called [see now Rent Restriction Rules, 1957], which clearly directs the county court judge that he must take this matter into consideration, whether it is raised by the pleadings or not. It is for the plaintiff to establish that his case is one as to which the statute justified the making of an order or giving of a judgment. A

How does the statute itself deal with orders or judgments? Assume an action which but for the statute would be an ordinary action at common law to recover premises by a landlord against a tenant, how does the statute itself in terms deal with orders or judgments which are so obtained? It seems to me one has only to look at sub-s. (5) and sub-s. (6) of s. 5 of the Act of 1920 to ascertain what the view of the legislature itself is with regard to orders or judgments, what I may describe as permitted orders or judgments, to see how it regards them. Sub-section 5 says: B

"An order or judgment against a tenant for the recovery of possession of any dwelling-house or ejectment therefrom under this section shall not affect the right of any sub-tenant to whom the premises or any part thereof have been lawfully sublet before proceedings for recovery of possession or ejectment were commenced, to retain possession under this section, or be in any way operative against any such sub-tenant." D

No order or judgment against the tenant in the ordinary sense is recovered under the section. The order or judgment is recovered in the action. One matter which has to be dealt with and considered in that connection is whether the claim is one which is permitted by the section. If the claim is permitted by the section, then an order or judgment may be made in the original action. But that is not the view of the legislature. The legislature regards a permitted order or judgment as one made under the section. Again, in sub-s. (6) of s. 5 there are these words: E

"Where a landlord has obtained an order or judgment for possession or ejectment under this section on the ground that he requires a dwelling-house for his own occupation . . ."

I will turn back to s. 5 (1) (d) [now Act of 1933, Sched. I, para. g] to see what is the position of the landlord who is asking for an order or judgment for possession on the ground that he requires the dwelling-house for his own purpose. What the statute says is: F

"No order or judgment for the recovery of possession of any dwelling-house to which this Act applies . . . shall be made or given unless . . . (d) the dwelling-house is reasonably required by the landlord for occupation . . ." G

Assume an action is brought by virtue of the landlord's common law right to bring an action of ejectment in which he claims that he requires the premises for his own occupation. The order or judgment is not obtained under the section in the ordinary sense; it is permitted by the section; and because it is permitted by the section the statute and the legislature choose to treat it and speak of it as an order or judgment obtained under the section. H

That being the view of the legislature, one has to consider what is the meaning of s. 17 (2). I agree that the only point really for the decision of this case is whether, although under the County Courts Act the county court would have no jurisdiction to deal with this particular case, yet the true construction of s. 17 (2) is that the county court is given additional jurisdiction because the action is a claim or other proceeding arising out of the Act. If the judgment when recovered I

A is a judgment under s. 5, and if the tenant is described as a tenant retaining possession by virtue of the provisions of the Act [see s. 15], and the landlord is seeking to turn out that tenant on grounds which are to be found only in the statute, it seems to me impossible to say that the action, although in a sense it is a common law action, is not in the circumstances within the meaning of s. 17 (2), a claim or other proceeding arising out of the Act. I only desire to add this further observation. It seems to me that this view of the legislation is emphasised by the fact that in the Administration of Justice Act, 1920, which was passed in the same year, but a few months later than the Rent Restrictions Act, there is this provision in s. 3 (2) [repealed: see County Courts Act, 1934, Sched. 5]:

“Notwithstanding anything in any Act, it shall not be lawful for any party in a county court or any inferior court of civil jurisdiction to require any action or other matter arising under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, to be tried with a jury.”

The object was to provide that in this particular class of case, in which among other things no judgment or order was to be given unless it appeared to the court to be reasonable that it should be given, a party should not be entitled to a jury.

For these reasons, with great submission to the learned judge, I think the view he took was a wrong view. I think the view which we took in *Gill v. Luck* (4) although possibly it was not necessary to go as far as we did go, was the right view, and that the various decisions which the learned judge has cited to the contrary are wrong. I think the appeal must be allowed, with costs.

SCRUTTON, L.J.—This is an appeal from a long and exhaustive judgment of McCARDIE, J. The question really, in my view, is a very short one, indeed, depending on the meaning of six words in one section of one statute, and not capable of any very prolonged argument once that statute has been read. The exact question here is whether the learned master was right in remitting to the county court an action brought by the plaintiff, who claimed to recover possession of a house, the occupation of which was being held by a tenant under the provisions of the Rent Restrictions Act, and for arrears of rent at £2 6s. a week. £2 6s. a week is over £100 a year. The master has power under s. 1 of the County Courts Act, 1919 [see now County Courts Act, 1934, s. 50] to remit a claim for recovery of land, with or without a claim for rent or mesne profits, to any county court in which the action might have been commenced, if the subject-matter and the amount thereof had been within the jurisdiction of the court.

The question, then, is whether a claim to recover a house, the rent of which is over £100 a year, is within the jurisdiction of the county court. That turns on s. 17 (2) of the Rent Restrictions Act, 1920:

“A county court shall have jurisdiction to deal with any claim or other proceedings arising out of this Act or any of the provisions thereof, notwithstanding that by reason of the amount of claim or otherwise the case would not but for this provision be within the jurisdiction of the county court . . .”

So it was contemplated that certain claims relating to houses with a rent of more than £100 a year would not be within the jurisdiction of the county court but for this provision that the county court shall have jurisdiction to deal with it. Those claims are described as “proceedings arising out of this Act or any of the provisions thereof.” The only question in this case is: Is this writ a proceeding arising out of this Act, or any of the provisions thereof? The argument on behalf of the landlord is this: It is not a claim arising out of the Rent Restrictions Act; it is a claim arising out of the common law; a landlord, the tenancy of whose tenant has been properly determined, has the right to eject him by common law; that is the right this landlord is seeking to exercise; it is a claim arising out of this Act. I think that if that were accurate it would be very technical, but as a matter of fact it is inaccurate. There was common law at the time of LORD COKE. On many

matters it has been materially altered by subsequent statutes applied to the subject-matter under which you can now ask for things which you could not have asked for under the common law at the time of LORD COKE. In such a case it is not, in my view, accurate to say that a claim arises out of the common law at the time of LORD COKE. It arises out of the common law as modified by the subsequent statutes applied to the subject-matter. In the present case in my view, the common law right to possession no longer exists ; it has been modified by the Rent Restrictions Act in cases to which the Act applies ; and it is not accurate to say that one is claiming under the common law. You cannot claim under the common law, because the common law has gone. One asks, looking at this statute and using the statute as a dictionary : In what sense did the legislature use this phrase "arising out of this Act"? In the first place, one takes judicial notice, from long and painful experience, that this Act is badly and loosely drafted. In this section "arising out of this Act or any of the provisions thereof" is quite superfluous. It cannot arise out of the Act without arising out of the provisions thereof ; and if it arises out of one of the provisions thereof, it arises out of the Act. There was no necessity to use the double phrase, except by a person who did not think very carefully of what he was saying. Then, when one asks, what did Parliament mean by "claim or proceedings arising out of this Act," one turns back to s. 5, and one finds that in sub-s. (5) of s. 5 Parliament provides for an order for the recovery of possession to be made under that section, which, as a matter of fact, does not authorise the making of the order so much as restrict the previous right to make the order. The same language is used in sub-s. (6) : "has obtained an order or judgment for possession or ejectment under this section." Again the section restricts the making of the order. The order is made under the common law as restricted by the Act. When one turns to s. 15 (1), that says : "A tenant who by virtue of the provisions of this Act retains possession of any dwelling-house . . ." There is no provision of the Act which entitles him to retain possession of a dwelling-house. There are provisions of the Act which prevent orders being made for possession by the landlord ; but there is no provision of the Act entitling a tenant to retain possession. Parliament throughout has used language very loosely, and has drafted the Act as if it were an Act plus the common law—has treated any order which is made under the joint effect of the Act and the common law as "under this Act," "under this section," "arising under the provisions of this Act." One gains additional help as to the senses in which Parliament, in my view, uses those words when one looks at the Administration of Justice Act, 1920, passed in the same session of Parliament. There one finds that Parliament in the same year, has provided by s. 3 (2) [repealed : see above] :

"It shall not be lawful for any party in a county court or any other inferior court of civil jurisdiction to require any action or other matter arising under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 to be tried with a jury."

The landlord's argument involves that any action with regard to a house to which the Act applies can still be tried with a jury, because, according to him, it is not an action arising under the Rent Restrictions Act, but under the common law. I do not know that it is necessary finally to decide it in this case ; but I am satisfied at present that Parliament meant that no action for recovery of possession of a house under the Rent Restrictions Act should be tried with a jury in the county court, using the words "arising under the Increase of Rent and Mortgage Interest (Restrictions) Act" in the wide sense that I have indicated, as a claim arising under the common law as modified by the Rent Restrictions Act. That is all I propose to say about the matter, except this. As I read the decision of this court in *Gill v. Luck* (4), certainly my brother ATKIN, and inferentially my brother BANKES, expressed the same opinion as I am now expressing, and I respectively think they were right ; but I come to this decision on a consideration of the words of the

A statute, and, following the words of the statute, it appears to me that when a landlord issues his writ claiming to turn out a tenant who holds under the provisions of the Rent Restrictions Act, and when he claims a rent increased from the agreed rent because of the provisions of the Rent Restrictions Act, the double claim he is making is a claim arising under the provisions of the Rent Restrictions Act. If so, under s. (2) of the Act of 1920, the county court had jurisdiction to try this case ; and if it had jurisdiction to try this case, the master had authority under the Act of 1919 to refer the matter to the county court.

ATKIN, L.J.—This case comes before us in somewhat remarkable circumstances. The plaintiff issued his writ to recover possession of premises to which undoubtedly the Rent Restrictions Act applies, and also for recovery of arrears of rent and mesne profits. He made an application for judgment under Ord. 14 before MASTER BALL. MASTER BALL, no doubt applying the principles laid down by the Court of Appeal in *Gill v. Luck* (4), refused the application and remitted the case to the Whitechapel County Court under the provisions of s. 1 of the County Courts Act, 1919 [see now County Courts Act, 1934, s. 50]. Whether he could do so or not depended upon whether the action was an action which could have been commenced in the county court. However, he remitted it ; and it seems to me perfectly plain that by s. 4 of that Act [see now s. 74 of Act of 1934] the county court judge has jurisdiction to entertain an action so remitted. It was not for him to consider whether the order had or had not been properly made. No objection was taken by the parties to that. The matter remained from Oct. 21, when the order was made, until Nov. 27, when application was made to McCARDIE, J., to extend the time for appealing from the order of the master.

It seems to me very unfortunate in the interests of everybody that this case was not allowed to remain in the county court, where by this time it would have been tried. However, we have to deal with it. We have to consider whether or not the learned judge was right in coming to the conclusion that the master could not remit this case because it was a case which could not be commenced in the county court. That depends entirely upon the proper construction to be put upon the words which have been read so often of s. 17 (2) of the Rent Restrictions Act, 1920. It raises the question whether an action for the recovery of possession of premises to which the Act applies is a claim or other proceeding arising out of the Act or any of the provisions thereof. One has to read the section as a whole ; and one has to read it in reference to what appear to me to be the correlative clauses at the end, namely, that if a person takes proceedings under this Act in the High Court which he could have taken in the county court, he shall not be entitled to recover any costs. I do not think that there was any distinction in the mind of the draftsman between taking proceedings under the Act in the High Court and making a claim or taking other proceedings arising out of the Act or provisions thereof in the county court. To my mind, an action by a landlord for recovery of possession of premises to which the Act applies, in which the landlord has to satisfy the court that the conditions of s. 5 of the Act of 1920 [see now Act of 1933, Sched. I] have been complied with, is a claim or other proceeding arising out of the Act, and a judgment so obtained is a judgment under the Act. If the proceeding is not a proceeding arising out of or under the Act, it would appear to be impossible that the judgment could be a judgment under the Act.

It is true there has been and there are great difficulties in different parts of this Act, arising out of the drafting of it ; but in this particular case I think it may be said that the draftsman is his own interpreter, and he has made it plain, because he has in fact used this language in the terms of sub-s. (5) and sub-s. (6) of s. 5. I will read sub-s. (5) :

“An order or judgment against a tenant for the recovery of possession of any dwelling-house or ejection therefrom under this section shall not affect the right of any sub-tenant to whom the premises or any part thereof have

been lawfully sublet before proceedings for recovery of possession or ejectment were commenced, to retain possession under this section, or be in any way operative against any such sub-tenant."

The object of that is plain. It is a clause which is the charter of the sub-tenant. Notwithstanding that there may be a breach by the immediate tenant, the sub-tenant is protected in his sub-tenancy. That was absolutely necessary for the protection of the particular class of people whom this Act was intended to protect. According to the view expressed to us in argument, and a view, I think, which is necessitated by the judgment of the learned judge, if a judgment is recovered either in the High Court or in the county court for possession against the immediate tenant, the sub-tenant is not protected in his possession of his premises. Certainly such a result as that would, to my mind, be a very remarkable one, because it would lead, as I think, to the destruction of the far greater proportion of the benefits of the Rent Restrictions Act. The same consideration applies to sub-s. (6), where the same terms are used :

"Where a landlord has obtained an order or judgment for possession or ejectment under this section on the ground that he requires a dwelling-house for his own occupation, and it is subsequently made to appear to the court that the order was obtained by misrepresentation or the concealment of material facts, the court may order the landlord to pay to the former tenant such sum as appears sufficient as compensation . . ."

For my part I have heard no explanation of that section which can in any way be reconciled with the grounds which have been put forward in argument for supporting the judgment of the learned judge. In fact counsel for the landlord was reduced to saying that he could only explain the use of the language by saying it was bad draftsmanship. But what the real effect of it was, unless such an order was an order made under the Act, I am quite unable to see. It seems to me that the view taken by the draftsman and taken by the legislature is reasonably plain. The result of the Rent Restrictions Act was undoubtedly to affect the rights of landlords and undoubtedly also to affect the rights of tenants in respect of premises to which the Act applies. The landlord lost his right to resume possession of his property upon the determination of a term of tenancy coming to an end in the ordinary way. The tenant acquired rights to remain in possession which he would not have possessed but for the Act.

I think that s. 17 (2) looks at the matter in this way. The landlord, having had his ordinary rights very seriously restricted, is then given the right to exercise the ordinary right of possession upon certain terms. He has to show affirmatively that the case is brought within one of the several conditions that are laid down in s. 5 of the Act of 1920 [see now Act of 1933, Sched. I] as a condition of an order made by the court ; and he has to prove in addition that it is reasonable that an order for ejectment should be made. I think it is a perfectly rational view to take of that legislation that a landlord who comes to ask the court to exercise a power which, under the section, the court can only exercise upon the performance of those conditions, is, in fact, exercising a right and making a claim under the Act. Therefore, the language is perfectly apt language. If one were looking for general reasons of policy I should have thought it was reasonably plain that the intention of the Act was that in respect of these small houses, which, as a rule, are let to poor people, it was considered advantageous that the proceedings should take place in the county court rather than in the High Court, and especially so because there are certain applications in which the sole jurisdiction is given to the county court, and the relationship of landlord and tenant in respect of particular premises may, in some cases, be adjudicated upon only in the county court. One has to go to the county court in the district in which the house is, before a judge who presumably is familiar with the conditions of that particular district, and is able to form a better judgment and make a much better determination than a High Court

A judge as to the convenience and as to the possibility of providing alternative accommodation in that particular district, a matter which very often has to be considered. The result of that appears to me to be that the legislature intentionally increased the jurisdiction of the county courts so that they could deal with all questions relating to the recovery of possession or other questions arising under the Rent Restrictions Act. It is to be remembered that the maximum standard
B rent which brings a case within the Rent Restrictions Act is very near the ordinary statutory jurisdiction of the county court, namely, £100 a year, the maximum under the Rent Restrictions Act being £105. It has also to be remembered that by reason of the different provisions of the Rent Restrictions Act premises which were quite plainly within the ordinary jurisdiction of the county court at particular times have, by reason of the permitted increases, risen, as far as the rent payable
C is concerned, to beyond what was the statutory jurisdiction of £100 a year. It appears to me very reasonable and proper that the legislature should have intended that the jurisdiction of the county court should increase with the amount of permitted rent, thus still keeping the house within the jurisdiction of the county court so long as the Rent Restrictions Act applied to it.

D There is one further point. The jurisdiction of the county court in any case would depend not on the rent actually paid to the landlord, but the rent payable to the landlord ; and it may very well be in this case that there was jurisdiction in the master, quite apart from this question, because the rent payable might well have been less than £100 a year. But that is not the ground upon which I determine this case. It appears to me that the true view is that an action of this kind for
E recovery of possession of premises to which the Act applies against a person who, it is admitted, has been at any rate a statutory tenant, is an action in which the county court has jurisdiction, quite regardless of the question as to how much rent in fact is payable at the time the action is brought. I propose to reserve consideration of the question that arose in *Gunter v. Davis* (5), of the position where proceedings are brought against a trespasser and not a tenant, sub-tenant, or
F statutory tenant. I do not propose to say anything about that now. In a case such as the present, where a claim is brought by the landlord, who admittedly has to satisfy the conditions of s. 5 of the Rent Restrictions Act by showing that there has been a breach of the conditions or of some of the obligations of his tenant, or of some of the conditions of s. 5, and also has to show that it is reasonable to make an order, I think the county court judge has jurisdiction. I think the
G master was perfectly right in remitting this case, and that the learned judge was wrong, both in extending the time for appealing against the order of the master and in reversing the learned master's order. I agree that the appeal should be allowed, with costs.

Appeal allowed.

Solicitors : *Albin L. Hunt ; Palmer & Robinson.*

[*Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.*]

HARNETT v. BOND AND ANOTHER

[HOUSE OF LORDS (Viscount Cave, L.C., Lord Dunedin, Lord Atkinson, Lord Sumner and Lord Buckmaster), March 9, 10, 12, 13, May 15, 1925]

[Reported [1925] A.C. 669; 94 L.J.K.B. 569; 133 L.T. 482; 89 J.P. 182; 41 T.L.R. 509; 69 Sol. Jo. 575]

Person of Unsound Mind—Absence on trial—Right to re-take—Patient's condition—Decision in medical officer of house from which patient granted leave of absence—Power to re-take patient wherever he might be found—Detention after re-taking under original reception order—Negligence by medical officer—Remedy—Right of third party to detain patient to hand over to medical officer.

A consent by two justices, visitors of a house licensed for the reception of mental patients, to leave of absence from the house on probation for twenty-eight days was granted to a patient provided that the medical officer of the house should "at any time before the expiration of the said period have power to take back the said patient into the licensed house if his mental condition requires it,"

Held: (i) the person who was to be the judge whether the patient's condition required that he should be taken back into the house must be the medical officer of the house in whom was vested the power to re-take the patient ;

(ii) the power to re-take the patient could be exercised wherever he might be found ;

(iii) when once the patient had been re-taken the leave of absence order came to an end, and the patient could be detained under the reception order under which he was originally received into the house ;

(iv) if the power to re-take the patient was exercised negligently, the negligence did not render the re-taking unlawful so as to give rise to an action against the medical officer for false imprisonment, the remedy (if any: see s. 330 of the Lunacy Act, 1890, as substituted by s. 16 of the Mental Treatment Act, 1930) being by an action for negligence ;

(v) forcible detention of the patient by a third party pending his being handed over to the medical officer of the house was legally unjustifiable.

Decision of Court of Appeal, [1924] 2 K.B. 517, affirmed.

Notes. The Lunacy Act, 1890, has been repealed by the Mental Health Act, 1959, but it is thought that this case may still be of some value in interpreting certain provisions of the later Act, particularly s. 39.

Considered: *Shipman v. Shipman*, [1938] 4 All E.R. 732. Referred to: *de Freville v. Dill*, [1927] All E.R. Rep. 205; *Harnett v. Fisher*, [1927] A.C. 537; *D.P.P. v. Head*, [1958] 1 All E.R. 679.

As to absence on leave see 21 HALSBURY'S LAWS (2nd Edn.) 433, 434.

Appeal from an order of the Court of Appeal (BANKES, WARRINGTON, and SCRUTTON, L.JJ.), reported, [1924] 2 K.B. 517.

The facts appear in the opinions of their Lordships.

S. Cope Morgan and *J. W. Morris* for the appellant.

The Attorney-General (Sir Douglas Hogg, K.C.), *Harold Morris*, K.C., *Bowstead*, and *Harold Murphy* for the respondent Bond.

A. Neilson, K.C., and *T. Carthew* for the respondent Adam.

T. S. Pedler held a watching brief for the British Medical Association.

The House took time for consideration.

May 15. The following opinions were read.

VISCOUNT CAVE, L.C.—This is an appeal by the plaintiff in the action against orders of the Court of Appeal in England reversing a judgment of LUSH, J., in

A his favour for £5,000 damages against the defendant Bond, and for £20,000 damages against the defendants Bond and Adam jointly, and ordering a new trial of the action as against the defendant Bond and judgment to be entered in favour of the defendant Adam.

B The appellant, Mr. William Smart Harnett, was, on Nov. 10, 1912, received by the respondent Dr. George Henry Adam as a private patient in a house licensed for the reception of lunatics known as Malling Place, West Malling, in the county of Kent. The reception order was made on the petition of the appellant's brother, and it was not disputed on this appeal that at the date when the reception order was made the appellant was of unsound mind. After the reception of the appellant at Malling Place his mental health improved, and on Dec. 12, 1912, Dr. Adam thought it safe to permit him to be absent upon trial for a period under s. 55 (3) C (b) of the Lunacy Act, 1890. The consent required by the section was signed by two of the visiting justices for Kent, and was in the following form, which is said to have been approved by the Law Officers of the Crown :

D We, the undersigned, being two of the visiting justices of private asylums for Kent, hereby sanction leave of absence from Malling Place of Wm. Smart Harnett on probation for the period of twenty-eight days, but this sanction is revocable by us at any time during that period ; Provided that the medical officer shall at any time before the expiration of the said period, have power to take back the said patient into the licensed house, if his mental condition requires it.

E The appellant accordingly left Malling Place on Dec. 12 with his brother, who had been asked by Dr. Adam to take care of him, but shortly afterwards he separated from his brother and went to his own home at Sittingbourne. On Dec. 13 he was seen by several persons, who formed varying opinions as to his sanity, and on that afternoon he went up to London and stayed at an hotel near Moorgate Street. On the morning of Dec. 14 he called at the offices of the Commissioners in Lunacy in Victoria Street, taking with him £30 in a bag, and asked to see a commissioner. The purpose of the appellant in making this call is not very clear ; but it would appear from his evidence, and from a letter which he had written to the commissioners on the preceding day, that he wished the commissioners to hand him over to the care of the police and took with him the £30 as payment or security for that purpose. The appellant had interviews with Mr. Dickinson, secretary of the Board of Control, and with the respondent Dr. Bond, who was the commissioner in attendance at the offices on that day, and they both formed an unfavourable opinion as to his mental state, and, after consulting the file relating to his case, communicated with Dr. Adam on the telephone. Whether this telephone message was actually given by Dr. Bond or by Mr. Dickinson at his request, and what were the precise terms of the message, is left in some doubt ; and this is by no means surprising, as the evidence relating to this conversation was given more than eleven years after it took place. But it appears clearly from the evidence given by Dr. Bond and Mr. Dickinson, as well as from that of Dr. Adam, that Dr. Adam was informed that the appellant was at the office of the commissioners, and was in a very excited state and unfit to be about by himself, and that Dr. Adam replied that he would send a car and two attendants for him. I It was suggested on behalf of the appellant that the message was sent before Dr. Bond had personally interviewed the appellant, but I do not think that this was established ; and in any case it is proved that Dr. Bond had a long conversation with the appellant before the car arrived and formed a clear opinion that he was unfit to be at large. Pending the arrival of the car, Dr. Bond caused the appellant to be detained (without the use of any violence) in a room at the offices ; and on the arrival of the car the two attendants were taken to the room where the appellant was and took him back with them to Malling Place, where he arrived at about five o'clock in the afternoon. On the same evening at about seven o'clock he

was seen by Dr. Adam, who formed the opinion that he was much worse mentally than when he had been released on trial, and accordingly detained him under the reception order of November. The appellant was confined at Malling Place until Feb. 22, 1913, when he was removed to the Croydon Mental Hospital; and on Feb. 25, 1913, he was examined by the medical superintendent of that asylum and certified to be suffering from mania. Similar examinations and reports were made by the medical superintendent on Mar. 25, 1913, Oct. 12, 1913, and subsequent dates. On Aug. 24, 1917, the appellant was removed to the Holloway Sanatorium at Virginia Water, and he was again removed on April 30, 1918, to St. Ann's, Canford Cliffs, and on April 29, 1920, to Aylsham as a single patient; and at each of these places the reports and certificates required by statute for his continued detention were duly made and given. He was also, as the Act required, frequently seen by the commissioners and the visiting justices, as well as by a Chancery visitor; and to all these persons he appeared to be still of unsound mind, and a proper person to be detained under care and treatment. On Oct. 15, 1921, the appellant escaped from the house at Aylsham, and, having remained at large for upwards of fourteen days, he could not be re-taken under s. 85 of the Act and remained at liberty. Shortly afterwards he was examined by two eminent medical practitioners having experience in mental cases, and they declared him to be of sound mind.

On May 31, 1922, the appellant commenced these proceedings against Dr. Bond and Dr. Adam, and by his statement of claim charged them with conspiring together to cause him to be detained at the commissioners' offices on Dec. 14, 1912, and afterwards at Malling Place, and also with assault and false imprisonment, and claimed damages against both and each of them. No charge of negligence on the part of Dr. Adam was made in the statement of claim; but Dr. Adam in his defence pleaded that he had acted in good faith and with reasonable care, and relied on s. 330 of the Lunacy Act. The action was heard by LUSH, J., and a special jury; and after a long hearing the learned judge summed up the case and put to the jury seventeen questions which were answered as follows:

1. Did Dr. Bond cause the plaintiff to be detained at the office until the attendants came for him? Answer: Yes.

2. Did he cause him to be sent back for the purpose only of his being examined by Dr. Adam or for the purpose of his being detained at Malling Place? Answer: Being detained at Malling Place.

3. Did Dr. Bond cause the plaintiff to be taken back? Answer: Yes.

4. Was the plaintiff of unsound mind on Dec. 14, 1912? Answer: No.

5. Was he fit to be at large? Answer: Yes.

6. Was he dangerous to himself or others? Answer: No.

7. Did Dr. Bond honestly believe that the plaintiff was of unsound mind? Answer: No.

8. Or that he was not fit to be at large? Answer: No.

9. Or that he was dangerous to himself or others? Answer: No.

10. Did he believe that the plaintiff had escaped from his brother's charge? If so, was that his reason for having him sent back? Answer: Yes.

11. Did he take reasonable care to ascertain the true facts? Answer: No.

12. Did he honestly believe that Dr. Adam had retained a power of taking the plaintiff back during the twenty-eight days in the Leave of Absence Order? Answer: Yes.

13. Did Dr. Adam when he received the telephone message and sent the car, honestly believe that the plaintiff on Dec. 14 was of unsound mind and unfit to be at large? Answer: Yes.

14. That it was in his interest that he should be taken back to Malling Place? Answer: Yes.

15. Did he take reasonable care in acting as he did? Answer: No.

- A 16. Did he make it known to the plaintiff that he was liable to be retaken if his mental condition required it? Answer: No.
17. Was the detention of the plaintiff at the Commissioners' offices the act of Dr. Bond alone or was it really the act of both the defendants? Answer: Dr. Bond.

It is common ground that the answer to question 10 was explanatory of the answers to questions 7, 8, and 9, the effect of the four answers being that Dr. Bond acted for the reason given in question 10 and not because of any belief, honest or otherwise, concerning the appellant's state of mind. These answers having been given, the learned judge proceeded to address the jury upon the question of damages, and directed them that they could, if they thought fit, assess damages upon the footing that the confinement of the appellant during the whole period from his return to Malling Place until his escape from Aylsham, was a direct consequence of the acts done by the defendants on Dec. 14, 1912; but being apparently uncertain on this point, and as to the joint liability of the defendants, he requested the jury to make alternative assessments in manner appearing in the following further questions and answers:

- D 18. Damages against the defendants? Answer: £25,000.
- (a) Apportion the sum of £25,000. Answer: Bond £17,500—Adam £7,500.
- (b) Assess the damages on the footing that the defendants are only responsible for the detention up to Feb. 22, 1913 and apportion it, the special damage being £82. On this footing the total sum is £10,000: Bond £7,500—Adam £2,500.
- E (c) Assess damages against Dr. Bond merely for detention at the offices, taking into consideration the whole purpose for which he was so detained? Answer: £5,000.
- (d) Assess damages against Dr. Bond and Dr. Adam jointly on the footing that they knew the plaintiff would be deprived of the remainder of his twenty-eight days' liberty and apportion that. Answer: Total sum £9,800. Bond £7,400—Adam £2,400.

Upon these complicated findings the learned judge was called upon to pronounce judgment; and after hearing further arguments he held that the chain of causation set up by the detention of the appellant at the commissioners' offices on Dec. 14, 1912, was not broken, either when Dr. Adam on examining the patient after his return to Malling Place formed the opinion that he was then of unsound mind and detained him, or when the appellant was removed to Croydon in 1913, or in November, 1913, when there was a re-certification, or at any subsequent removal or certificate, and that it was quite open to the jury to treat the long detention as the direct consequence of the wrongful acts of the defendants. On that footing he gave judgment against Dr. Bond for £5,000 and against both defendants for £20,000 with costs.

The defendants having applied to the Court of Appeal for a new trial or judgment, that court (consisting of BANKES, WARRINGTON, and SCRUTTON, L.JJ.) unanimously set aside the judgment of LUSH, J., and ordered a new trial as against Dr. Bond and that judgment should be entered for Dr. Adam. As to Dr. Bond, the learned lords justices held that the chain of causation had been broken, not only when Dr. Adam decided to retain the appellant after his return to Malling Place, but at "innumerable points" after that date, and that it was plainly not permissible for the jury in assessing damages to treat the whole period of the appellant's captivity as directly caused by the events of Dec. 14, 1912. As to Dr. Adam, they held that under the terms of the leave of absence order he was entitled to re-take the appellant at any time before the end of the twenty-eight days, if in his opinion, honestly formed, it became necessary to do so, and that there was no evidence upon which the jury could find want of reasonable care on his part. From this decision the plaintiff has appealed to this House.

As regards Dr. Bond, I feel no doubt whatever that the Court of Appeal was right in ordering a new trial. It is not disputed that, on the assumption that the findings of the jury as to the appellant's mental condition on Dec. 14, 1912, were correct, Dr. Bond had no right to cause the appellant to be detained at the office pending the arrival of Dr. Adam's car, and is liable for damages for that illegal detention. But those damages must, on the authorities, be confined to such as were the direct consequence of the wrong committed; and to hold that the detention of the appellant at the offices for a few hours was the direct cause, not only of his being re-taken and conveyed to Malling Place, but also of his being confined in that and other houses until October, 1921, appears to me to be impossible. Dr. Bond could not and did not direct or authorise Dr. Adam to re-take the appellant or to confine him at Malling Place; the re-taking and confinement were the independent acts of Dr. Adam, and each of them was a *novus actus interveniens* sufficient to break the chain of causation. Further, the confinement of the appellant could not have continued during nine years without repeated examination and re-certification by the proper authorities; and for the consequences of those events Dr. Bond cannot on any intelligible principle be held to be responsible. Whether the direct consequences of Dr. Bond's action in detaining the appellant at the office ceased when the appellant was handed over to the two attendants and entered the car, or on his arrival at Malling Place, or later on his being examined by Dr. Adam, it is not necessary now to say. That may be a question to be determined at the new trial. But in any case it appears to me that those consequences cannot on any just view of the matter be deemed to have extended beyond seven o'clock on the evening of Dec. 14, 1912. It was argued that even on this view of the matter the appellant was entitled to judgment against Dr. Bond for £5,000 as the damages assessed by the jury for detention at the offices; but this finding was obviously coloured by the directions given by the learned trial judge on the question of damages, and by the addition to the question of the words "taking into consideration the whole purpose for which he was so detained," and it appears to me that the whole matter ought to receive fresh consideration at the hands of a jury.

With regard to Dr. Adam, it is remarkable that, whereas he was charged in the pleadings with conspiracy and false imprisonment, no direct question was put to the jury as to either of those charges. The charge of conspiracy was apparently abandoned during the trial, and in any case it was plainly negatived by the findings of the jury in answer to the thirteenth and fourteenth questions. The charge of complicity in the false imprisonment at the commissioners' office was negatived by the answer to the seventeenth question, and there was no finding of false imprisonment by Dr. Adam at Malling Place. Why, then, was Dr. Adam held liable in damages at all? It must have been on the ground of the answer of the jury to the fifteenth question, namely, that Dr. Adam, in acting as he did—that is to say, in sending a car and taking the appellant back to Malling Place—did not take reasonable care; and yet want of reasonable care was not charged against Dr. Adams in the pleadings, and the issue only arose on his defensive plea founded on s. 330 of the Act. It appears to me that on this ground alone, namely, the total failure of the plaintiff to establish either of the charges made by him against Dr. Adam, the latter would be entitled to judgment. But in a case of this kind it is undesirable to base a decision on any narrow ground; and I propose to consider shortly whether, either on the findings of the jury or on the evidence, there is any ground for the judgment entered against Dr. Adam.

First, then, was there any ground for charging Dr. Adam with conspiring with Dr. Bond to cause the plaintiff to be detained and removed to Malling Place? Plainly not. There was no evidence to support such a charge, and it is negatived by the findings of the jury. I, therefore, dismiss this charge as wholly untenable. Secondly, was there ground for charging Dr. Adam with false imprisonment—that is to say, with re-taking or detaining the plaintiff without lawful authority?

A As to this it was argued that under the terms of the leave of absence order set
out above, Dr. Adam could only take back the appellant if the mental condition
of the latter required it, and that, as the jury have found the appellant to have
been sane on Dec. 14, 1912, this condition was not fulfilled. In my opinion, there
is no foundation for this argument. The provision in the leave of absence order
empowering the medical officer to take back the patient "if his mental condition
B requires it," cannot mean that the medical officer is to take back the patient (if
at all) at the risk of having it found by a jury many years afterwards that the
patient's mental condition was consistent with his remaining at large. Some person
must be the judge of the patient's mental condition at the time when the question
arises, and this person can only be the medical officer in whom the power to re-take
him is vested. Nor is there any substance in the suggestion made by counsel for
C the appellant that the power to re-take the patient reserved by the order could
not be exercised by re-taking him outside the licensed house. I think it clear
that it was capable of being exercised wherever the patient might be found. When
once the patient is re-taken, the leave of absence order comes to an end, and he
can be detained under the existing reception order. But, thirdly, stress was laid
D on the finding of the jury as to want of reasonable care, and it was said that a
medical officer could not re-take a patient out on trial unless he acted with reason-
able care in so doing, that the onus was on him to prove reasonable care, and
that if he failed to do so the re-taking was void. This argument appears to me
to be fallacious. The leave of absence order authorises the medical officer to re-take
the patient if the patient's mental condition requires it. If this power is exercised
negligently it may be that there is a remedy ; but the negligence does not make
E the re-taking unlawful, and the remedy (if any) is by action for negligence and
not by action for false imprisonment. But apart from this observation, I agree
with the Court of Appeal in holding that in the present case there was no evidence
on which the jury could properly find Dr. Adam to have failed to exercise reasonable
care. It is suggested that he should have gone up to London himself or should
have sent his assistant. But it was proved that the assistant was entitled to be
F absent from Malling Place on that afternoon, and that Dr. Adam could not leave
the house without a medical officer ; and in these circumstances he was entitled
to rely on the information given him by Dr. Bond on the telephone, coupled with
his own previous knowledge of the case, as sufficient ground for bringing the patient
back, subject, of course, to the duty (which he performed) of personally examining
him on his return. I agree that there was no evidence of negligence and that Dr.
G Adam is entitled to judgment.

I desire to make one further observation. The fact that the appellant, whom
the jury found to be sane in December, 1912, and whom they doubtless considered
to be quite sane at the time when the action was heard, had been confined as
a lunatic during the greater part of the interval between those dates, has naturally
given rise to anxiety. It was not proved at the trial or found by the jury that
H during that interval the appellant was of sound mind ; but it is not impossible
that the jury took that view and desired to compensate the appellant for his long
detention by giving a verdict for heavy damages against the two defendants. If
the defendants had been really responsible for an unjustifiable detention of the
appellant during all those years the sum awarded might not have been excessive,
I but the full investigation of the case both by the Court of Appeal and by this
House has led to the conclusion that no such responsibility can be justly laid on
Dr. Bond or on Dr. Adam. The Lunacy Acts provide for the protection of the
public against the risk of unjustified detention by forbidding the detention of any
person as insane except on a proper certificate and in a place duly certified for
that purpose, and by requiring that every patient so confined shall be personally
seen and examined at regular intervals both by the Commissioners in Lunacy and
by the visiting justices, and shall be free to make complaint (in letters which
must be forwarded unopened) to the Lord Chancellor or the Judge in Lunacy, to

the Secretary of State or to the commissioners, or to the persons (generally his relations) on whose petition he has been confined. It may be—I do not say that it is—the fact that all these precautions are insufficient, and that the lunacy laws require to be further strengthened in the interests of the persons whom they may affect. But even if that be so, that is no reason for visiting with vindictive penalties persons who have acted in good faith, and who are not responsible for any defect in the law. In my opinion, the Court of Appeal came to the right decision, and I move your Lordships that this appeal be dismissed with costs. A B

LORD DUNEDIN.—I have never had a shadow of hesitation in thinking that the judgment of the Court of Appeal was right. Mr. Harnett was detained in a private asylum under a reception order against which nothing has been said. He was then liberated for a period of twenty-eight days on trial under a leave of absence order signed by two visiting justices, but with a proviso authorising the medical officer at any time during the twenty-eight days to take back the patient if his mental condition required it. Being out of the asylum in virtue of the leave of absence order he of his own accord presented himself at the office of Dr. Bond. He saw Dr. Bond who, having identified his case on the file, knew that he had come from Malling Place. He considered him to be in a very excited state and thought it would be well that Dr. Adam should see him. He telephoned to that effect and a motor-car with two attendants was sent to take him to Malling Place. Pending the arrival of the car Harnett was forcibly detained. For that detention it is admitted Bond had no legal justification. But what was the direct result of it? Only that Harnett was examined by Adam. It is true that a question was put to the jury: Did Dr. Bond cause Harnett to be sent back for the purpose only of his being examined by Dr. Adam or for the purpose of his being detained at Malling Place? To which they answered: Being detained at Malling Place. But the question, in my opinion, was illegitimate and misleading. Bond had no power to say that Harnett should be detained at Malling Place, and nothing that Bond thought or intended could make any difference as to Dr. Adam's power to put an end to his liberty on probation or his responsibility for taking that step. To ask the jury whether Bond's purpose in sending him to Adam was that he should be detained at Malling Place was, if they were to answer as they did, simply to ask them to affirm a non sequitur. Conceivably, though I doubt it, such a question might have been founded on averments as to a malicious motive on Bond's part with an intent to injure, but there was nothing of that in the case. Following on their answer to this question the jury were instructed that they could give damages for the whole period of Harnett's detention, though that detention began as already stated by Adam's determination to end the period of probation and was continued through all the years Harnett was in different places of confinement under renewed orders of different medical men. Such a suggestion has only, in my judgment, to be stated to be rejected. I look on it as preposterous. As to Dr. Adam, I think he is clearly, under the circumstances, protected by s. 330 of the Lunacy Act. I feel bound to add that the question of whether a person so admitted can under existing safeguards be kept for an unduly long period in a lunatic asylum is not the question in this case. Indeed, the learned judge expressly told the jury they would not be called on to say what was the plaintiff's mental condition during the nine years of detention. The course of inquiry permitted in the case clashed strongly, in my judgment, with that pronouncement. I concur. C D E F G H I

LORD SUMNER.—For the reasons just given I concur in the motion proposed by the Lord Chancellor.

LORD BUCKMASTER.—According to the verdict of the jury in this case, the plaintiff while a sane man has been imprisoned in a private lunatic asylum, and it follows that he has suffered a grievous wrong for which no money payment can provide an adequate compensation. The jury have obviously been impressed

A with the gravity of the position and have given a verdict in favour of the plaintiff which has resulted in a judgment for the sum of £5,000 as damages against Dr. Bond and £20,000 against Dr. Adam and Dr. Bond jointly, who, they say, were in their several degrees held responsible for the injuries that he sustained. The only question is whether Dr. Bond and Dr. Adam together or separately are legally liable for these sums. Dr. Bond is one of the Commissioners in Lunacy whose offices are in 66, Victoria Street. Dr. Adam is the licensed proprietor of a home for the reception of persons of unsound mind at West Malling, in the county of Kent. On Nov. 10, 1912, Dr. Adam received the plaintiff in this establishment under a reception order which has not been challenged in these proceedings. On Dec. 12, thinking the plaintiff sufficiently restored to justify his release upon a probation order, the plaintiff was permitted to leave the establishment in company with his brother. The brother, however, was not responsible for his safe keeping, nor was the plaintiff placed under his control. On the morning of Dec. 14, at about 10.15, the plaintiff appeared at the offices of the Commissioners in Lunacy with £30 in a handbag and asked to see the commissioner. He said that he desired that the money should be deposited with the commissioners to pay for a man to be sent to his house to prevent his being returned to the asylum. The statement as to what actually occurred and the true sequence of events is far from plain. The plaintiff's own account is not consistent, nor does Dr. Bond's memory agree exactly with the memorandum taken at the time. Dr. Bond appears to have thought that the plaintiff had eluded his brother's custody, and this may be explained by one of the plaintiff's statements in evidence where he said he told Dr. Bond: "I am to be under my brother for twenty-eight days." Influenced, it may be, by this, Dr. Bond communicated with Dr. Adam on the telephone, informing him that the plaintiff was there and stating that he did not think he ought to be at large. The plaintiff stayed at the offices from 10.15 to 1.30; at 1.30, when he proposed to go for lunch, he was informed that he was not at liberty to go, and two efforts that he made to leave were prevented, but it is not suggested that any actual force or violence was exercised. He was, however, detained until about 2.30, when two attendants sent by Dr. Adam from West Malling arrived in a motor-car, when he was given into their custody and by them taken back to Dr. Adam, and he remained under restraint at one institution or another from that time until his escape in 1923.

The detention by Dr. Bond was an unlawful act for which he is responsible in damages, and it was decided by the learned judge that the measure of these damages might be taken in terms of the whole period of the plaintiff's confinement. I am unable to see how this can be supported. Dr. Bond had no power and no authority over Dr. Adam, and when once the plaintiff was returned to West Malling the duties with regard to his custody devolved upon him and were discharged by Dr. Adam alone. If Dr. Adam had thought that, whatever appearance the plaintiff had presented at Victoria Street, he was none the less fit to be at liberty, it was his plain duty to have acted accordingly, nor can I think that any statement made by Dr. Bond upon the telephone as to what he thought can have caused Dr. Bond to share in or be party to the judgment that Dr. Adam formed. From the time when Dr. Adam re-assumed control Dr. Bond's responsibility ceased. The Court of Appeal had held that this was the time when the plaintiff actually returned to West Malling; there has been no appeal from this judgment, and it is therefore unnecessary to consider whether it did not cease at the earlier moment, when the plaintiff was placed in charge of Dr. Adam's assistants at Victoria Street. The jury have, however, found that Dr. Bond did not honestly believe that the plaintiff was of unsound mind, and an attempt is made to explain this verdict by saying that Dr. Bond acted on the belief that the plaintiff had escaped from his brother's custody. The explanation appears to me inadequate. Whatever mistake Dr. Bond may have made, I can find nothing whatever in the evidence that on any interpretation of the word can cast the least question on his

honesty, and I think it is to be regretted that a question should have been left to the jury in such a form that the verdict taken upon it must, in the plain meaning of the words, cast a reflection upon Dr. Bond's character which no sophistry can explain away. One injustice cannot be remedied by committing another.

Returning now to the case of Dr. Adam, the first thing to decide is what were his powers after the plaintiff had been liberated under the probation order. I have no desire to repeat what has been already said upon this point; when once it be accepted that such an order is in the nature of an experiment to try whether a man is fit to be restored to complete liberty, it appears to me to follow that the powers conferred by the reception order, including complete control of the person named in the order, are merely in abeyance and at any time if the custodian honestly thinks it is in the interest of the patient, the control can be resumed and the patient taken back. Any other contention would result in this: that if the patient completely broke down during the period of probation, it would require a new reception order before he could be taken back, and of this I can find no trace in the provisions of the statute. Dr. Adam was, therefore, at liberty to re-take the plaintiff, and however deplorable may have been the mistakes which the verdict of the jury have decided were made, they have completely acquitted Dr. Adam in taking him back of doing any act except in what he honestly believed to be the interests of the plaintiff. I can find no evidence that Dr. Adam so failed in the discharge of his duties as to render him liable in damages, and I agree with the judgment of the Court of Appeal that as against him the proceedings fail.

VISCOUNT CAVE, L.C.—I am informed by my noble and learned friend, **LORD ATKINSON**, that he concurs in the judgment which I have delivered.

Appeal dismissed.

Solicitors: *Rooper & Whately; Solicitor to the Ministry of Health; Le Brasseur & Oakley; W. E. Hempson.*

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

Re DELOITTE. GRIFFITHS v. DELOITTE

[CHANCERY DIVISION (Tomlin, J.), October 15, 16, 27, 1925]

[Reported [1926] Ch. 56; 95 L.J.Ch. 154; 135 L.T. 150]

Will—Gift to class—Ascertainment—Children of annuitant—Annuitant aged sixty-five—Presumption of incapacity further to bear children—Accumulation beyond permitted period—Gift to children of annuitant—Class of children not ascertained—Disposition of surplus income until death of annuitant.

In determining rights in law the court is not entitled to inquire into the capacity of any person to bear children, and, accordingly, a class of children cannot be treated for the purpose of dealing with an estate as incapable of increase on the footing that their mother is past child-bearing. The court, therefore, refused to close a class of children by presuming a woman of sixty-five past child-bearing.

By her will, dated July 6, 1901, the testatrix, who died on January 9, 1904, directed her trustees to hold a fund of £25,000 on trust to pay an annuity to her niece and then to accumulate the residue of the income of the £25,000 at compound interest, both capital and accumulations to be held in trust after the niece's death for children of the niece who attained the age of 21 years. In 1925, at the end of the period of 21 years after the death of the testatrix, the niece was aged 65 and there were living six children of the niece, all of whom had reached the age of 21.

A **Held:** (i) on construction of the will there was a direction for accumulation extending beyond the permitted period of a kind which could not be stopped by the application of the principle of *Wharton v. Masterman* (1), [1895] A.C. 186, and, therefore, the Accumulations Act, 1800, applied and produced the same result as though the testatrix had directed that at the expiration of the statutory period the accumulations should stop with the result that there would be a gap and the surplus income between the end of the period to the death of the niece would fall into residue; (ii) the court had no power to obviate the above conclusion by holding that, in view of the niece's age at the end of the twenty-one years, it could be presumed that she was past child-bearing so as to enable the class of her children then to be closed.

B *Jee v. Audley* (2) (1787), 1 Cox Eq. Cas. 324; *Re Dawson, Johnston v. Hill* (3) (1888), 39 Ch.D. 155; and *Re Travis, Frost v. Greatorex* (4), [1900] 2 Ch. 541, applied.

C **Notes.** The Accumulations Act, 1800, was repealed by s. 207 and the Seventh Schedule to the Law of Property Act, 1925, and replaced with amendments by s. 164 of that Act.

D Doubted: *Berry v. Geen*, [1938] A.C. 575. Referred to: *Re Dicker, Crallan v. Tomlinson*, [1947] Ch. 248.

As to restriction on accumulation see 25 HALSBURY'S LAWS (2nd Edn.) 168 et seq., and as to gifts in wills to classes see *ibid.*, vol. 34, p. 266 et seq. For cases see 37 DIGEST 130 et seq., and 44 DIGEST 760 et seq. For Law of Property Act, 1925, s. 164, see 20 HALSBURY'S STATUTES (2nd Edn.), 771.

E Cases referred to:

(1) *Wharton v. Masterman*, [1895] A.C. 186; 64 L.J.Ch. 369; 72 L.T. 431; 48 W.R. 449; 11 T.L.R. 301; 11 R. 169, H.L.; 37 Digest, 146, 721.

(2) *Jee v. Audley* (1787), 1 Cox, Eq. Cas. 324; 29 E.R. 1186; 37 Digest 57, 15.

(3) *Re Dawson, Johnston v. Hill* (1888), 39 Ch.D. 155; 57 L.J.Ch. 1061; 59 L.T. 725; 37 W.R. 51; 37 Digest 93, 295.

F (4) *Re Travis, Frost v. Greatorex*, [1900] 2 Ch. 541; 69 L.J.Ch. 663; 83 L.T. 241; 49 W.R. 38; 44 Sol. Jo. 625, C.A.; 37 Digest 147, 725.

(5) *Saunders v. Vautier* (1841), 4 Beav. 115; Cr. & Ph. 240; 10 L.J.Ch. 354; 41 E.R. 482, L.C.; 44 Digest 1090, 9406.

(6) *Weatherall v. Thornburgh* (1878), 8 Ch.D. 261; 46 L.J.Ch. 658; 39 L.T. 9; 26 W.R. 593, C.A.; 37 Digest 146, 724.

G (7) *Re Lowman, Devenish v. Pester*, [1895] 2 Ch. 348; 64 L.J.Ch. 567; 72 L.T. 816; 11 T.L.R. 396; 12 R. 362, C.A.; 44 Digest 428, 2575.

(8) *Re Parry, Powell v. Parry* (1889), 60 L.T. 489; 37 Digest 148, 743.

(9) *Lord Dungannon v. Smith* (1846), 12 Cl. & Fin. 546; 10 Jur. 721; 8 E.R. 1523, H.L.; 44 Digest 946, 8014.

H **Originating Summons** asking *inter alia* (i) if an annuity was payable out of current annual income only, or also out of accumulation of income; (ii) if the children of the annuitant were entitled to receive this accumulation of income; (iii) whether the children could stop any further accumulations and have the surplus income paid to them; and (iv) who would be entitled to the surplus income after the period of twenty-one years had expired.

I By her will, dated July 6, 1901, the testatrix devised and bequeathed her residuary real and personal estate upon trust for sale and conversion, and, subject to payment of her funeral and testamentary expenses, debts, and legacies, for investment as therein mentioned, and to hold £25,000 of the investments upon trust to pay the annual sum of £500 to her niece Mrs. Gosling, during her life, and, if her husband, Charles Gosling, should survive her, upon trust if the trustees should think fit, but not otherwise, to pay to him during his life £150 per annum. The testatrix died on Jan. 9, 1904. She further directed by her will that her trustees should accumulate the residue of the income of the £25,000 at compound interest,

and that the accumulations should follow the dispositions thereafter made of the capital sum of £25,000. The capital sum and the accumulations were then given after Mrs. Gosling's death A

"In trust for all the children or any child of my said niece who shall whether living at my death or born afterwards attain the age of twenty-one years."

Mrs. Gosling was born in 1860. She had been once married, and her husband, Charles Gosling, was still alive. She had had six children, all of them had long since attained the age of twenty-one years. The fund had been set aside and invested, and considerable sums of surplus income had been accumulated. The period of twenty-one years from the death of the testatrix expired on Jan. 9, 1925. B

L. W. Byrne for the summons.

Frederick Whinney for Mrs. Gosling.

Gavin T. Simonds, K.C. and Swords, for Mrs. Gosling's children, referred to *Saunders v. Vautier* (5), *Wharton v. Masterman* (1), *Weatherall v. Thornburgh* (6), *Re Travis, Frost v. Greatorex* (4), *Re Lowman, Devenish v. Pester* (7). C

L. F. Potts and A. Ellis for incumbancers of the children's shares.

Spens, K.C., and *Danckwerts*, for the residuary legatees, referred also to *Re Parry, Powell v. Parry* (8). D

Cur. adv. vult.

Oct. 27. **TOMLIN, J.**, read the following judgment. The object of this summons is to determine the rights of the parties under the will of the testatrix, who died on Jan. 9, 1904, in a fund set aside pursuant to the trusts of the will to answer an annuity and in accumulations of past income arising from the fund and in the future income of the funds and its accumulations. The first question to be determined is as to the interest (if any) of the annuitant and her husband in the surplus income and the accumulations thereof. E

In my opinion, upon the true construction of the will neither Mrs. Gosling nor her husband has any interest in the accumulations. Such accumulations could not, I think, be resorted to for payment of any arrears of any annuity. I express no opinion whether Mrs. Gosling's annuity or any annuity which may become payable to her husband constitutes a continuing charge on the income of each year, that is to say, whether before any surplus is ascertained in any year all arrears in previous years have to be made good. That question has not arisen and is not likely to arise, and does not affect the other questions which I have to determine. F

My next task is to decide what are the rights in regard to (a) accumulations made prior to Jan. 9, 1925, and (b) surplus income arising after that date from the fund and accumulations. It is said on behalf of the six children of Mrs. Gosling that, their mother having become long since past child-bearing, they were in a position before the period of twenty-one years from the death of the testatrix expired to stop the accumulations in which no one but themselves could have any interest, and that the case is covered by the decision of the House of Lords in *Wharton v. Masterman* (1). On the other hand, it is said on behalf of the representatives of the residuary legatees that, inasmuch as there is no gift of the accumulations except to a class who as a matter of law can only be ascertained at Mrs. Gosling's death, there is not and cannot be till such death any person entitled to stop the accumulations, that the case is one to which the *Thellusson Act* applies, and that the surplus income since Jan. 9, 1925, until the death of Mrs. Gosling falls into residue. In considering the application of the *Thellusson Act* [the *Accumulations Act, 1800*] my course is clear. I have first of all to construe the will, and, having construed the will, if I find that in any event there is a direction for accumulation extending beyond the permitted period of a kind which cannot be stopped by the application of the principle of *Wharton v. Masterman* (1), I must say after such period the Act applies and produces the same result as though the G
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testator had directed that at the expiration of the period the accumulations should stop, with the result that there would be a gap, and the surplus income between the end of the period to the death of Mrs. Gosling would be undisposed of except so far as it was carried by the residuary gift: see judgment of JAMES, L.J., in *Weatherall v. Thornburgh* (6). Putting aside for the moment the question of Mrs. Gosling's age, I think that I am bound to construe this will as containing a direction to accumulate during Mrs. Gosling's life, with a gift of the original corpus and of the accumulations to a class consisting of her children who attain the age of twenty-one years, and therefore not ascertainable till Mrs. Gosling's death or within twenty-one years after her death. Upon this view of the will, I do not think that it can be said that at any time during Mrs. Gosling's life there is other than an effective direction for accumulation which apart from the Act would have to be given effect to. Upon this footing the Act will apply, and after the twenty-one years the surplus income will fall into residue.

Can I modify this result by having regard to the age of Mrs. Gosling? I think not. It seems to me to have been laid down with great force on many occasions that it is not permissible in determining rights in law to inquire into the capacity of persons to beget or bear children. LORD KENYON, in *Jee v. Audley* (2), in which the matter was considered with reference to the rule against perpetuities, says:

"I am desired to do in this case something which I do not feel myself at liberty to do, namely to suppose it impossible for persons in so advanced an age as John and Elizabeth Jee to have children; but if this can be done in one case it may be in another, and it is a very dangerous experiment, and introductive of the greatest inconvenience to give a latitude to such sort of conjecture."

Of this judgment CHITTY, J., in *Re Dawson* (3) says as follows (39 Ch.D. at p. 161):

"It is clear that LORD KENYON was considering the case generally, and it is clear that if he had admitted the evidence in this case, or admitted any argument with regard to the impossibility of issue, it would have followed that he must, and that the court must, in every other case make an inquiry into the impossibility of issue other than that which arises from death. As I pointed out in the argument, if medical testimony was admitted in this case for the purpose of showing that the lady was past child-bearing, it would equally be admitted as a matter of law in the case of a woman of younger age, and it may be medical testimony could shew that she was incapable of bearing a child, and evidence of that class might, therefore, consistently with the supposed principle, be adduced in the case of a woman of thirty or even younger; and if the principle is pursued in this way, there could be no ground for rejecting evidence in the case of a man. It is unnecessary to pursue that. Of course, the probability is not great, but there are cases, I take it, in which it could be proved that it was impossible for a man to have children. The Master of the Rolls appears to me to have deliberately rejected this argument on grounds which appeared to him to be sufficient, and he speaks of the danger of the experiment and the great inconvenience and the latitude which would be introduced into the law. That is a decision pronounced, as I have said, more than a century ago, and it is cited in the text-books without any adverse comment. It has also been mentioned by several eminent judges since, and with approval. It may be that sometimes rhetorical phrases are applied even by eminent judges to propositions of law. In *Lord Dungannon v. Smith* (9) (12 Cl. & F. at p. 631) LORD BROUGHAM in eloquent language described it as 'one of the corner stones of the law,' and I understand the Lord Chancellor in the same case to have considered the decision in *Jee v. Audley* (2) to be 'one of the landmarks'."

There is also support for the same view in an authority earlier than *Jee v. Audley* (2), and cited to CHITTY, J., in *Re Dawson* (3), and accepted by him as relevant,

namely, a passage in COKE UPON LITTLETON, vol. 1, s. 53, dealing with a woman's right to dower. The section is as follows : A

"And also, in every case where a woman taketh a husband seised of such an estate in tenements, &c., so as by possibilities it may happen that the wife may have issue by her husband, and that the same issue may by possibilitie inherit the same tenements of such an estate as the husband hath, as heire to the husband, of such tenements she shall have her dower, and otherwise not. For if tenements be given to a man, and to the heires which he shall beget of the bodie of his wife, in this case the wife hath nothing in the tenements, and the husband hath an estate but as donee in special taile. Yet if the husband die without issue, the same wife shall be endowed of the same tenements ; because the issue, which she by possibility might have had by the same husband, might have inherited the same tenements. But if the wife dyeth, living her husband, and after the husband takes another wife, and dieth, his 2. wife shall not be endowed in this case, for the reason aforesaid." B C

Then the note is as follows :

"So as by possibility it may happen that the wife may have issue by her husband.' Albeit the wife be a hundred years old, or that the husband at his death was but foure or seven years old, so as she had no possibilitie to have issue by him, yet seeing the law saith, that if the wife be above the age of nine years at the death of her husband, she shall be endowed, and that woman in ancient times have had children at that age, whereunto no woman doth now attaine, the law cannot judge that impossible, which by nature was possible. And in my time, a woman above threescore years old hath had a child, and ideo non definitur in jure." D E

CHITTY, J., thought, and I respectively agree, that that passage meant that no legal proposition can be founded on the impossibility of issue.

Further, the same principle seems to me to have been applied by the Court of Appeal in *Re Travis* (4), a case in which the question of the application of the Thellusson Act arose. It is said, however, that this last-mentioned case can be distinguished, because there the gift was contingent while here it is vested subject to a partial defeasance by the birth of other children. I am unable, however, to see the value of this distinction, if in fact I must determine the rights without regard to the capacity or incapacity of the parents to bear further children. It has also been urged upon me that in administration the court will sometimes give liberty to distribute a fund on the footing that there can be no more children, and that this is a ground for taking into account Mrs. Gosling's age. There are no doubt cases where on any view none but members of a particular class can take and where, though this class is theoretically capable of increase, it cannot in fact be increased. In such cases the court, acting administratively and not as a court of construction, will for convenience distribute on the footing that the class is closed. Such a course, however, could never be taken where, as here, so to act would affect the rights of other parties taking in certain events against the class. F G H

I must therefore, hold that upon the true construction of the will and in the events which have happened the income accrued or accruing between the expiration of the period and the death of Mrs. Gosling falls into residue. This is a result which may appear, at any rate to those who do not profit by it, as one to be regretted, because it defeats the expressed intention of the testatrix; but that is the purpose of the Act, and the construction which has brought this matter within the ambit of the Act results not from adherence to a blind technicality, but from the application of a principle of public utility forbidding for the purpose of determining legal rights the employment of an inquiry of a kind often detrimental to prosecute and difficult if not impossible to answer, and calculated if permissible to throw upon the dispositions of testators a cloud of uncertainty. [His Lordship I

A answered the questions in the summons by declaring in answer to the first question that the annuity of £500 was not payable out of accumulations ; by answering questions (ii) and (iii) in the negative, and by declaring that as from the end of twenty-one years from the death of the testatrix the income mentioned in question (iv) fell into residue.]

B Solicitors: Wansey, Stammers & Co.; Rooper & Whately; Coward, Chance & Co.

[Reported by L. MORGAN MAY, Esq., Barrister-at-Law.]

GIDDEN v. MILLS

D [KING'S BENCH DIVISION (Salter and Greer, JJ.), May 28, July 31, 1925]

[Reported [1925] 2 K.B. 713; 95 L.J.K.B. 1; 134 L.T. 21; 24 L.G.R. 27]

Rent Restriction—Application of Acts—Time of determination—Status of premises when action for possession brought—Possession—Part of premises sub-let by tenant as dwelling-house—Part retained by tenant as business premises—Right to possession of part used as business premises—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 5 (1), and s. 12 (2).

To ascertain whether premises are a dwelling-house to which the Rent Restriction Acts apply the court must look at their status at the time when an action for possession of the premises is brought, and not merely to the terms of the lease or agreement of tenancy granted or made by the landlord.

Where premises have been let as a whole as a dwelling-house within the Rent Restriction Acts, and part has been subsequently sub-let by the lessee as a dwelling-house, and part retained by him as business premises, the lessee can claim the protection of the Rent Restriction Acts for the part sub-let as a dwelling-house, although he is not himself in actual possession, but the part used as business premises is no longer protected by the Acts.

Notes. Followed: *West Wales Joint Board for the Mentally Defective v. Evans* (1928), 139 L.T. 382. Considered: *Fordree v. Barrell* (1931), 95 J.P. 141. Doubted: *Haskins v. Lewis*, [1930] All E.R. Rep. 227. Considered: *Gee v. Hazleton*, [1931] All E.R. Rep. 485; *Wolfe v. Hogan*, [1949] 1 All E.R. 570. Referred to: *Leslie v. Cummings*, [1926] All E.R. Rep. 408; *Thompson v. Rolls*, [1926] All E.R. Rep. 257; *Ebner v. Lascelles*, [1928] 2 K.B. 486; *Whitty v. Scott-Russell*, [1950] 1 All E.R. 884; *Court v. Robinson*, [1951] 1 All E.R. 209; *Piper v. Muggleton*, [1956] 2 All E.R. 249. *Levermore v. Jobey*, [1956] 2 All E.R. 362.

I As to the scope of the Rent Restriction Acts see 23 HALSBURY'S LAWS (3rd Edn.) 720-723, and as to premises losing the protection of the Acts see *ibid.*, p. 808. For cases see 31 DIGEST (Repl.) 634 et seq. For the Rent Restriction Acts of 1920 and 1933 see 13 HALSBURY'S STATUTES (2nd Edn.) 981, 1044.

Cases referred to:

- (1) *Callaghan v. Bristowe* (1920), 89 L.J.K.B. 817; 123 L.T. 622; 84 J.P. 250; 36 T.L.R. 841; 18 L.G.R. 442, D.C.; 31 Digest (Repl.) 640, 7473.
- (2) *Chapman v. Hughes* (1923), 129 L.T. 223; 39 T.L.R. 260; 67 Sol. Jo. 518; 21 L.G.R. 350; 31 Digest (Repl.) 713, 7985.
- (3) *Epsom Grand Stand Association, Ltd. v. Clarke* (1919), 35 T.L.R. 525; 63 Sol. Jo. 642, C.A.; 31 Digest (Repl.) 704, 7935.

- (4) *Hicks v. Scarsdale Brewery Co.*, [1924] W.N. 189; 157 L.T. Jo. 80, D.C.; 31 Digest (Repl.) 658, 7605. A
- (5) *Keeves v. Dean*, *Nunn v. Pellegrini*, [1924] 1 K.B. 685; 93 L.J.K.B. 203; 130 L.T. 593; 40 T.L.R. 211; 68 Sol. Jo. 321; 22 L.G.R. 127, C.A.; 31 Digest (Repl.) 694, 7865.
- (6) *Phillips v. Hallahan*, [1925] 1 K.B. 756; 94 L.J.K.B. 694; 133 L.T. 236; 41 T.L.R. 407; 69 Sol. Jo. 444; 23 L.G.R. 440, D.C.; 31 Digest (Repl.) 649, 7529. B
- (7) *Prout v. Hunter*, [1924] 2 K.B. 736; 93 L.J.K.B. 993; 132 L.T. 193; 40 T.L.R. 868; 69 Sol. Jo. 49; 22 L.G.R. 746, C.A.; 31 Digest (Repl.) 639, 7467.
- (8) *Rider v. Rollitt*, [1920] W.N. 227; 36 T.L.R. 687; 84 J.P. Jo. 267; 31 Digest (Repl.) 639, 7464. C

Appeal by the landlord from Bloomsbury County Court.

The facts and arguments are set out in the judgment of GREER, J., post p. 125.

Birkett, K.C., and *Stainton* for the landlord, plaintiff in the action.

Sir Malcolm Macnaghten, K.C., and *Humphrey Edmunds* for the tenant, defendant. D

The following cases were referred to: *Callaghan v. Bristowe* (1), *Chapman v. Hughes* (2), *Epsom Grand Stand Association, Ltd. v. Clarke* (3), *Hicks v. Scarsdale Brewery Co.* (4), *Keeves v. Dean* (5), *Phillips v. Hallahan* (6), *Prout v. Hunter* (7), *Rider v. Rollitt* (8).

Cur. adv. vult.

July 31. The following judgments were read. E

SALTER, J.—I have had the advantage of reading the judgment of GREER, J., in this case, and I need not repeat the facts. I agree with the observations he makes as to the order or judgment for the recovery of possession. I agree, also, that the conversion of the upper part of the warehouse into living rooms (if such conversion ever took place) and their use as living rooms were not breaches of the covenants of the lease of 1865. The case turns on s. 12 (2) and s. 5 (1) [see now Rent, &c., Restrictions (Amendment) Act, 1933, s. 3 (1), Sch. I] of the Act of 1920. The question is whether the demised premises as a whole are "a house let as a separate dwelling", and, if not, whether any part of the premises is "a part of a house let as a separate dwelling." As regards the premises as a whole, I think there was no evidence in which the learned judge could find, if he did find, that they were "let as a dwelling." The warehouse, or the stable, or the garage was never, as a whole, let as a dwelling or used as a dwelling. The facts are very different from those in *Callaghan v. Bristowe* (1). I, therefore, consider the two parts separately, and the upper part first. When premises are let to a tenant on such terms that he is free to use them as a dwelling-house, or not, as he pleases, it is impossible to say from the terms of the tenancy whether the premises are "let as a dwelling," or not. In such a case regard must be had to the user which is being made of the premises by the tenant or the sub-tenant then in occupation at the time when possession is sought to be obtained. If they are being used as a dwelling they are "let as a dwelling" and no order in ejectment can be made except in circumstances which do not exist here. It must, I think, be added by way of qualification that the user as a dwelling must not be a breach of any contract in which the plaintiff in ejectment is entitled to rely. A tenant cannot deprive his landlord of his common law rights by breaking the contract of tenancy. Further, the occupier at the time when possession is sought must be a person entitled to the protection of the Act. The prohibition in s. 5 (1), is against the ejectment of a tenant (that is, of a former tenant holding over), not against the ejectment of a mere trespasser. The occupier claiming the protection of the Act must be a former tenant or sub-tenant holding over or his successor under s. 12 (1) (g). In this case the sub-letting of the upper part as a dwelling was no breach of either F G H I

A of the leases, and Wilmore is a former sub-tenant holding over. Moreover, Wilmore's tenancy agreement expressly provides that the upper part demised to him shall be used as a private dwelling-house only. Therefore, whether regard is had to the head lease, or to the underlease, or to Wilmore's agreement, and whether to the terms of the letting or to the use made of the premises let, the upper part of these premises is found to be "a part of a house let as a separate dwelling," and B and an order of ejectment in respect of it is forbidden. As regards the garage alone, that has never been let as a separate dwelling and has never been, and is not, so used. As to this part, therefore, the plaintiff is entitled to his common law rights. The appeal succeeds and the judgment for the defendant must be set aside and judgment entered for the plaintiff on his alternative claim for possession of the garage alone.

C **GREER, J.**—This is an appeal from the judgment of the judge of the Bloomsbury County Court, dismissing with costs an action for possession of certain premises consisting of a garage with living rooms above, known as No. 6, Galen Place, Bury Street.

D On Mar. 20, 1865, the Duke of Bedford and the trustees of the Bedford estate, who are the freeholders, let the premises in question to George L. Neighbour for sixty years from Christmas, 1863, under the description of

"All that piece of ground situate . . . with the warehouse thereon erected being in the rear of . . . No. 13, Bloomsbury Square."

The lease contained the following covenant :

E "And the premises hereby demised shall not at any time during the said term be converted into or occupied as chambers, or as or for a school, seminary, or college of any kind, or as for a madhouse, billiard room, or public concert, music or ballroom, shooting gallery, or as or for a brothel, or as or for a foundry, hospital, infirmary, dispensary, public office, or institution of any kind, or as or for a house or shop for the sale of coals . . . vegetables, tobaccos, F wines, spirits . . . or provisions of any kind, without such consent as aforesaid."

There was this proviso :

"that the reception in the event of the breach, neglect, non-performance, or non-observance of any of the covenants contained therein of rent on the part of the said duke, or of the said trustees, their heirs or assigns, or their steward or agent, shall not be, and shall not be construed to mean, a waiver of any of the covenants . . . or of the penalty attached to the non-performance thereof."

Before 1913 the lessee's interest became vested in Messrs. W. Abbott and A. S. Rushton who by sub-lease dated Nov. 17, 1913, sub-let the premises to the defendant under the description of "all that piece of ground . . . with the coach-house and stable thereon erected." The sub-lease was for a period expiring on Dec. 22, 1923. No evidence was given at the trial showing how or when the premises had been converted from a warehouse into a coach-house and stable, but it appears that in Messrs. Abbott and Rushton's time, before the sub-lease to the defendant, the premises had been used as a coach-house and stable, with living room for the coachman in the upper floor. The defendant Mills converted the premises into a garage with living rooms over, the living rooms having a separate and independent entrance, and occupied them by keeping cars in the garage and by his chauffeur using the living rooms, not as tenant, but as servant. On Sept. 1, 1922, the defendant ceased to occupy the living rooms by his chauffeur, and let them to one Wilmore at a rent of £6 5s. per month, but continued in occupation of the garage. His lease expired on Dec. 22, 1923, and the head lease vested in Abbott and Rushton expired on Dec. 25, 1923. It is evident that after that date both the defendant and Wilmore would, apart from the Rent Restriction Acts, have become

trespassers against whom an order for possession could not be refused. On July 31, 1924, the freeholders leased the premises to the plaintiff, and it was conceded that as regards the right to possession the plaintiff stood in the shoes of the freeholders. The county court judge decided in favour of the defendant on the ground that the premises in question constituted a dwelling-house to which the Rent Restriction Acts applied, that the defendant was lawfully in possession, that breaches of covenant, if any, had been waived, and that, if such breaches of covenant had not been waived, he gave relief under the Conveyancing Act, and in any event he exercised his discretion under the Rent Restriction Act in favour of the defendant. In my judgment, the learned county court judge was right in refusing to give judgment for possession of the living rooms, but wrong in refusing to give judgment for possession of the garage.

It was argued by counsel for the plaintiff landlord that, inasmuch as the defendant was not in possession of any part of the premises as a dwelling-house, he could not claim the benefits of the Rent Restriction Acts, and, therefore, there must be judgment for the plaintiff as against the defendant, whether Wilmore was entitled to remain in possession of the living rooms or not, and he relied on the judgment of SWIFT, J., in *Hicks v. Scarsdale Brewery Co.* (4). In that case the plaintiff sued for possession of a dwelling-house which he had let to a man named Armstrong, and the defendants had by assignment become entitled to the lease. They sub-let to Sleight, who lived on the premises. The defendants never themselves occupied. It was admitted that the occupier was protected by the Acts and could not be ejected. The county court judge made an order for possession against the defendant. On appeal SWIFT, J., held that he was right because the Rent Restriction Acts were intended to protect the tenant in occupation, and that a tenant not himself in occupation whose terms has expired could not take advantage of the Acts. ACTON, J., thought that the express words of the Act prohibited the judge from making an order for possession. No point had been made in the county court about the nature of the action for possession. It seems to me that the action for possession is an action for an award of actual possession, and a judgment of possession is binding on the persons in fact in possession, and if judgment for possession is given the bailiff of the county court in executing the judgment must take physical possession and turn out whoever may be on the premises, unless they are occupied by a sub-tenant entitled to the protection of s. 5 of the Rent Restriction Act, 1920, as amended by the Act of 1923. It is impossible to read s. 138 of the County Courts Act, 1888 [see now s. 48 of the County Courts Act, 1934] without seeing that an action for possession under that Act is an action for physical possession. The action may be brought against the persons actually in possession, or it may be brought against the tenant. Whoever may be selected as defendant, it is an action, not for a declaration of rights to the rents and profits, but for possession of the land itself. And if there is a statute which prohibits an order of possession, this is a complete answer to the action for possession, notwithstanding the fact that the obstacle to an order does not arise out of the defendant's rights, but arises out of the privileged position of the person in actual occupation.

In my opinion, the first point made for the landlord fails so far as it is concerned with an order for possession of the whole premises. I agree with SWIFT, J., that a tenant who has sub-let the whole of the premises let to him is outside the protection of the Act, but I do not think a judgment for possession can be given as long as the premises are in the occupation of a person who is entitled by the Act to remain in occupation. The landlord's second point was that there had been a breach of a term of the agreement of tenancy in that the premises were being used as "chambers." Clauses of forfeiture are to be constructed strictly, and having regard to the rest of the restrictive clause I think it would be wrong to construe the word as meaning residential chambers. The prohibition of use as a madhouse or as a brothel seems to indicate that it was contemplated as permissible for people to live on the premises provided they were neither mad nor habitually unchaste.

A I do not think the letting of the rooms for residential purposes was a breach of terms of the lease.

It is unnecessary to deal with the further question of waiver, or reasonableness, but it remains for me to consider the difficult question whether the judge was wrong in refusing to make an order for possession of the garage only. Proviso (ii) to s. 12 (2) of the Increase of Rent, &c., Act, 1920, provides that

B "the application of this Act to any house or part of a house shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade, or professional purposes."

C It seems to me that this proviso must be constructed distributively, so as to mean that where a house is let as a dwelling-house so as to make the statute apply to it, then the fact that part of the house is used as a shop, &c., will not take it out of the Act, and that where part of a house is so let then the fact that a portion of the part so let is used as a shop, &c., will not take the part so let out of the Act, but it does not mean that where part of the house is let separately as a dwelling-house, and part is let separately for business premises, the Act applies to the whole house. It has been decided, and I think rightly, that where the landlord or owner gets possession of a house which was a dwelling-house within the Act, and himself, by separate lettings divides it into rooms let as a dwelling-house, and rooms let by separate agreement as business premises, the Act no longer applies to the business premises: see *Phillips v. Hallahan* (6). In the present case neither the landlord nor his immediate lessee has made any separate letting of different parts of the premises in question, but the defendant tenant himself has separately let the upper portion of the premises as a dwelling-house, and is continuing to use the ground floor himself as a garage.

F It was decided in *Prout v. Hunter* (7) that if a lessee sub-lets the premises for purposes other than those which are protected by the Act he thereby changes the status of the premises and the Act ceases to apply to them. In that case the plaintiff let an unfurnished flat to a tenant who furnished the flat and sub-let to the defendant. The court held that the flat had lost the status it had under the tenancy agreement between the plaintiff and his tenant; it had become a furnished flat, and the Act no longer applied to it. It seems to me to follow from this that in order to ascertain whether the premises are a dwelling-house to which the Act applies the court must look at the status of the premises at the time the action for possession is brought, and not merely to the terms of the lease or agreement of tenancy granted or made by the plaintiff. If the defendant had let the garage to another person as a garage the garage would on the authority of *Prout v. Hunter* (7), and *Phillips v. Hallahan* (6), be outside the Act. Does it make any difference that he has not separately let the garage, but is using it as a garage himself? I think not. It seems to me that where a house is let on terms which admit of its user as business premises or as a dwelling-house and at the time the action is brought it is being used by the defendant solely for business purposes, the house is then not within the definition of a dwelling-house to which the Act applies. It is not then "let," or looking at it from the opposite angle, "tenanted" as a dwelling-house. I can see no other way in which the Act can be applied to houses let without any prohibition as to user, so that they may be used in any lawful way, than by holding that user at the time the claim to possession is made must determine the question whether the Act applies to them or not. The proviso to sub-s. 2, of s. 12, seems to show that, except as therein provided, user may be the determining factor in deciding whether the Act does or does not apply to premises. In my judgment, by dividing the premises into two parts—one let as a dwelling-house and the other retained for his own use as a garage—the defendant has lost the protection of the Act so far as the garage is concerned. The action is a common law action for possession of the whole of the premises. The defendant is entitled to say to the court that s. 5 prohibits an order for possession of the living

rooms inasmuch as his tenant was lawfully in possession of those rooms when the lease came to an end, but he cannot rely on the section as an answer to the plaintiff's claim for possession of the garage. I think the appeal should be allowed and judgment given for possession of the garage.

Appeal allowed.

Solicitors: *Stanley Evans & Co.; Mills & Morley.*

[*Reported by T. R. FITZWALTER BUTLER, Esq., Barrister-at-Law.*]

Re GIBBS AND HOULDER BROS. & CO., LTD.'S LEASE. HOULDER BROS. & CO., LTD. v. GIBBS

[COURT OF APPEAL (Sir Ernest Pollock, M.R., Warrington and Sargant, L.JJ.), May 5, 1925]

[Reported [1925] Ch. 575; 94 L.J.Ch. 312; 133 L.T. 322; 41 T.L.R. 487; 69 Sol. Jo. 541]

Landlord and Tenant—Assignment of lease—Consent—Refusal—Ground of refusal extraneous to lease and relation of landlord and tenant.

By a lease dated Sept. 29, 1908, the defendant demised to the plaintiffs premises for a term of twenty-one years, and the plaintiffs covenanted that they would not during such term, without the consent of the defendant first obtained, assign, sub-let, or part with the possession of the demised premises or any part thereof, "such consent not to be withheld unreasonably in the case of a respectable and responsible person or corporation." In June, 1924, the plaintiffs wished to assign the premises to R., Ltd., for the residue of the term, but the defendant, while stating that he had not the slightest objection to R., Ltd., on the ground of respectability and responsibility, refused his consent on the ground that by the assignment he would lose R., Ltd., as good tenants of other property belonging to him, for which he would have great difficulty in finding another tenant. The plaintiffs sought declarations that the defendant's refusal was unreasonable and that they were entitled to assign the lease without his consent.

Held: the question whether or not a particular act was reasonable or unreasonable could not be determined on abstract considerations, but must be regarded in reference to the circumstances in which it was committed; when the question arose on the construction of a contract the outstanding circumstance to be considered was the nature of the contract and the relation between the parties resulting from it—in the case of a lease the relation between the lessor and the lessee; in the present case the sole reason operating on the defendant's mind was extraneous to the lease and the relation of landlord and tenant; and, therefore, the plaintiffs were entitled to the declarations they claimed.

Notes. In *Tredegar v. Harwood*, [1928] All E.R. Rep. 11, two members of the House, VISCOUNT DUNEDIN and LORD PHILLIMORE, expressed the opinion, obiter, that reasonableness was not necessarily to be referred to something which touched both parties to the lease sought to be assigned, but was to be read in a general sense. The present decision was followed and applied as stated below. By the Landlord and Tenant Act, 1927, s. 19, a covenant not to assign, &c., without

A consent is to be deemed to be subject to a proviso that consent is not to be unreasonably withheld.

Doubted: *Tredegar v. Harwood*, [1928] All E.R. Rep. 11. Followed: *Re Swanson's Agreement*, *Hill v. Swanson*, [1946] 2 All E.R. 628. Applied: *Lee v. K. Carter, Ltd.*, [1948] 2 All E.R. 690. Considered: *Re Town Investments, Ltd., Underlease*, *McLaughlin v. Town Investments, Ltd.*, [1954] 1 All E.R. 585.

B Referred to: *Premier Confectionery (London) Co. v. London Commercial Sale Room, Ltd.*, [1933] All E.R. Rep. 579; *Lambert v. Woolworth & Co. (No. 2)*, [1938] 2 All E.R. 664; *Swanson v. Forton*, [1949] 1 All E.R. 135.

As to covenants against assignment or underletting see 23 HALSBURY'S LAWS (3rd Edn.) 629 et seq.; for cases see 31 DIGEST (Repl.) 410 et seq.; and for Landlord and Tenant Act, 1927, see 13 HALSBURY'S STATUTES (2nd Edn.) 883.

C Cases referred to:

(1) *Re Winfrey and Chatterton's Agreement*, [1921] 2 Ch. 7; sub nom. *Re Winfrey and Chatterton's Agreement*, *Chatterton v. Evison*, 90 L.J.Ch. 417; 125 L.T. 159; 37 T.L.R. 428; 65 Sol. Jo. 379; 31 Digest (Repl.) 480, 5572.

D (2) *Bates v. Donaldson*, [1896] 2 Q.B. 241; 65 L.J.Q.B. 578; 74 L.T. 751; 60 J.P. 596; 44 W.R. 659; 12 T.L.R. 485, C.A.; 31 Digest (Repl.) 424, 5521.

(3) *Treloar v. Bigge* (1874), L.R. 9 Exch. 151; 43 L.J.Ex. 95; 22 W.R. 843; 31 Digest (Repl.) 420, 5491.

(4) *Barrow v. Isaacs & Son*, [1891] 1 Q.B. 417; 60 L.J.Q.B. 179; 64 L.T. 686; 55 J.P. 517; 39 W.R. 338; 7 T.L.R. 175, C.A.; 31 Digest (Repl.) 547, 6696.

E (5) *Governors of Bridewell Hospital v. Fawkner and Rogers* (1892), 8 T.L.R. 637; 31 Digest (Repl.) 423, 5510.

(6) *Mills v. Cannon Brewery Co.*, [1920] 2 Ch. 38; 89 L.J.Ch. 354; 123 L.T. 324; 84 J.P. 148; 36 T.L.R. 513; 64 Sol. Jo. 447; 31 Digest (Repl.) 423, 5511.

F (7) *Harrison, Ainslie & Co. v. Barrow-in-Furness Corpn.* (1891), 63 L.T. 834; 39 W.R. 250; 31 Digest (Repl.) 423, 5507.

(8) *Young v. Ashley Gardens Properties, Ltd.*, [1903] 2 Ch. 112; 72 L.J.Ch. 520; 88 L.T. 541, C.A.; 31 Digest (Repl.) 431, 5575.

Appeal from an order given by TOMLIN, J., reported [1925] 1 Ch. 198.

The defendant, by an indenture of lease, dated Sept. 29, 1908, demised to the plaintiffs premises known as White Building, Market Street, Sheffield, for a term of twenty-one years from Sept. 29, 1908, and the plaintiffs thereby covenanted that they would not during such term, without the consent of the defendant first obtained, assign, sub-let, or part with the possession of the demised premises or any part thereof, "such consent not to be withheld unreasonably in the case of a respectable and responsible person or corporation." In June, 1924, the plaintiffs agreed with Roneo, Ltd., to assign the premises to them for the residue of the term, subject to the consent of the defendant being obtained in accordance with the covenant. Roneo, Ltd., the proposed assignees, held on a yearly tenancy from the defendant No. 12, Market Street, Sheffield, which adjoined the premises the subject of the proposed lease. In reply to a letter from the plaintiffs asking for his consent to the proposed lease, the defendant, on June 18, 1924, wrote to the plaintiffs' manager stating that he was not willing to consent to the proposed assignment on the ground that it would result in Roneo, Ltd., giving up their tenancy of No. 12, Market Street. On Aug. 30 he wrote to the solicitor of Roneo, Ltd., saying that he had not the slightest objection to Roneo, Ltd., as tenants of the plaintiffs' premises on the ground of any want of respectability and responsibility. The defendant, on Sept. 2, again wrote to the solicitor:

"My sole reason for withholding my consent is on the reasonable ground that by the assignment I should lose Roneo, Ltd., as good tenants of No. 12, and because I shall have great difficulty in finding any tenant for No. 12."

This refusal the plaintiffs considered was unreasonable, and they took out a summons asking for a declaration: (i) That, on the true construction of the lease, and in the events which had happened, the refusal of the defendant to grant a licence to the plaintiffs to assign the lease to Roneo, Ltd., was unreasonable; and (ii) that, notwithstanding such refusal, the plaintiffs, without any licence from the defendant, were entitled to assign the lease to Roneo, Ltd.

J. H. Stamp, for the plaintiffs, referred to *Re Winfrey and Chatterton's Agreement* (1), *Bates v. Donaldson* (2).

Gavin T. Simonds, K.C., and *R. F. Roxburgh*, for the defendant, referred to *Treloar v. Bigge* (3), *Barrow v. Isaacs & Son* (4), *Governors of Bridewell Hospital v. Fawcner and Rogers* (5), *Mills v. Cannon Brewery Co.* (6), *Harrison, Ainslie & Co. v. Barrow-in-Furness Corpn.* (7), *Bates v. Donaldson* (2).

TOMLIN, J., in giving judgment, said that the principle stated by *A. L. SMITH, L.J.*, in *Bates v. Donaldson* (2) was accurately stated, and that it was by reference to the personality of the proposed new lessee or the nature of the proposed new user or occupation of the premises, that the court had to judge of the reasonableness of the lessor's refusal to consent to an assignment. It was quite true that the injury threatened or apprehended to the lessor might be in respect of something which had nothing to do with the lease of the demised premises; it might be in relation to other property of which he was the owner, but the danger must come from the nature of the user or occupation or from the personality of the assignee. In the present case what is the real reason of the refusal? The real reason was not one which had anything to do with the personality of the lessee, or with the user or occupation of the premises. It was that the lessor wanted to prevent the assignee from giving up other premises of which he was lessor. In other words, his real purpose in refusing an assignment was not in relation to the demised premises at all, but in relation to other property, and to bring pressure to bear on the assignee not to give up a tenancy of different premises belonging to him. The refusal of the landlord was unreasonable, and, that being so, the lessee was free to assign. The landlord appealed.

Gavin T. Simonds, K.C., and *R. F. Roxburgh* for the landlord.

J. H. Stamp for the tenants.

SIR ERNEST POLLOCK, M.R.—This is an appeal from a decision of *TOMLIN, J.*, given upon an originating summons in which the plaintiffs ask that, on the true construction of a lease under which they were lessees, and in the events which have happened, it may be declared that the refusal of the defendant to grant a licence to the plaintiffs to assign the lease to Roneo, Ltd., was unreasonable, and, secondly, that, notwithstanding such refusal, the plaintiffs, without any licence from the defendant, were entitled to assign the lease to Roneo, Ltd.

The first question is the real question that we have to decide, because it has been held in *Treloar v. Bigge* (3) that where there has unreasonably been a refusal on the part of the lessor to allow the lessee to assign, the lessee is entitled to assign the premises without a licence. It is unnecessary to state the facts at length. It is only necessary to say, in order to explain my judgment, that the plaintiffs were the lessees under a lease granted by the defendant, which is dated Sept. 29, 1908, of premises known as No. 10, Market Street, in the city of Sheffield. The plaintiffs went into possession and have held the premises under that lease, which contains the following covenant:

"The company [i.e., the plaintiffs] will not, during the said term, without the consent in writing of the lessor first obtained, assign, sub-let, or part with the possession of the hereby demised premises, or any part thereof, such consent not to be withheld unreasonably in the case of a respectable and responsible person or corporation."

A The lessees are now anxious to assign the balance of the term. The lessor has refused his consent, and he refused it candidly and avowedly on the grounds which are stated in a letter to which attention has been called, and which is in these terms:

B "I withhold my consent to Houlder Bros. assigning to Roneo, Ltd., on the reasonable ground that by the assignment I should lose Roneo, Ltd., as good tenants of No. 12 [the premises adjoining the demised premises], and because I should have great difficulty in finding any tenant for No. 12 in the present abnormal condition of trade in Sheffield, the loss being rent at the rate of £295 per annum, and probably for a considerable period."

C The premises which were granted to the plaintiffs upon this lease lie contiguous to the premises No. 12 of which Roneo, Ltd., are the tenants; and Roneo, Ltd., are the proposed tenants to whom the plaintiffs desire to assign the balance of their term. The short point, therefore, for us is whether or not the avowed reason for Mr. Gibbs withholding his consent, namely, that he will have great difficulty in finding a tenant for No. 12, part of his property, in the present abnormal condition of trade in Sheffield, with the consequent burden of an empty building, and possible loss of rent, is an adequate reason under the terms of the covenant in the lease for withholding his consent to the assignment. It is admitted that Roneo, Ltd., fulfil the condition mentioned in the covenant and are a respectable and responsible person or corporation, but it is claimed by Mr. Gibbs that in the case where a respectable and responsible person or corporation is submitted as a proposed assignee, he still has a right to withhold his consent, the only condition being that that consent must not be withheld unreasonably. The question therefore is: Is it unreasonable on the part of Mr. Gibbs to refuse to consent to the assignment to Roneo, Ltd., on the ground that he will run a risk, and that, personally, his interest is imperilled by the fact that there might be a loss supervening to him if Messrs. Roneo, Ltd., should give up the shop of which they are at present in occupation, No. 12, and take No. 10? It is stated shortly that the reason for the refusal is not the occupation of the premises No. 10 by Roneo, Ltd., but the non-occupation by Roneo, Ltd., of these other premises which are not comprised in the parcels of the lease.

E It is unnecessary, I think, to go through the cases, of which there are some half dozen or more, bearing more or less upon this point. It appears to me that in construing the meaning of the words "such consent not to be withheld unreasonably," one has to bear in mind that by law, without this covenant, the tenant would have a right to assign the premises. The lessor, therefore, takes this covenant from the lessee in order to cut down the lessee's rights, and to be able to ensure that the premises do not pass into the hands of some person or corporation to whom objection could reasonably be taken by the lessor. Equally, the lessee, while accepting the burden of this covenant which prevents his assigning without the leave of the landlord, obtains from the landlord these words which cut down the right of the landlord to withhold his consent, and prevent him from acting from caprice, mere prejudice, or the like. Without going through the cases that have been referred to, it seems to me useful to call attention to the statement made by KAY, L.J., in *Barrow v. Isaacs & Son* (4) ([1891] 1 Q.B. at p. 423):

H "The terms of the covenant are quite clear. If the intended lessees are respectable and responsible persons the consent is not to be 'arbitrarily withheld'."

I It is agreed, or certainly not argued, that there is any difference between "arbitrarily" and "unreasonably." KAY, L.J., goes on:

"Those words simply mean that the consent must be asked for before the assignment, and that it may be withheld, even though the intended lessees are proper persons, if such withholding is not arbitrary. Many cases may be supposed in which it would not be."

Then he passes on to give some cases as illustrations of what would not be arbitrary, but all of them relate to the user of the property or have some connection with the actual property which is the subject of contract between the lessor and lessee. The next case is *Bates v. Donaldson* (2) where A. L. SMITH, L.J., says:

"It is not, in my opinion, the true reading of this clause that the permission can be withheld to enable the lessor to regain possession of the premises before the termination of the term. It was in my judgment inserted alio intuitu altogether, and in order to protect the lessor from having his premises used or occupied in an undesirable way or by an undesirable tenant or assignee, and not in order to enable the lessor to, if possible, coerce a tenant to surrender the lease so that the lessor might obtain possession of the premises."

His judgment differs, in some important degree, from the judgment which had been delivered by KAY, L.J., and I think the closer one examines the case the more clear that becomes, because I suggested in argument that what KAY, L.J., had said was subject to the passage in which he said ([1896] 2 Q.B. at pp. 244, 245): "Clearly it is not sufficient for him to say, 'I want to oblige the lessee to sell to me.'" He does afterwards make some suggestions which are not in accordance with what A. L. SMITH, L.J., intends to lay down. For my part, I agree with A. L. SMITH, L.J., and I think that we must look at these words in their relation to the premises, and to the contract made in reference to the premises between the lessor and the lessee; in other words, one must pay attention to the relation of the landlord and tenant inter se, or, perhaps one may add, to the due and proper management of the property, as in *Governors of Bridewell Hospital v. Fawcner and Rogers* (5), where there is an illustration of a withholding of consent on broad grounds bearing upon the estate of the lessor, or it may be on grounds which are important between the lessor and other tenants of that property or that estate, of which the lessee had cognisance, but I do not think the words can be so interpreted as to be properly exercised when the reason of the lessor is one given independently of the relation between the lessor and the lessee, and on grounds which are entirely personal to the lessor, and wholly extraneous to the lessee. As an illustration of what I mean I refer to *Young v. Ashley Gardens Properties, Ltd.* (8), where a condition was attempted to be imposed by the lessor, not in reference to the relation between himself and the lessee, not in relation to the property which was the subject of the lease, but one wholly personal to the lessor himself, a condition whereby he attempted to obtain immunity from possible increase in the rates.

In the present case it appears to me that the lessor has frankly avowed that there is no objection to Roneo, Ltd., as a respectable and responsible corporation, and that the sole reason operating upon his mind is something extraneous to the relation of landlord and tenant, something extrinsic from the lessee, and something which is wholly personal to the lessor. To hold that such a reason is a good exercise of the duty of the landlord in complying with the terms of the covenant would be, to my mind, to give an interpretation to the words which is far too wide, and going beyond the cases, and while I think it is impossible to give an exact definition which will fit all cases, I prefer the reasoning which is stated by A. L. SMITH, L.J., in *Bates v. Donaldson* (2), and, I think, has been followed by TOMLIN, J. For these reasons I think the appeal must be dismissed with costs.

WARRINGTON, L.J.—I am of the same opinion. The question turns upon the construction of a lease, the plaintiffs being the lessees, and the defendant being the lessor. The lease contained a covenant against assignment, or under-letting without the consent in writing of the lessor, but that covenant was qualified by these words:

"such consent not to be withheld unreasonably in the case of a respectable and responsible person or corporation."

A The lessor has withheld his consent to an assignment to an admittedly respectable and responsible corporation, the company called Roneo, Ltd., and the question, therefore, is whether he has unreasonably withheld his consent. He has withheld that consent on this ground. The proposed assignee happens to be tenant to himself of a shop in the same building, and adjoining that which is the subject of the lease. The lessor is convinced on what I will assume to be sufficient ground that, if the proposed assignee is allowed to take the assignment of the shop, the subject of the lease, he will give up the other shop, and the lessor will have considerable difficulty in finding a new tenant therefor. It is on that ground that the lessor has refused consent. That is a ground having no reference to the actual personality of the proposed assignee and no reference to the effect of the proposed assignment in reference to the user or occupation of the demised premises.

C The question whether a particular act is reasonable or unreasonable is obviously one that cannot be determined on abstract considerations. An act must be regarded as reasonable or unreasonable in reference to the circumstances under which it is committed, and when the question arises on the construction of a contract the outstanding circumstance to be considered is the nature of the contract to be construed, and the relation between the parties resulting from it. In the present case the contract is a lease, and the relation between the parties that of lessor and lessee. The first question that arises is: What is the inference as to the intention of the parties in inserting in the lease a provision of this kind? What was the danger which the landlord contemplated, and against which the tenant was content to protect himself? It must, of course, be borne in mind that without this covenant the lessee would have a free right to assign to whom he pleased the premises comprised in the lease, and the covenant, therefore, is inserted as a protection to the lessor, and then the proviso is attached to it in order to prevent the lessor making an unreasonable use of that protection. What is to be inferred from what may be treated as in the contemplation of the parties when the contract was made? I think it must be, as I have said, that it was intended to protect the lessor as against a tenant, who, although respectable and responsible, might well be reasonably objectionable in other ways, and, secondly, from the point of view of the property, to prevent the landlord from having to accept a tenant whose user of the property might again be reasonably objectionable. The user of the property to be reasonably objectionable need not necessarily be objectionable to the lessor, as lessor of that particular property. The user of the property might damage the lessor in other ways, and, if it did, then an objection to that user would be reasonable, but, whichever way it is looked at, I think you must find in the objection something which connects it either with the personality of the intended assignee who is suggested as the new tenant of the property, or with the user which he is likely to make of the property to be assigned to him.

H When one looks at the authorities—I do not propose to go through them—this, at any rate, is plain, that in the cases in which an objection to an assignment has been upheld as reasonable it has always had some reference either to the personality of the tenant, or to his proposed user of the property. The case which was, perhaps, most relied upon by the landlord is *Governors of Bridewell Hospital v. Fawcner and Rogers* (5), because there what was apprehended was damage to the lessor in respect of other property of the lessor, but the damage which was apprehended would have resulted, if it resulted at all, from either the nature of the proposed assignee, who was the General of the Salvation Army, or to the use to which he was likely to put the property, so that that fell within the limitation which I have suggested. I think that even in the judgment of Kay, L.J., in *Bates v. Donaldson* (2) the same idea is to be found, although he puts it in more general terms. First of all he says:

“I agree that if the proposed assignee intended to use the house for some purpose to which the landlord might reasonably object, though such purpose was

not forbidden by the lease, nor by any rule of law, the landlord might reasonably refuse to permit the assignment."

Then there were the words which were much relied upon by the landlord:

"So I should think there might be other reasons, personal rather to the landlord than the tenant, which might justify his refusal under the terms of this covenant."

In the *Bridewell Case* (5) the refusal was personal rather to the landlord than to the tenant, but it had reference to the user by the proposed tenant of the property, and so I think that it does not at all follow that KAY, L.J., had in contemplation any such objection as that with which we have to deal in the present case. I think the judgment of A. L. SMITH, L.J., entirely supports the view which the learned judge has expressed. On the whole, I agree with the judgment of TOMLIN, J., and, in my judgment, the appeal ought to be dismissed with costs.

SARGANT, L.J.—I am of the same opinion. In *Re Winfrey and Chatterton's Agreement* (1) I had to consider this sort of case, and in particular to consider the two rather conflicting judgments of KAY, L.J., and A. L. SMITH, L.J., in *Bates v. Donaldson* (2). I then expressed a decided preference for the views of A. L. SMITH, L.J. I am glad to think that that preference now has been affirmed by the other members of this court. I should like to point out that, in my judgment, the sentence of A. L. SMITH, L.J.:

"It was, in my judgment, inserted *alio intuitu* altogether and in order to protect the lessor from having his premises used or occupied in an undesirable way or by an undesirable tenant or assignee,"

is a general statement and is not to be read as merely negating the subsequent sentence—"and not in order to enable the lessor to, if possible, coerce a tenant to surrender the lease." It seems to me that he is laying down, in the first part of that sentence, a major premise and stating what he thinks are the limits of the clause in question, and it is merely one consequence of that view of those limits that the lessor must not use the clause to coerce the tenant to surrender the lease. I should like also to point out that that phrase of A. L. SMITH, L.J., "*alio intuitu*," is, in my judgment, absolutely applicable, because it recognises that, in considering the operation and effect of a lease of this kind, you have to consider what was within the reasonable contemplation of the parties to the lease. In the present case counsel for the tenants has pointed out in his able argument that it is not necessary for the success of his clients that the operation of the lease should be limited even as little narrowly as A. L. SMITH, L.J., limited it, because he (counsel) points out that not only is what is contemplated something that is not in relation to the use or occupation of the premises, or to the personality of the tenant, but that the reason has nothing whatever to do with the subject-matter of the demise. I was very much impressed by his argument that in a case of this kind the reason must be something affecting the subject-matter of the contract which forms the relationship between the landlord and the tenant, and that it must not be something wholly extraneous and completely dissociated from the subject-matter of the contract. It is to be noticed that, under the statute of Henry VIII [32 Hen. 8, c. 34: *Grantees of Reversions, 1540*], on an assignment of a reversion, or conveyance of a reversion of a lease, the relationship between the landlord and tenant is completely transferred to the new parties. The result of any other view than that which I have expressed in the present case would be that, as the personality of the lessor varied, so the reasons for refusing or withholding the consent of the lease might vary if those reasons might include any circumstance that happened for the time being to affect the pecuniary interest of the lessor. In the present case the reason for refusing has nothing whatever to do with the relationship of landlord and tenant in regard to the subject-matter of the demise. The sole reason is that, if the property is allowed to be assigned to the new tenants, the new tenants will

A probably desire to terminate their tenancy of other property under the power of determination given to them by the lease under which they hold that property from the defendant. In my judgment, that is a reason wholly dissociated from, and unconnected with, the bargain made between the lessor and the lessees under the lease that we have to consider, and is, from that point of view, a purely arbitrary and irrelevant reason. I agree that the appeal should be dismissed.

B Solicitors: *Ashurst, Morris, Crisp & Co.*; *Bell, Broderick & Gray*, for *Rodgers & Co.*, Sheffield.

[Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.]

C

SPENCER v. KENNEDY

D [CHANCERY DIVISION (Astbury, J.), December 11, 1925]

[Reported [1926] Ch. 125; 95 L.J.Ch. 240; 134 L.T. 591]

Company—Director—Qualification—Time—Registration of qualifying shares.

E By an article of association of a private company the directors had power at any time to appoint "any other qualified person" to be a director, either to fill a casual vacancy or as an additional director, but so as not to exceed the maximum number of directors, which under the special articles was five. Under provisions of Table A which had been adopted by the company a director's qualification was one share. At a directors' meeting held on Nov. 14, 1925, a transfer of one share from one of the directors to H.M. was produced and passed for registration, and it was then moved and carried that H.M. should be appointed an additional director. Another transfer of one share by another of the directors to F.M. was produced and passed for registration, and it was then proposed and carried that F.M. should be appointed a director. Both the transfers were registered on Nov. 16.

F **Held:** on construction of the article of association "qualified person" meant a person who was at the time of his appointment holding the necessary share qualification; although at the board meeting on Nov. 14 H.M. and F.M. acquired an absolute right to have their shares registered they did not become members of the company or qualify as directors until the transfers were registered on Nov. 16; and, therefore, their election as directors on Nov. 14 was not valid.

G **Notes.** Under art. 77 of the Table A scheduled to the Companies Act, 1948, no shareholding qualification for directors is required unless and until a qualification is fixed by the company in general meeting. The present decision would become applicable on such a qualification being fixed, or in the case of a company which had not adopted Table A, but was governed entirely by special articles in which a qualification was prescribed.

I Doubted: *Holt v. Catterall* (1931), 47 T.L.R. 332. Considered and Applied: *Robert Batcheller & Sons, Ltd. v. Batcheller*, [1945] 1 All E.R. 522; *Grundt v. Great Boulder Proprietary Mines, Ltd.*, [1947] 2 All E.R. 439. Applied: *Holmes v. Lord Keyes*, [1948] 1 All E.R. 721.

As to the shareholding qualification of directors see 6 HALSBURY'S LAWS (3rd Edn.) 284-289, and for cases see 9 DIGEST 462 et seq. For Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Cases referred to:

- (1) *York Tramways Co. v. Willows* (1882), 8 Q.B.D. 685; 51 L.J.Q.B. 257; 46 L.T. 296; 30 W.R. 624, C.A.; 9 Digest (Repl.) 453, 2973.

- (2) *Re Great Northern Salt and Chemical Works, Ex parte Kennedy* (1890), 44 Ch.D. 472; 59 L.J.Ch. 288; 62 L.T. 231; 2 Meg. 46; 9 Digest (Repl.) 453, 2974. A
- (3) *Re Percy and Kelly Nickel, Cobalt and Chrome Iron Mining Co., Jenner's Case* (1877), 7 Ch.D. 132; 47 L.J.Ch. 201; 37 L.T. 807; 26 W.R. 291, C.A.; 9 Digest (Repl.) 463, 3026.
- (4) *Channel Collieries Trust, Ltd. v. Dover, St. Margaret's and Martin Mill Light Rail. Co.*, [1914] 2 Ch. 506; 84 L.J.Ch. 28; 111 L.T. 1051; 30 T.L.R. 647; 21 Mans. 328, C.A.; 10 Digest (Repl.) 1239, 8716. B
- (5) *Société Générale de Paris v. Walter* (1855), 11 App. Cas. 20; 55 L.J.Q.B. 169; 54 L.T. 389; 34 W.R. 662; 2 T.L.R. 200, H.L.; 9 Digest (Repl.) 435, 2843.
- (6) *Bainbridge v. Smith* (1889), 41 Ch.D. 462; 60 L.T. 879; 37 W.R. 594; 5 T.L.R. 375, C.A.; 9 Digest (Repl.) 465, 3037. C

Motion for an injunction.

The Revelation Expanding Suit Case Co., Ltd., was incorporated as a private company on Oct. 3, 1923, to purchase and work a patent belonging to one Ernest Kennedy. The capital of the company was £500 in 500 shares of £1 each, of which 249 shares were allotted to Ernest Kennedy as fully paid-up shares, and one fully paid-up share was allotted to his nominee Jerome Kennedy. The other shares were paid for in cash and allotted as to 200 shares to George Spencer, as to twenty-five shares to Frederick Martin, and as to twenty-five shares to Henry Martin. The signatories to the memorandum of association were Jerome Kennedy and Henry Martin. The company partly adopted Table A and partly was governed by special articles, which provided as follows. By art. 17 the number of directors was not to be less than two nor more than five. By art. 18 Ernest Kennedy, Henry Martin, George Spencer and Frederick Martin were appointed the first directors, Ernest Kennedy and Henry Martin being appointed permanent directors for their lives. By art. 19 Ernest Kennedy was appointed chairman of the board of directors as long as he was a director. By art. 20:

"The directors shall have power at any time and from time to time to appoint any other qualified person to be a director of the company either to fill a casual vacancy or as an addition to the board, but so that the total number of directors shall not at any time exceed the maximum number hereinbefore fixed. Any director so appointed shall hold office only until the next following ordinary general meeting, when he shall retire, but shall be eligible for re-election."

By art. 22 the quorum of directors was made two. Article 23 provided:

The office of a director shall be vacated . . . (d) If he cease to hold the necessary share qualification, or do not obtain the same within one month from the date of his appointment."

By art. 25 Henry Martin was appointed managing director, subject to the terms of an agreement which provided that he should hold office for five years from the date of the incorporation of the company. The relevant articles of Table A were as follows:

"Article 18 [see art. 22 of 1948 Table A]. The instrument of transfer of any share in the company shall be executed both by the transferor, and transferee, and the transferor shall be deemed to remain a holder of the share until the name of the transferee is entered in the register of members in respect thereof.

Article 70 [see art. 77 of 1948]. The qualification of a director shall be the holding of at least one share in the company, and it shall be his duty to comply with the provisions of s. 73 of the Companies (Consolidation) Act, 1908 [now s. 182 of the Companies Act, 1948].

Article 78 [see art. 89 of 1948]. At the first ordinary meeting of the company the whole of the directors shall retire from office, and at the ordinary meeting

A in every subsequent year one-third of the directors for the time being, or if their number is not three or a multiple of three, then the number nearest to one-third, shall retire from office.

Article 80 [see art. 91 of 1948]. A retiring director shall be eligible for re-election.

B Article 81 [see art. 92 of 1948]. The company at the general meeting at which a director retires as aforesaid may fill up the vacated office by electing a person thereto."

The company had been remarkably successful, but, unfortunately, friction had arisen between the directors as to the management of the company from which the ensuing events arose.

C The annual general meeting was held on Wednesday, Nov. 11, 1925, at 6.30 p.m., at which Ernest Kennedy (chairman), Jerome Kennedy, Henry Martin, and Spencer were present. Spencer was due to retire from the office of director by rotation, but offered himself for re-election. Part of the business of the meeting of which notice was given was the election of a director in place of Spencer. At the meeting the election of Spencer was moved by Henry Martin and seconded by Spencer himself, but Ernest Kennedy stated that he could not support the motion as he wished to get control of the board, that Jerome Kennedy would vote with him, and that he should use his casting vote. In consequence of this the matter was not then dealt with, but the general meeting was adjourned until Thursday, Nov. 12, at 5.30 p.m., and then successively to Saturday, Nov. 14, at noon, and Tuesday, Nov. 17, at 10 a.m. On Friday, Nov. 13, Henry Martin, as managing director, called a board meeting for Saturday, Nov. 14, at 11 a.m., to consider the resignation of Messrs. Morgan Bros. & Co., the auditors, the passing of transfers, and the appointment of new directors. At this meeting Ernest Kennedy (chairman), Spencer, Henry Martin, and Frederick Martin were present. The resignation of the auditors was accepted, and a transfer was produced of one share from Henry Martin to Henry Morgan and was passed for registration. Henry Martin then moved and Frederick Martin seconded the appointment of Henry Morgan as an additional director under special art. 20, which was carried, and Henry Morgan then attended the meeting. Transfers by Frederick Martin of his twenty-five shares, as to one share to Francis Morgan, and as to twenty-four shares to Henry Martin, were then produced, and were passed for registration. Frederick Martin then retired from the meeting, and Henry Morgan proposed and Henry Martin seconded, a resolution that, as Frederick Martin had lost his qualification as director, his office should be declared vacant under special art. 23 (d), which was carried. Henry Morgan then proposed, and Henry Martin seconded a resolution, that Francis Morgan should be appointed a director to fill this casual vacancy, which was carried. Spencer, whose directorship was in suspense owing to the adjournment of the general meeting, did not vote on these resolutions. Ernest Kennedy, who was in the chair, stated that his own attendance was not to be taken as an admission by him of the validity of the meeting or of the proceedings. The three above-mentioned transfers were registered on Monday, Nov. 16. At the adjourned general meeting on Tuesday, Nov. 17, there were present Ernest Kennedy (chairman), Jerome Kennedy, Spencer, Henry Martin, Henry Morgan, and Francis Morgan. The chairman stated that he had been advised that the appointment of the two Morgans as directors was invalid, and that their offices were vacant. He proposed and Jerome Kennedy seconded that John Hope be appointed a director in place of Henry Morgan, which was carried by the casting vote of the chairman. The chairman then proposed and Jerome Kennedy seconded that Edward Merkin be appointed a director in place of Francis Morgan, which was also carried by the casting vote of the chairman. The resolution as to Spencer's re-election was then put and lost by the chairman's casting vote. The chairman then proposed that Jerome Kennedy should be appointed a director in place of Spencer, which was

also carried by the casting vote. No notice had been given of the intention to propose the appointments of Hope and Merkin, nor did either of them hold a share in the company. No adjourned general meeting was held on Wednesday, Nov. 18. On Nov. 20, Spencer, Henry Morgan and Francis Morgan, as plaintiffs, commenced this action against Ernest Kennedy, Hope, Merkin, Jerome Kennedy, and the company as defendants, claiming (i) a declaration that the two Morgans were duly appointed directors at the board meeting on Nov. 14 and had not vacated their offices; (ii) a declaration that the resolutions at the general meeting on Nov. 17 appointing Hope, Merkin, and Jerome Kennedy directors were invalid; (iii) a declaration that, as nobody had been appointed a director in the place of Spencer at the general meeting which ought to have been held on Nov. 18, he was still a director; (iv) an injunction restraining Hope, Merkin, and Jerome Kennedy from acting as directors; (v) an injunction restraining the defendants from preventing the three plaintiffs from attending board meetings or acting as directors. Notice of motion was given for interlocutory injunctions to be granted in the terms of (iv) and (v). On the motion coming on for hearing, the defendants admitted that the appointments of Hope and Merkin were invalid in default of proper notice, and the questions discussed were whether Henry Morgan and Francis Morgan were duly appointed directors, whether Spencer remained a director, and, if he did not so remain, whether Jerome Kennedy was validly appointed in his place.

Greene, K.C., and *Lionel Cohen*, for the plaintiffs, referred to *York Tramways Co. v. Willows* (1), *PALMER'S COMPANY PRECEDENTS* (12th Edn.), vol. 1, p. 710; *Re Great Northern Salt and Chemical Works* (2). As to the third point, if we are right in saying that Spencer must be deemed to have been re-elected, there was no vacancy to which Jerome Kennedy could be elected. His election purported to be made before the day on which Spencer could either be replaced or re-elected, and his election was a nullity.

Topham, K.C., and *F. Whinney*, for the defendants, referred to *BUCKLEY ON COMPANIES* (10th Edn.) p. 173; *Jenner's Case* (3), *Channel Collieries Trust, Ltd. v. Dover, St. Margaret's, and Martin Mill Light Rail. Co.* (4), *Société Générale de Paris v. Walker* (5), *Bainbridge v. Smith* (6).

ASTBURY, J., stated the facts, and continued: There are three questions to be answered, namely: (i) Were the Morgan plaintiffs validly elected? (ii) Did the plaintiff Spencer remain a director? (iii) If not, was the defendant Jerome Kennedy validly elected in his place?

The plaintiffs justify the elections of the Morgans under special art. 20, which enables the directors to appoint "any other qualified person" either "to fill a casual vacancy" or as "an addition to the board." They contend that "a casual vacancy" means a vacancy not arising from ordinary retirement by rotation under art. 78 of Table A. If the plaintiffs are right on the qualification point the plaintiff Henry Morgan was appointed as an additional director, and the plaintiff Francis Morgan was appointed to fill the vacancy caused by Frederick Martin's loss of qualification. The substantial question is whether the Morgans were "qualified persons" within special art. 20 when they were appointed directors thereunder. What does a "qualified person" postulate? Article 70 of Table A provides that the qualification of a director shall be "the holding of at least one share," and requires him unless already qualified, to comply with s. 73 of the Companies (Consolidation) Act, 1908, which, as modified by special art. 23 (d), requires him to obtain his qualification within one month from his appointment [see now s. 183 of Companies Act, 1948]. Special art. 23 (d) provides that the office of a director shall be vacated "if he cease to hold the necessary share qualification, or do not obtain it within one month of his appointment." Having regard to this one month's grace, it looks at first sight difficult to decide what the expression "qualified person" in special art. 20 really means. The plaintiffs contend that it cannot refer to an existing share qualification, but refers to fitness or suitability. I do not think that that is the

A proper meaning. I think that it means a person actually "holding" the necessary share qualification. Special art. 20 and art. 70 of Table A are not really inconsistent, because under art. 81 of Table A the company at the general meeting at which a director retires by rotation may fill up the vacated office by electing "a person" thereto. Qualification is not expressly required in that case, although the person so elected must, of course, qualify within one month under art. 70 of Table A and s. 73 of the Act of 1908, as modified by special art. 23 (d). But on an appointment under special art. 20 the board is restricted to a "qualified person," i.e., a person actually "holding" the necessary share qualification. The plaintiffs contend that the two Morgans were so qualified at the time of their appointments. They contend that, as before their appointments the transfers to the Morgans were passed by the board for registration, and nothing but the purely ministerial act of registration remained to be done, they held one share each before they were appointed. For many statutory purposes that may be so, but they were not actually members of the company until the transfers were registered on Monday, Nov. 16, although on Saturday, Nov. 14, at a board meeting at which all the directors were present, they acquired an absolute right to registration, I do not think that they were in fact "qualified persons" within special art. 20 until the actual registration on the following Monday, and, although it is only a technical point, I do not think that their election was valid.

[His LORDSHIP then dealt with a further point arising under art. 82 of the 1908 Table A. The corresponding article in the 1948 Table A—art. 92—omits the words on which the further point arose, and, therefore, a report on this matter is not needed.]

The result is that I make an order restraining the defendants Hope and Merkin from acting as directors until the trial or further order, and I make no further order on the motion. Later on, if the parties so desire, this motion can be treated as the trial of the action.

Solicitors: *Churchill, Clapham & Co.; Blunt, Clark & Co.*

[Reported by E. KNOWLES CORRIE, Esq., Barrister-at-Law.]

BARRETT AND ANOTHER v. HARDY BROS. (ALNWICK), LTD.

[KING'S BENCH DIVISION (Bankes and Scrutton, L.JJ., sitting as additional judges),
March 11, April 1, 1925]

[Reported [1925] 2 K.B. 220; 94 L.J.K.B. 665; 133 L.T. 249; 41 T.L.R. 426;
69 Sol. Jo. 492; 23 L.G.R. 427]

Rent Restriction—Apportionment—Rateable value—Apportionment of dwelling-house part of premises not themselves within Rent Restriction Acts—increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 12 (3).

A tenant is not debarred from having the standard rent or the rateable value of the premises which he occupies fixed by apportionment by the fact that the comprising property is not itself a dwelling-house or by the fact that it is not a dwelling-house to which the Rent Restriction Acts apply. In construing s. 12 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the words "dwelling-house to which this Act applies" must be construed, not as a dwelling-house of which the rent and rateable value are within the

statutory limit, but merely as a house or part of a house let as a separate dwelling. A

Notes. Section 12 (1) (a) of the Rent Restriction Act, 1920 (set out in the judgment of BANKES, L.J., *infra*) was repealed by the Rent Act, 1957, as respects England and Wales, but not Scotland. The words in square brackets in s. 12 (3) (*infra*) were repealed, also as to England and Wales only, by the Rent Act, 1957.

Referred to: *Phillips v. Potter* (1925), 94 L.J.K.B. 819; *Court v. Robinson*, [1951] 1 All E.R. 209; *Capital and Provincial Property Trust, Ltd. v. Rice*, [1951] 2 All E.R. 600. B

As to apportionment of rateable value see 23 HALSBURY'S LAWS (3rd Edn.) 724-726 and for cases see 31 DIGEST (Repl.) 685-688. For Rent Restriction Act, 1920, see 13 HALSBURY'S STATUTES (2nd Edn.) 981, and for Rent Act, 1937, see *ibid.*, vol. 37, p. 550. C

Cases referred to:

- (1) *Woodward v. Samuels* (1920), 89 L.J.K.B. 689; 122 L.T. 681; 84 J.P. 105, D.C.; 31 Digest (Repl.) 673, 7690.
- (2) *Sinclair v. Powell*, [1922] 1 K.B. 393; 91 L.J.K.B. 220; 126 L.T. 210; 38 T.L.R. 239; 66 Sol. Jo. 235; 20 L.G.R. 78, C.A.; 31 Digest (Repl.) 673, 7691. D
- (3) *Woodhead v. Putnam*, [1923] 1 K.B. 252; 92 L.J.K.B. 137; 128 L.T. 281; 67 Sol. Jo. 228; 21 L.G.R. 85, D.C.; 31 Digest (Repl.) 687, 7787.
- (4) *Marchbank v. Campbell*, [1923] 1 K.B. 245; 92 L.J.K.B. 137; 128 L.T. 283; 39 T.L.R. 120; 67 Sol. Jo. 184; 21 L.G.R. 90, D.C.; 31 Digest (Repl.) 686, 7782. E
- (5) *R. v. Marylebone County Court Judge*, [1923] 1 K.B. 365; 92 L.J.K.B. 367; sub nom. *R. v. Scully, Ex parte Boon*, 128 L.T. 364; 39 T.L.R. 169; 67 Sol. Jo. 299; 21 L.G.R. 139, D.C.; 31 Digest (Repl.) 685, 7771.
- (6) *Sutton v. Begley*, [1923] 2 K.B. 694; 92 L.J.K.B. 1086; 129 L.T. 773; 68 Sol. Jo. 82; 21 L.G.R. 679, C.A.; 31 Digest (Repl.) 686, 7786.
- (7) *Joy v. Eppner*, [1925] 1 K.B. 362; 94 L.J.K.B. 157; 132 L.T. 343; 41 T.L.R. 136; 69 Sol. Jo. 841; 23 L.G.R. 52, D.C.; 31 Digest (Repl.) 667, 7654. F
- (8) *Lelyveld v. Peppercorn*, [1924] 2 K.B. 638; 93 L.J.K.B. 1057; 131 L.T. 828; 40 T.L.R. 743; 22 L.G.R. 640, D.C.; 31 Digest (Repl.) 687, 7788.
- (9) *Williams v. Perry*, [1924] 1 K.B. 936; 93 L.J.K.B. 521; 131 L.T. 471; 40 T.L.R. 539; 68 Sol. Jo. 617; 22 L.G.R. 471, D.C.; 31 Digest (Repl.) 649, 7528. G

Appeal from Westminster County Court.

By an agreement, dated Aug. 17, 1917, the landlords of a flat situated on the second floor of No. 61, Pall Mall, London, let to one Bassett the flat for a term of five years from Sept. 20, 1917, at an annual rent of £185 during the first two years, and £200 during the last three years. The whole property consisted of a basement let separately as a restaurant, a ground floor shop, and five floors above, some being used for residential and some for business purposes. By a lease dated Oct. 11, 1922, the landlords let to Mr. Bassett and Mrs. Evans the same flat on a quarterly tenancy commencing Sept. 29, 1922, at an annual rent of £215, payable quarterly, Mrs. Evans being made a party to this lease. On Aug. 3, 1914, the flat was let as business premises only at an annual rent of £150, and at that time the basement and first floor were assessed together at £375 gross and £313 rateable and the four floors above were assessed together at £240 gross and £200 rateable. At a later date the four upper floors were assessed together at £240 gross and £200 net, the shop at £650 gross and £592 net, and the basement at £450 gross and £372 net. The second floor had never been assessed separately. On an application by the tenants for apportionment, the county court judge held that he had jurisdiction to apportion, and on Nov. 3, 1924, made an order declaring that the rateable value of the whole premises should be apportioned between the second floor flat H

A and the rest of the premises, as follows: viz., £60 to the flat. The landlords appealed on the grounds that the county court judge had no jurisdiction to make an apportionment at all, and that, if the flat in question was within the protection of the Rent Restriction Acts, the rateable value should have been apportioned as at Aug. 17, 1917.

B *Topham, K.C.*, and *Grundy* for the landlords.
Beyfus for the tenants.

Cur. adv. vult.

April 1. The following judgments were read.

C **BANKES, L.J.**—This appeal raises the question what is the proper construction to be placed on the apportionment section (s. 12 (3)) of the Rent Restrictions Act, 1920. If it had been possible to foresee all the practically endless variety of circumstances and conditions which may and do arise out of agreements between landlords and tenants, it might have been better for the courts to have confined the operation of this sub-section within what are obvious limits, rather than to have attempted to find a construction which, by ignoring the exact language of the legislature, was thought to give effect to its intention. The result has been that in the attempt to stop obvious holes through which a landlord might escape from the clutches of the statute a chasm has been opened in which even a house in Pall Mall may be engulfed, and opportunities given to unscrupulous tenants to evade quite legitimate obligations. The sub-section provides as follows [the words in square brackets having been repealed: see note supra]:

E “Where, for the purpose of determining the [standard rent or] rateable value of any dwelling-house to which this Act applies, it is necessary to apportion [the rent at the date in relation to which the standard rent is to be fixed, or] the rateable value of the property in which that dwelling-house is comprised, the county court may, on application by either party, make such apportionment as seems just, and the decision of the court as to the amount to be apportioned to the dwelling-house shall be final and conclusive.”

F “Standard rent” is defined in s. 12 (1) [repealed: see note supra], as follows:

“Except where the context otherwise requires: (a) The expression “standard rent” means the rent at which the dwelling-house was let on Aug. 3, 1914, or, where the dwelling-house was not let on that date . . . in the case of a dwelling-house which was first let after the said Aug. 3, the rent at which it was first let . . .”

G Rateable value is defined in s. 12 (1) (e) as:

“The rateable value on Aug. 3, 1914, or, in the case of a dwelling-house or a part of dwelling-house first assessed after that date, the rateable value at which it was first assessed.

H There have been quite a number of reported decisions upon the construction to be placed upon s. 12 (3). The first in order of date was *Woodward v. Samuels* (1), decided in February, 1920. This was a simple case, as the whole house was within the protection of the statute, and was, therefore, a dwelling-house to which the Act applied, and the action of the landlord had been merely to let off rooms as separate dwelling-houses without any structural alteration. The next case in order of date was *Sinclair v. Powell* (2), decided in the Divisional Court in May, 1921. In that case the house was not within the protection of the statute and the court held that, as the building when it was let off in flats was not within any Rent Restrictions Act, the landlord was entitled to deal with it as he pleased, and that a tenant of one of the flats in those circumstances was not entitled to ask for an apportionment of rent. On appeal the court was divided in opinion as to the grounds of their decision. *ATKIN, L.J.*, and I considered that the house had been so structurally altered that no apportionment of the rent of the original house could be demanded. *SCRUTTON, L.J.*, decided upon the same ground as was taken in the

Divisional Court. Looking back now over the decisions that have been given, both in the Divisional Court and in the Court of Appeal (to some of which I was a party), since that case was decided, I am inclined to think that it would have been better to have adhered to the view taken by the Divisional Court and by SCRUTTON, L.J., and allowed the legislature to amend the law so as to stop obvious omissions in it rather than to follow the course of endeavouring to supply the omissions by an interpretation of the subsection which practically ignores its actual wording. The decisions which have succeeded *Sinclair v. Powell* (2) are *Woodhead v. Putnam* (3) and *Marchbank v. Campbell* (4), *R. v. Marylebone County Court Judge* (5), *Sutton v. Begley* (6), *Joy v. Eppner* (7). The result of these decisions undoubtedly is, to use SALTER, J.'s, language in *Woodhead v. Putnam* (3) ([1923] 1 K.B. at p. 256), that to entitle a tenant to apportionment under s. 12 (3), it is not necessary that the property in which the applicant's dwelling-house is comprised should itself be a dwelling-house or should be subject to the Act. In other words, a construction of the subsection has been established which reads "standard rent" in a sense other than the sense in which it is defined by the Act, and gives to the expression, "dwelling-house to which this Act applies," not the full sense of a dwelling-house the rent or rateable value of which is within the statutory limit, but merely the sense of being a house or part of a house let as a separate dwelling. As a result of this construction, apportionment is permissible for the purpose of ascertaining whether a house or a part of a house is or is not within the Act, and persons become entitled to claim the protection of the Act under conditions which I cannot think were ever contemplated by the legislature. The present case is the first which I have come across in which an application has been made to apportion the rateable value of premises in order to take advantage of the Act. I think that we must follow the line of decisions to which I have referred, and we must ignore the definition of rateable value contained in s. 12 (1) (e), in the same way as the definition of standard rent has been ignored.

The material history of the property is as follows. It is situate in Pall Mall, No. 61. It consists of a basement let separately as a restaurant, a shop on the ground floor, and five floors above, some used for business and some for residential purposes. The position of the premises occupied by the tenants in the present case is the third floor, which was let to them for residential purposes on a three years' lease at the annual rent of £215. This floor has never been separately rated. The last previous letting was for residential purposes, also by a lease date Aug. 17, 1917, at the annual rent of £185. Previously to that the floor had been let as business premises only, at an annual rent of £150. The position with regard to the assessment of the premises was that in August, 1914, the basement and first floor were assessed together at £375 gross and £313 rateable, and the second, third, fourth and fifth floors were assessed together at £240 gross and £200 rateable. At a later date the second, third, fourth, and fifth floors were assessed together at £240 gross and £200 net, the shop at £650 gross and £592 net, and the basement and café £450 gross and £375 net. The county court judge considered that he was bound to accede to the application for apportionment. Upon the authorities, I think that he was right. He treated the application as an application to apportion the rateable value as between the four floors which were assessed together. In this I think that he was probably right, and on his apportionment of the figures the floor occupied by the tenants is brought within the control of the statute. The appeal, therefore, fails and must be dismissed with costs. During the argument our attention was called to the recent decision of a Divisional Court in *Lelyveld v. Peppercorn* (8). I do not think the decision in that case can be applied to the present one, and it may be that some day the question of whether that decision is consistent with the earlier decisions will have to be considered.

SCRUTTON, L.J.—The question on this appeal is whether the county court judge had a right to apportion the rateable value of No. 61, Pall Mall, to ascertain the

A rateable value of the second floor flat therein on Aug. 3, 1914. The object of this application was no doubt to lead up to a claim for rent overpaid, having regard to the standard rent and statutory increases. That these premises should be within the Rent Restriction Acts seems, at first sight, absurd. The rent of this flat has not since March, 1914, been less than £150 per annum, the superior limit for rent-restricted houses in London having never been more than £105. It is hoped by B apportionment to get a rateable value of less than £105. At present, under the 1920 assessment, the whole building is rated at £1,100 gross, £967 net; the part which comprises this flat, apparently three floors, being rated at £450 gross and £375 net.

C The language of the Rent Restriction Act makes it very difficult to say what the legal position is. The statutory authority for apportionment is to be found, if at all, in s. 12 (3), of the Act of 1920. This begins:

"Where, for the purpose of determining the standard rent or rateable value of any dwelling-house to which this Act applies."

D As whether a house is within the Act depends on whether its standard rent or rateable value exceeds a certain limit, this section, literally read, runs round in a useless circle. One cannot know whether the Act applies to the house till one knows its standard rent or rateable value; if one has not determined these items there is no proof that the Act applies to it. It is said that one must read the words as if they said: "Where in order to determine the standard rent or rateable value of any dwelling-house for the purpose of seeing whether this Act applies to it, it is necessary to apportion," &c. The words obviously do not say that in their E ordinary meaning. The definitions in s. 12 (1) do not help the matter.

"Except where the context otherwise requires 'standard rent' means the rent at which the dwelling-house was let on Aug. 3, 1914, or where first let after the said third day of August, the rent at which it was first let."

F In fact, on Aug. 3, 1914, the whole of what is now the second-floor flat was not separately let; what was let at £150 a year was "all those two rooms on the second floor, with the use in common with others of the lavatory and w.c. on the half landing." The tenant covenanted not without the consent in writing of the landlord to carry on any business, "except that of a consulting engineer or similar business, but to use the same as such office only." The lease says nothing about a dwelling-house. The county court judge has found "that it is a dwelling-house"; G there was evidence that it was used as a dwelling-house at some time not earlier than July, 1917, and in August, 1917, it, with a bathroom, was let as a dwelling-house, but I cannot construe the earlier lease except as a tenancy "to use as an office only." As the important matter is the rights under the lease, not the de facto use (*Williams v. Perry* (9)), and as the Rent Restriction Act did not in 1915 apply to purely business premises, the standard rent of these premises would H be fixed by the rent paid when they were first let as a dwelling-house—in August, 1917—when the two rooms with the bathroom, lavatory, and w.c., were let at a rental of £185, far above the statutory limit. No question of apportionment of rent, therefore, arises, and as far as rent is concerned this flat is not a dwelling-house to which the Act applies.

I Next comes the question of "rateable value." This is again defined "except where the context otherwise requires" as the rateable value on Aug. 3, 1914, or in the case of a dwelling-house or part of a dwelling-house first assessed after that date the rateable value at which it was first assessed. In fact, in 1910 the shop and basement were assessed at £263, the then first and second floors together at £192, and the then third floor, the floor of the flat, at £78. In 1912 the first floor was thrown into the shop, which was then assessed at £375; the old second, third, fourth, and fifth floors were assessed at £240; the present flat was not separately assessed. Returning to the definition, this flat was, therefore, not separately assessed at that date, Aug. 3, 1914, or first assessed after that date. If

I am correct that its standard rent is to be fixed in August, 1917, when it was first let after Aug. 3, 1914, as a private dwelling-house, it seems obvious that its rateable value in August, 1914, as a business office must be immaterial to the question whether it is within the Act as a dwelling-house. The date at which the judge has apportioned seems wrong, though as the rateable value of the four floors was the same in 1917 as in 1914, I do not think this makes any practical difference. In law, however, the definition of rateable value does not appear to apply to the facts of this case.

The question still remains whether it is possible to read s. 12 (3), in the extended manner I have suggested, or whether the real way to construe the section is not to say that it allows apportionment where one knows that the whole house is within the Act by its rent and rateable value, and, therefore, knows that any part of it is within the Act, and fix the apportioned standard rent of that part, so that questions of increase of rent can be determined, but that one cannot use the section where one does not know before one starts that the house is within the Act, because the jurisdiction only exists in cases where the house is within the Act. The county court judge seems inclined to take this view, but to escape from it by saying that the assessment of four floors at £240 is evidence that the house is within the Act. But this seems to be apportioning before you have settled whether the house is within the Act. I have carefully examined a large number of the reported apportioned cases. I do not find that the difficulties about apportionment of rateable value have ever been considered. In most of the cases about apportionment of rent the house whose rent was apportioned was within the Acts when apportionment took place, and, therefore, of course, a part of it would be also within the Acts. But certainly in one case in the Court of Appeal (*Sutton v. Begley* (6)) the whole house seems to have been outside the Acts, and yet apportionment took place. I think I am bound by this to hold that it is necessary to read s. 12 (3), of the Act of 1920 as applying to cases where it is necessary to apportion to find out whether the case is within the Acts. If so, the judge had a right to apportion the rateable value, but at the same date as that of the standard rent, i.e., when the house was first after 1914 let as a dwelling-house—namely, August, 1917. The appeal must be dismissed with costs.

Solicitors: *Beamish, Hanson, Airy & Co.*, for *Dickson, Archer & Thorp*, Alnwick; *Gibbs, White & King*.

[Reported by T. R. FITZWALTER BUTLER, ESQ., Barrister-at-Law.]

HALL v. ROGERS

[KING'S BENCH DIVISION (Bankes and Scrutton, L.JJ., sitting as additional judges), February 26, 1925]

[Reported 133 L.T. 44; 41 T.L.R. 341; 69 Sol. Jo. 397; 23 L.G.R. 550]

Rent Restriction—Decontrol—"Actual possession" of premises by landlord—Possession in fact—Apparent dominion—Rent and Mortgage Interest Restrictions Act, 1923 (13 & 14 Geo. 5, c. 32), s. 2 (1) (3).

The provision of s. 2 (3) of the Rent and Mortgage Interest Restrictions Act, 1923, which requires the landlord to come into "actual possession" of a dwelling-house before it is taken out of the scope of the Rent Acts, is directed against a "notional" coming into possession by the landlord, e.g., during the interval between the end of an old tenancy and the commencement of a new one. The words are meant to contrast possession in fact with the right to possess and any inferences which may be drawn from that right. In using those words Parliament intended to require actual control or apparent dominion in fact.

Notes. Section 2 of the Act of 1923 was repealed by the Increase of Rent, &c., Act, 1938, but the present case may still be of value in determining whether premises were decontrolled under s. 2, since, if they were, they would not be subject to "old control."

Considered: *Jewish Maternity Society Trustees v. Garfinkle* (1926), 95 L.J.K.B. 766. Distinguished: *Barton v. Keeble*, [1928] All E.R. Rep. 198. Considered: *Thomas v. Metropolitan Housing Corpn., Ltd.*, [1936] 1 All E.R. 210; *Holt v. Dawson*, [1939] 3 All E.R. 635. Referred to: *Brooks v. Liffen*, [1928] 2 K.B. 347; *Goodier v. Cooke*, [1940] 2 All E.R. 533; *Stirling v. Gilbert*, [1952] 2 All E.R. 153.

As to the limits of "old control" see 23 HALSBURY'S LAWS (3rd Edn.) 731-735, and for cases see 31 DIGEST (Repl.) 724 et seq. For the Rent Restriction Acts, 1920, 1923, and 1938, see 13 HALSBURY'S STATUTES (2nd Edn.) 981, 1033, 1068.

Appeal by the landlord from an order of Edmonton County Court made in an action for possession.

In August, 1923, the tenant of premises at Tottenham had got into arrear with his rent. He left the premises after removing the furniture and without paying the rent due. His departure was not discovered by the landlord's agent, who managed the property, till three or four days later. The agent then visited the premises, and found them empty and without any keys in the locks of the doors. He walked round the premises, but there was no evidence to show how long he remained there. A few days later he entered into negotiations with, and subsequently let the premises to, the defendant at 17s. 6d. per week, on the basis that they had become decontrolled owing to their having come into the possession of the landlord within s. 2 (1) of the Rent and Mortgage Interest Restrictions Act, 1923. In September, 1924, the landlord brought an action for possession on the ground that the defendant, the new tenant, was in arrear with his rent. The defendant denied that there were any arrears of rent, and counterclaimed for overpaid rent and a premium paid by him. The county court judge found for the defendant on the ground that the landlord had never been in actual possession and the premises, therefore, were not decontrolled. The landlord appealed.

Merriman, K.C., and *Ronald Walker* for the landlord.

John Duncan for the defendant.

BANKES, L.J.—This is an appeal from a judgment of the learned county court judge, who is said to have misinterpreted s. 2 of the Rent Restriction Act, 1923, and, as the result, has arrived at a wrong conclusion in law on the facts that were

before him. The section is undoubtedly a very important section, because the effect of it is that, if the provisions of the section are complied with, a house which had been previously a controlled dwelling, becomes an uncontrolled dwelling, and the landlord, therefore, resumes rights which before the Rent Acts one was accustomed to associate with the position of a landlord. Section 2 (1) provides :

"Where the landlord of a dwelling-house to which the principal Act [the Rent Restriction Act, 1920] applies is in possession of the whole of the dwelling-house at the passing of this Act [July 31, 1923], or comes into possession of the whole of the dwelling-house at any time after the passing of this Act, then from and after the passing of this Act, or from and after the date when the landlord subsequently comes into possession, as the case may be, the principal Act shall cease to apply to the dwelling-house."

Then there comes an important definition of the expression "comes into possession of the dwelling-house," for s. 2 (3) provides :

"For the purposes of this section, the expression 'possession' shall be construed as meaning 'actual possession,' and a landlord shall not be deemed to have come into possession by reason only of a change of tenancy made with his consent."

The question upon which the learned county court judge is said to have misdirected himself is in reference to his construction of the expression "actual possession." He has said, and I think rightly said, that in order to interpret this section, you must look at the whole of it, and you must realise that the legislature has said not only that the landlord must be in actual possession, but also that the coming into possession by reason only of a change of tenancy made with his consent shall not be deemed to be coming into possession. I agree with what has been suggested, that those last words aim at what might be called a notional coming into possession, that is to say, the mere fact that when a tenancy is changed, there may be an interval of time during which it may be said that technically the landlord is in possession, the landlord being in possession for the interval of time between the time when the tenancy of the outgoing tenant expires and that of the incoming tenant commences. I think the fact that the sub-section is so expressed emphasises that the legislature is speaking of something which can be reasonably considered as an actual possession. We have no control over what the learned county court judge's conclusion may have been on any question of fact which was before him, and I am not in the least suggesting that, if the case had been tried before me in the first instance, I should have come to the same conclusion as the learned judge on the facts ; but what we have to consider, and all we have to consider, is whether on the facts before him he was entitled as a matter of law to come to the conclusion that this landlord was not proved to have been in actual possession. What happened was this. The dwelling-house in question was one of a number of flats. The property of the landlord was managed by an agent ; the tenant of this flat appears to have got into arrear with his rent. The agent was apparently in the habit of calling for the rent fortnightly ; he went there on a day early in August, and the tenant then paid something on account of rent, but there was a substantial amount of arrears still owing. Very shortly after that the tenant left. Some of his furniture was taken away on that day, while some of it remained for a few days, and was then removed. It did not come to the ears of the agent until some three or four days after the last of the furniture had been removed, that the tenant had in fact disappeared, and he did not go to the premises until the time came when in the ordinary course he would call there for the rent. That day was Aug. 21 ; that was three or four days after it had first come to his knowledge that the tenant was no longer there and had removed all his furniture. He found the place empty, as he had been told it was. I will not say there were no locks, but at any rate there was no key to any of the locks of the doors, and the place was open and empty. He walked round and came out again. How long he remained nobody

A knows ; there was no evidence given. He walked in and looked round ; he came out again and left the place. He apparently did not communicate with the landlord, but he let, or entered into negotiations for letting, the premises to a person on the footing that the house was a decontrolled house.

The question is whether, in those circumstances, the judge was bound to find as a matter of fact, or as a mixed matter of fact and law, that the landlord had taken actual possession of these premises. It seems to me that in every case it must be to a large extent a matter of fact, and if the facts are such that the learned county court judge came to the conclusion that, although the outgoing tenant intended to abandon his tenancy and leave for good, and although the landlord had abundant opportunities for taking actual possession, but did nothing which, in the judgment of the learned judge, as a matter of fact amounted to a taking of actual possession, he was entitled to say so. I put this illustration. Supposing the learned judge had come to the conclusion that what the agent in fact did on Aug. 21 was no more than looking through the window, in those circumstances nobody could really suggest that the landlord or his agent had done any such unequivocal act as would have amounted in law to taking actual possession. That being so, I do not desire to say more than is necessary in reference to the difficult questions which arise under this statute, except to say that in this case I do not think we are able to interfere with the conclusion at which the learned judge arrived, because on the facts before him it seems to me he was justified in arriving at the conclusion to which he came, although, as I say, I am not prepared to say that I should have drawn from the facts the same inference as he did.

E **SCRUTTON, L.J.**—A landlord wants possession of a dwelling-house, a particular floor in a house. The learned county court judge has declined to give it him. Whether the landlord is entitled to the order for possession depends upon whether the house has ceased to be subject to the control of the Rent Restriction Acts, or has become decontrolled, as the phrase is. That, again, turns on the meaning of certain words in s. 2 of the Rent and Mortgage Interest Restriction Act, 1923. The words of s. 2 (1) and (3) of the Act, read together,

“Where the landlord of a dwelling-house . . . comes into actual possession of the . . . dwelling-house . . . then . . . from and after the date when [he] comes into possession . . . the principal Act shall cease to apply to the dwelling-house, and a landlord shall not be deemed to have come into possession by reason only of a change of tenancy made with his consent.”

G The question is: What did Parliament mean by using the phrase “actual possession”? Using the words in their ordinary sense, I think they are meant to contrast possession in fact with the right to possess and any inferences which may be drawn from the right to possess. I find a passage which illustrates the view to take in the well-known work of POLLOCK AND WRIGHT ON POSSESSION, at p. 10:

H “Whether legal possession shall follow physical possession or not is a point of law. Whether there exists, at the date in question, between a person and a given thing, the relationship of physical possession or occupation, is wholly or mainly a matter of fact. But this, in turn, may be disputed, and then it must be settled whether the specific facts admitted or proved will suffice to establish the existence of the de facto relation of control or apparent dominion required as the foundation of the alleged right.”

I That defines the physical possession as the relation de facto of control or apparent dominion of the thing possessed, and treats it as a question of fact. I think Parliament in using the phrase “actual possession” intended to reject the legal right to possess and to require actual control or apparent dominion in fact. I see a question coming whether that control or apparent dominion must be rightful, because I suppose it is not sufficient for a landlord, in the absence of the tenant during an undetermined tenancy, to walk in and take possession. and say: “I am in control”

and keep the tenant out, and, therefore, the premises become decontrolled. Perhaps we may reserve that question until it arises. If, however, "actual possession" is possession in fact, then the question is one of fact for the county court judge whether what happened was de facto control or apparent dominion by the landlord as distinguished from a right to exercise such control. The evidence in this case was that the tenant left, leaving rent unpaid; that for three or four days the landlord did not find it out, but after three or four days his agent went to the premises, walked round them and saw that they were empty, walked out again, and a week afterwards let the premises. It appears to be that this is evidence from which the county court judge may find one way or the other; he may say "This amounts to actual possession." I suppose if the agent had locked the door, it certainly would have amounted to actual possession in fact. On the other hand, the county court judge may say: "This does not amount to actual possession; it is a mere visit of inquiry to see what is the matter, and does not involve the actual taking possession." If it is a question of fact, and whatever we might have found ourselves, provided there was evidence, as I think there was, the decision of the county court judge is final, and on his finding of fact there is no successful appeal to this court.

Appeal dismissed.

Solicitors: *H. A. Phillips : Nimmo & Harvey.*

[*Reported by T. R. FITZWALTER BUTLER, Esq., Barrister-at-Law.*]

BOWRON v. BOWRON

[COURT OF APPEAL (Sir Ernest Pollock, M.R., Warrington and Scrutton, L.JJ.), December 16, 17, 1924, January 19, 1925]

[Reported [1925] P. 187; 94 L.J.P. 33; 132 L.T. 773; 89 J.P. 43; 41 T.L.R. 245; 69 Sol. Jo. 325; 23 L.G.R. 223; 27 Cox, C.C. 769]

Husband and Wife—Summary proceedings—Desertion—Constructive desertion—Continuing offence—Time limit for making complaint—Complaint based on cruelty committed out of time—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict., c. 39), s. 4.

Where a husband by his cruelty causes his wife to leave the matrimonial home he is guilty of constructive desertion, and that offence is presumed to continue unless and until the husband proves genuine repentance and sincere and reasonable attempts to get his wife to return to him. The offence being a continuing offence, where the wife seeks from magistrates a maintenance order under s. 4 of the Summary Jurisdiction (Married Women) Act, 1925, the magistrates have jurisdiction to hear the complaint even though it is not made within six months from the time when the desertion began. This is so even though the charge of constructive desertion is based on facts which would have sustained a complaint under s. 4 of persistent cruelty, but no complaint was made with regard to that matter within six months of the last act of cruelty.

Notes. Considered: *Jordan v. Jordan*, [1939] 2 All E.R. 29; *Bennett v. Bennett*, [1939] 2 All E.R. 387; *Cohen v. Cohen*, [1940] 2 All E.R. 331. Referred to: *Sifton v. Sifton*, [1939] 1 All E.R. 109; *Williams v. Williams*, [1939] 3 All E.R. 825; *Crowther v. Crowther*, [1951] 1 All E.R. 1131; *W. v. W. (No. 2)*, [1954] 2 All E.R. 829.

A As to desertion and constructive desertion see 12 HALSBURY'S LAWS (3rd Edn.) 233 et seq., and for cases see 27 DIGEST (Repl.) 333 et seq., 711. For Magistrates' Courts Act, 1952, s. 104, see 32 HALSBURY'S STATUTES (2nd Edn.) 503.

Cases referred to:

- (1) *Beer v. Beer* (1906), 94 L.T. 704; 54 W.R. 564; 22 T.L.R. 338, 367; 27 Digest (Repl.) 289, 2340.
- (2) *Charter v. Charter* (1901), 84 L.T. 272; 65 J.P. 246; 17 T.L.R. 327, D.C.; 27 Digest (Repl.) 350, 2898.
- (3) *Dickinson v. Dickinson* (1889), 62 L.T. 330; 27 Digest (Repl.) 351, 2902.
- (4) *Ellis v. Ellis*, [1896] P. 251; 65 L.J.P. 124; 75 L.T. 390; 60 J.P. 823; 45 W.R. 144; 12 T.L.R. 514, D.C.; 27 Digest (Repl.) 711, 6779.
- (5) *Frowd v. Frowd*, [1904] P. 177; 73 L.J.P. 60; 90 L.T. 175; 68 J.P. 436, D.C.; 27 Digest (Repl.) 698, 6672.
- (6) *Graves v. Graves* (1864), 3 Sw. & Tr. 350; 33 L.J.P.M. & A. 66; 10 L.T. 273; 10 Jur. N.S. 546; 12 W.R. 1016; 164 E.R. 1310; 27 Digest (Repl.) 347, 2877.
- (7) *Greene v. Greene*, [1916] P. 188; 85 L.J.P. 224; 115 L.T. 127; 32 T.L.R. 520; 60 Sol. Jo. 620; 27 Digest (Repl.) 289, 2331.
- (8) *Heard v. Heard*, [1896] P. 188; 65 L.J.P. 111; 60 J.P. 426; 12 T.L.R. 386, D.C.; 27 Digest (Repl.) 711, 6787.
- (9) *Jackson v. Jackson*, [1924] P. 19; 40 T.L.R. 45; 27 Digest (Repl.) 335, 2791.
- (10) *Medway v. Medway*, [1900] P. 141; 69 L.J.P. 56; 82 L.T. 627; 64 J.P. 120; 48 W.R. 622, D.C.; 27 Digest (Repl.) 697, 6669.
- (11) *Kay v. Kay* (1912), 108 L.T. 813; 77 J.P. 128, D.C.; 27 Digest (Repl.) 711, 6780.
- (12) *Koch v. Koch*, [1899] P. 221; 68 L.J.P. 90; 81 L.T. 61; 27 Digest (Repl.) 351, 2906.
- (13) *Pulford v. Pulford*, [1923] P. 18; 92 L.J.P. 14; 128 L.T. 256; 39 T.L.R. 35; 67 Sol. Jo. 170, D.C.; 27 Digest (Repl.) 334, 2785.
- (14) *Russell v. Russell*, [1924] A.C. 687; 93 L.J.P. 97; 131 L.T. 482; 40 T.L.R. 713; 68 Sol. Jo. 682, H.L.; 27 Digest (Repl.) 318, 2649.
- (15) *Sickert v. Sickert*, [1899] P. 278; 68 L.J.P. 114; 81 L.T. 495; 48 W.R. 268; 15 T.L.R. 506; 27 Digest (Repl.) 350, 2897.
- (16) *Thomas v. Thomas*, [1924] P. 194; 93 L.J.P. 61; 130 L.T. 716; 40 T.L.R. 250; 68 Sol. Jo. 339; 22 L.G.R. 653, C.A.; 27 Digest (Repl.) 349, 2890.

G **Appeal** by the wife against an order of a Divisional Court of the Probate, Divorce and Admiralty Division allowing an appeal by the husband from an order of justices finding that he had on Feb. 27, 1923, deserted his wife and ordering him to pay her £1 a week for her maintenance, and 5s. for that of the one child of the marriage.

Shanly for the wife.

Costello for the husband.

The following cases were referred to: *Beer v. Beer* (1), *Charter v. Charter* (2), *Dickinson v. Dickinson* (3), *Ellis v. Ellis* (4), *Frowd v. Frowd* (5), *Graves v. Graves* (6), *Green v. Green* (7), *Heard v. Heard* (8), *Jackson v. Jackson*, (9), *Medway v. Medway* (10), *Kay v. Kay* (11), *Koch v. Koch* (12), *Pulford v. Pulford* (13), *Russell v. Russell* (14), *Sickert v. Sickert* (15), *Thomas v. Thomas* (16).

I **SIR ERNEST POLLOCK, M.R.**—This is an appeal from an order of the Divisional Court which allowed an appeal from the justices of Penge, Kent, and discharged an order made by them ordering the husband to pay a weekly sum to the wife for the maintenance of herself and a child on the ground of his desertion.

The marriage took place on Jan. 2, 1915, and a boy, who is now living in the mother's care, was born on May 20, 1915. The husband served in the war of 1914–1918, and after being demobilised in October, 1920, went with his wife and child to New Zealand. They returned thence to this country at the close of 1921.

The evidence given by the wife before the magistrates was that the husband was frequently intoxicated, that he left his wife several times for weeks together, that he had on four or five occasions—or, indeed, more—expressed his wish to be rid of his wife or that he did not intend to live with her any more, and would be happier without her. He did not let his wife know where he was during these absences, and, when they were together, he abused his wife in word and deed, and was guilty of persistent cruelty towards her. Ultimately after several scenes, on Feb. 27, 1923, she left him, "because he told me on so many occasions that he did not care where I went, better earn my own living, and earn it on my back." On April 10, 1924, the wife took out a summons under s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, charging her husband with wilfully neglecting to maintain her and having thereby caused her to live separately and apart from him. By s. 8 of that Act, all applications under it have to be made in accordance with the Summary Jurisdiction Acts, and, to fulfil the requirements of the Summary Jurisdiction Act, 1848, s. 11, the application must be made within six months from the time when the matters arose which form the ground of complaint [see now Magistrates' Courts Act, 1952, s. 104]. Thus, as decided in *Ellis v. Ellis* (4) and *Kay v. Kay* (11), there was a complete answer available to the husband on this summons. Accordingly it was, on the advice of counsel, withdrawn, and on April 12, 1924, a second summons under s. 4 of the Act of 1895 for desertion by the husband was taken out by the wife on the basis that desertion, being a continuing offence, no time limit applies to it. At the hearing the justices found the husband guilty of desertion and ordered him to pay the weekly sum for the maintenance of his wife and child. From that order the husband appealed to the Divisional Court, who set aside the order of the justices, and the wife now appeals.

It has been decided in *Heard v. Heard* (8), a decision of the Divisional Court with which I agree, that desertion under s. 4 of the Act of 1895, is a continuing act, and that, therefore, an application to a court of summary jurisdiction based upon it need not be made within six months of the commencement of the desertion: see also *Thomas v. Thomas* (16) in this court. Further, *Frowd v. Frowd* (5) decided that the desertion referred to in s. 4 of the Act of 1895 has the same meaning as in the Matrimonial Causes Act, 1857, except that no period is specified as requisite to constitute an offence, and see also *Heard v. Heard* (8). If, therefore, there was evidence before the justices of continuing desertion on which they could act, their order was right and cannot be set aside. The Divisional Court held that there was no evidence of desertion other than of that which *HORRIDGE, J.*, termed "constructive" desertion—a phrase used to describe the parting of the wife from the husband where the departure was the act of the wife and not of the husband. The court thought that, though there was evidence which would have justified the justices in finding persistent cruelty on the part of the husband which caused the wife to leave him, it was not justifiable to regard the facts relevant to this charge upon the question of desertion per se charged in the summons. In my judgment, this view is too narrow. As pointed out in *Thomas v. Thomas* (16), the act of departure by the one spouse from the other draws its significance from the purpose with which it is done as revealed by conduct or other expressions of intention. In *Dickinson v. Dickinson* (3) the husband brought to the house a woman with whom he had immoral relations. The wife told the husband that either the woman or she must leave the house. The husband told the wife to do as she liked, but that the woman would remain. The wife thereupon left. It was held that the husband was guilty of deserting his wife. In *Charter v. Charter* (2) the husband told the wife to go where and do what she liked. It was held this was not desertion on his part because his words were a mere outburst in a quarrel, and not an expression of intention on his part. His wife "took him at his word"—at the face value of his expressions, not at their real meaning or purpose. The result would have been different if there had been an intention on his part to sever their relations. In

A *Koch v. Koch* (12) the husband refused to discharge a servant with whom he committed adultery and the wife left; he was held to have deserted his wife. In *Sickert v. Sickert* (15) desertion was held proved, for a wife is not bound to stay with a husband who persists in adultery in the matrimonial home. GORELL BARNES, J., said ([1899] P. at p. 282):

B "In most cases of desertion the guilty party actually leaves the other, but it is not always or necessarily the guilty party who leaves the matrimonial home. In my opinion, the party who intends bringing the cohabitation to an end and whose conduct in reality causes its termination, commits the act of desertion."

C see also *Graves v. Graves* (6), *Pulford v. Pulford* (13), and *Jackson v. Jackson* (9), where SIR HENRY DUKE, P., explains the same doctrine. You must look at the conduct of the spouses and ascertain their real intention. Did the husband show a determination to force his wife to leave him—did he intend her to go? If he did and he continues to maintain that intention there is desertion, even though the wife was the first to leave the matrimonial home.

D It is contended for the husband that in most—if not all—cases where the facts are on lines similar to those before us, the evidence indicating such an intention on the part of the husband would be such as to sustain a summons for persistent cruelty under s. 4 above, and that as the evidence to sustain such a charge is subject to the six months' limit, it ought not to and cannot be made use of to prove the quality of the act of severance between the spouses, for to admit it for this purpose is, in effect, to overcome the restriction of the six months' limit of time. There is less weight in this argument since the passing of the Licensing Act, 1902, which by s. 5 extends the provisions of s. 4 of the Act of 1895 to a married woman whose husband, is an habitual drunkard. Whether drunkenness is or is not habitual is a question of fact in each case, and it must be a continuing offence and also involve the proof of facts more than six months' old. It may be that the result of the present decision will be to give an alternative remedy to the wife in some cases where by lapse of time she is debarred from basing her claim upon persistent cruelty. Effect, however, must be given to the whole of s. 4. The provision which refers to persistent cruelty relieves the wife from proving any intention on the part of the husband to dismiss her. As a bully he may subject her to continued cruelty, while yet he wishes to keep her with him. If so, the wife has her remedy if the court holds that she left him because of his cruelty. Another part of the section serves to give a summary remedy to the wife for desertion. That offence is not proved by mere separation. The cases I have referred to, and there are others, clearly indicate that a purpose and intention must be attached to the separation before desertion is proved, but if it is proved and found to be continuing the remedy as in cases of persistent cruelty, is available to the wife. If it were not so, there would be a serious lacuna in the law, for by s. 12 of the Summary Jurisdiction (Married Women) Act, 1895, the Married Women (Maintenance in Cases of Desertion) Act is repealed and s. 4 of the Act of 1895 takes its place. There would be an imperfect remedy for desertion if a deserted wife were debarred from using evidence that might have been of service on another part of the section, and because of the lack of it had to wait two years before the offence was complete. The Act of 1895, like its predecessor, was intended to give a short and summary remedy for desertion to a wife. In my judgment, effect must be given to the words, "whose husband shall have deserted her," not less than to the rest of the section. There was before the justices evidence to which I have already referred which, in my judgment, was admissible upon the summons before them. They have accepted the wife's statement, and their conclusion upon the facts cannot be set aside by the Court of Appeal. The appeal will be allowed with costs here and in the Divisional Court and the order of the justices must be restored.

SCRUTTON, L.J.—On April 10, 1924, the wife took out a summons before justices under the Summary Jurisdiction (Married Women) Act, 1895, for maintenance, alleging that her husband had wilfully neglected to maintain her. On it appearing that the acts of cruelty were prior to Feb. 27, 1923, and, therefore, more than six months before the issue of the summons, she was advised that the proceeding was barred by the time limit in s. 11 of the Summary Jurisdiction Act, 1848: *Ellis v. Ellis* (4); *Medway v. Medway* (10). She, therefore, took out a summons on April 12, 1924, for the same relief arising from her husband's "desertion" of her, desertion having been held to be a continuing offence to which the time limit did not apply: *Heard v. Heard* (8). The magistrates heard both wife and husband, and obviously believed the wife. Her evidence established a course of persistent cruelty and drunkenness with statements by the husband that he meant to make it impossible for the wife, so that she should leave him. This class of evidence brings the case within LORD GORELL's judgment in *Sickert v. Sickert* (15) where it is explained that a husband who intentionally forces his wife to leave him by adultery and cruelty "deserts" her, though she in fact leaves him—a case sometimes described as "constructive desertion." The magistrates, therefore, granted the wife the relief asked. The Divisional Court reversed their decision on the ground, as I understand their judgment, that where desertion is caused by cruelty the matter complained of is the cruelty before the wife leaves, and proceedings must be taken within six months of the cruelty. They heard the case in June, 1924, and *Thomas v. Thomas* (16), the report of which was published in the July number of the LAW REPORTS, was not cited to them. That case appears to me to decide that desertion, consisting of the wife's departure forced by cruelty may be a continuing offence, not wiped out until the husband shows a genuine and satisfactory repentance of his previous intention to force the wife away. In some cases it is clear that the facts would show such a continuing intention, as where the husband continues living with a woman in the house, whose presence caused the wife to leave. But where there was original cruelty and expressed intention to force the wife to leave I do not think that the fact that there is no cruelty or expressed intention after she leaves prevents the desertion from continuing. The intention is presumed to continue unless the husband proves genuine repentance and sincere and reasonable attempts to get his wife back.

In the present case there was abundant evidence before the magistrates of original intention to force the wife to leave, and no evidence of repentance or inducement to return before the issue of the summons. In such a case, in my view, the magistrates were justified in finding continued desertion in the sense of a continuous forcing of his wife to live apart, without efforts to recover her, and in such a case, in my opinion, and contrary to the view of the Divisional Court the time limit did not begin to run from the date of the wife's leaving, but at the earliest from the date when the magistrates were satisfied that the original intention was abandoned, and the wife was informed of it in such a way that she should be satisfied as to its genuineness. The judgments in *Thomas v. Thomas* (16) should be a useful guide to magistrates on this point, but they must not ignore the time limit in that class of desertion where the husband forces the wife to leave him, unless they are satisfied that the intention continues. They may be so satisfied, if satisfied of the original intention, unless the husband satisfies them that his acts and declarations from the time of his wife's leaving him to the issue of the summons should have convinced the wife that she might safely return to him. The appeal must be allowed with costs and the order of the magistrates restored.

Appeal allowed.

Solicitors: *Last, Riches & Fitton; Wilberforce, Allen & Bryant.*

[Reported by J. L. DENISON, Esq., Barrister-at-Law.]

A HUYTON AND ROBY GAS CO. *v.* LIVERPOOL CORPORATION

[COURT OF APPEAL (Bankes, Scrutton and Atkin, L.JJ.), October 23, 26, November 20, 1925]

[Reported [1926] 1 K.B. 146; 95 L.J.K.B. 269; 134 L.T. 203; 90 J.P. 45; 42 T.L.R. 116; 70 Sol. Jo. 226; 24 L.G.R. 1]

Limitation of Action—Negligence—Action to be brought within six months of neglect complained of—Continuing damage—Continuing duty to remedy neglect.

The plaintiffs had lawfully laid gas pipes in certain roads in the defendants' district. Subsequently, the defendants, as the water undertakers of the district and acting under statutory authority, laid water mains in those roads in close proximity to the plaintiffs' pipes, completing the work in September, 1923. When making the necessary trenches the defendants failed to support the plaintiffs' pipes, and when filling in the ground after the completion of the work they failed to consolidate the earth around those pipes with the result that fractures in the pipes occurred owing to a subsidence of the ground which were finally remedied in September, 1924. On Dec. 12, 1924, the plaintiffs instituted an action claiming damages for the injury sustained, and the defendants pleaded the Public Authorities Protection Act, 1893, by way of defence.

Held: (i) there was a continuing duty upon the defendants under s. 32 of the Waterworks Clauses Act, 1847, to see that the earth which formed the support of the plaintiffs' pipes was properly filled in so as to continue to afford an adequate support to the pipes; (ii) there was a continuous neglect of that duty until within six months before writ issued so as to take the case out of the Public Authorities' Protection Act, 1893, and thus enable the plaintiffs to sue for all the damage.

Notes. The Public Authorities' Protection Act, 1893, was repealed by the Law Reform (Limitation of Actions, &c.) Act, 1954, but this case is included in these reports as being of some value in cases arising under other statutes of limitation the terms of which are similar to those of the Act of 1893, and as an example of continuing neglect or default.

Referred to: *Copper Export Association, Inc. v. Mersey Docks and Harbour Board* (1932), 48 T.L.R. 542; *Drake v. Bedfordshire County Council*, [1944] 1 All E.R. 633.

As to continuing damages see 24 HALSBURY'S LAWS (3rd Edn.) 188, and for cases see 32 DIGEST 340.

Cases referred to:

- (1) *Carey v. Bermondsey Metropolitan Borough* (1903), 67 J.P. 447; 20 T.L.R. 2; 2 L.G.R. 219, C.A.; 38 Digest 130, 953.
- (2) *Boynton v. Ancholme Drainage and Navigation Comrs.*, [1921] 2 K.B. 213; 90 L.J.K.B. 75; 124 L.T. 54; 85 J.P. 33; 18 L.G.R. 610, C.A.; 38 Digest 129, 947.
- (3) *Hague v. Doncaster R.D.C.* (1908), 100 L.T. 121; 73 J.P. 69; 25 T.L.R. 130; 53 Sol. Jo. 135; 7 L.G.R. 729, D.C.; 38 Digest 128, 942.
- (4) *R. v. Marshland Smeeth and Fen District Comrs.*, [1920] 1 K.B. 155; 89 L.J.K.B. 116; 121 L.T. 599; 83 J.P. 253; 17 L.G.R. 679; 38 Digest 121, 886.
- (5) *Earl of Harrington v. Derby Corpn.*, [1905] 1 Ch. 205; 74 L.J.Ch. 219; 92 L.T. 153; 69 J.P. 62; 21 T.L.R. 98; 3 L.G.R. 321; 38 Digest 127, 934.
- (6) *Tuckwood v. Rotherham Corpn.*, [1921] 1 K.B. 526; 90 L.J.K.B. 341; 124 L.T. 522; 85 J.P. 101; 19 L.G.R. 69; 13 B.W.C.C. 327, C.A.; 38 Digest 128, 911.

- (7) *Darley Main Colliery Co. v. Mitchell* (1886), 11 App. Cas. 127; 55 L.J.Q.B. 529; 54 L.T. 882; 51 J.P. 148; 2 T.L.R. 301, H.L.; 32 Digest 341, 238.

Appeal by the defendant corporation from an order of FINLAY, J., in an action tried by him at Liverpool Assizes without a jury.

The plaintiffs were a company incorporated for the purpose of supplying gas to the inhabitants of the parish of Huyton in the county of Lancaster. The defendant corporation, acting under the Liverpool Corporation Act, 1921, which incorporated the provisions of the Waterworks Clauses Act, 1847, took up certain roads in their district for the purpose of laying water mains. In those roads were gas pipes belonging to the plaintiff company and by them lawfully placed therein. The defendants removed the soil supporting these pipes, and so negligently replaced it that, in consequence of subsidence caused by the negligence, fractures were caused in the gas pipes and a considerable quantity of gas was lost. The work of the corporation was carried out between March and September, 1923. The fractures complained of occurred between June, 1923, and September, 1924. The gas company issued their writ on Dec. 12, 1924, claiming damages for the injury caused to their gas pipes, due, as they alleged, to the negligence of the contractors employed by the defendants to lay the water mains. The defendants set up by way of defence the Public Authorities' Protection Act, 1893. FINLAY, J., held that the plaintiffs' complaint was justified, that the defendants had failed to perform the obligations imposed upon them by s. 32 of the Waterworks Clauses Act, 1847, that the injury to the pipes belonging to the plaintiffs had arisen in consequence of default on the part of the contractors employed by the defendants in not sufficiently supporting such of the gas pipes as required artificial support and in not properly filling in the trenches they had made and consolidating the soil under or around the gas pipes which had been exposed in the course of making the trenches for the water pipes, and that the defendants were not protected by the Public Authorities' Protection Act, 1893. The defendants appealed.

By the Public Authorities' Protection Act, 1893, s. 1:

"Where after the commencement of this Act any action, prosecution or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty or authority the following provisions shall have effect:—(a) The action, prosecution or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect or default complained of, or, in case of a continuance of injury or damage within six months next after the ceasing thereof."

Greaves-Lord, K.C., and *Wooll* for the defendant corporation.

Singleton, K.C., and *Lynskey* for the plaintiffs.

Cur. adv. vult.

Nov. 20. The following judgments were read.

BANKES, L.J.—This is an appeal by the defendants from a judgment of FINLAY, J., deciding that the plaintiffs' action was not barred by the Public Authorities' Protection Act, 1893. The plaintiffs' claim was for damages for injury to some of their gas pipes due, as they alleged to the negligence of contractors employed by the defendants to lay water pipes in close proximity to the existing gas pipes of the plaintiffs. The action was not commenced until the month of December, 1924. The contractors had completed their work by September, 1923. It was in these circumstances that the defendants relied on the provisions of the Public Authorities' Protection Act, 1893.

It is not, in my opinion, open to this court to attempt to put its own construction upon the language of s. 1 of that Act. The case of *Carey v. Bermondsey Metropolitan Borough* (1) is binding upon this court, and it must accept the construction put upon the statute in that case. In the present case what is complained of is the neglect

A and default of the contractors employed by the defendants, which occurred not later than September, 1923. As a direct result of that neglect or default, the plaintiffs' pipes were cracked and injured, and some of the cracking and injury certainly occurred within six months of this action being commenced. An act of omission may constitute a breach of duty just as an act of commission can. In the recent case of *Boynton v. Ancholme Drainage and Navigation Comrs.* (2) this court held that it was the continuing neglect of the defendants which prevented the statute running. From some points of view and in some cases it is easier to establish a continuing neglect or default in the case of an act of omission than in the case of an act of commission, because once it is established that the act of omission constitutes a breach of duty the breach continues in most circumstances until the omission is remedied. This is, of course, not true where it can be established that the duty to remedy the omission ceased before the injury complained of occurred, or on the present construction of the statute if it ceased more than six months before the commencement of an action complaining of the omission. In the present case, but for the argument founded on the provisions of the Waterworks Clauses Act it would seem plain that the omission to give, or to restore, as the case may be, the necessary support to the gas pipes was a continuing breach of duty certainly down to the time when the fractures to the gas pipes occurred and the omissions were made good. It was said, however, that the effect of the Waterworks Clauses Act was to absolve the defendants from any responsibility for the condition of the road, and the excavations which had been made, after a certain period, and that as from that date the defendants' duty in regard to the plaintiffs' pipes ceased, and that there could, therefore, be no continuing breach of duty. I do not think that this argument, which is founded on the provisions of ss. 28 to 34 of the Waterworks Clauses Act, 1847, with respect to the breaking up of streets, can be supported. It is no doubt correct to say that the defendants were not entitled of their own motion and without applying for the necessary permission at the time when the fractures occurred to break up the streets for the purpose of making good the omissions of their contractors. That is, however, a very different thing from saying that those omissions were in consequence wiped out as breaches of duty. In my opinion, they continued as breaches of duty in spite of the difficulty (if any) there might be in making them good.

For these reasons I consider that the plaintiffs established the necessary continuing breaches of duty with the resulting damage down to a time within six months before the commencement of the action, and that the action consequently was maintainable. The appeal therefore fails, and must be dismissed with costs. For the purpose of this judgment it was not necessary to consider the authorities which were cited to us. Some day it may be necessary to consider whether the decision in *Hague v. Doncaster R.D.C.* (3) was correctly decided, and whether the summary of the decisions by McCARDIE, J., in *R. v. Marshland, Smeeth and Fen District Comrs.* (4) ([1920] 1 K.B. 173) is accurate. It is necessary, however, in reference to the judgment of BUCKLEY, J., in *Earl of Harrington v. Derby Corpn.* (5) ([1905] 1 Ch. at p. 227), to say that I do not think he had in mind a case like the present when he refers to damage inflicted once and for all and which continues unrepaired.

I **SCRUTTON, L.J.**—This appeal raises a question as to the applicability of the Public Authorities' Protection Act to the following circumstances.

Liverpool Corporation, acting under statutory authority, broke up certain roads for the purpose of laying water mains. In those roads were gas pipes of the Huyton company, lawfully placed therein. The corporation removed the soil supporting these pipes, and so negligently replaced it that in consequence of subsidence caused by the negligence certain fractures were caused in the gas pipes. The work of the corporation was carried out between March and September, 1923. Most of the fractures complained of were in July–September, 1924. The gas company issued

their writ on Dec. 12, 1924. Were Liverpool Corporation protected by the Public Authorities' Protection Act, s. 1 (a)? The Act was substituted for a large number of statutes containing varying limitations of the time within which legal proceedings must be started, many of which statutes made the time date from the arising of the cause of action. This language has been abandoned, and time is made to run from the "act, neglect or default complained of." What is the effect where the cause of action is damage following from an act or neglect, and the act is before the six months' period but the damage within it? Where there is one act which causes damage which gradually develops, as in a claim for personal injury, we are bound by the decision of the Court of Appeal in *Carey v. Bermondsey Metropolitan Borough* (1) to hold that time runs from the act, and not from the latest damage. It is not necessary to decide in the present case what is the result where no damage occurs till six months have elapsed from the act, and damage is a necessary part of the cause of action. If time runs from the act this leads to the startling result that you may lose a cause of an action before you have got it: it may be possible to avoid this remarkable result by holding that the words "neglect complained of," "default complained of," involve something which can be legally complained of, and, therefore, the time runs from the accruing of the cause of action, though not from the latest development of the damage; but it is not necessary so to decide in the present case. The case seems to me quite different where after the original act there is a legal duty to avert its consequences, neglect of which is a continuing breach from day to day. Where a man removes a support, which he ought to render continuously, and does not replace it, there is a continuing breach of duty, and on the day of the damage complained of there is a neglect and damage resulting therefrom, and it seems to me immaterial that the original removal was some time before. This helps one to appreciate the meaning of the concluding words of the section, "or in case of a continuance of injury or damage, within six months of the ceasing thereof." *Carey's Case* (1) says this means a continuance of the act or default. If the act or default continued the time would run from it, so long as it continued, under the first part of the section, and it appears to me that the additional words are meant to prevent the necessity of separating in a continuous act or neglect the damage resulting from that part of the continuity which was more than six months before the writ from the damage resulting from that part of the continuity which was within six months of the writ, and to enable the whole damage resulting from the whole continuous act or neglect to be recovered if the action was brought within six months of the cessation of the continuing damage. If this is so, in the present case there was a withdrawal of the support to which the gas pipes were entitled, a duty under s. 32 of the Waterworks Clauses Act to make good the road which had been broken up, and a continuous neglect of that duty from the time of the original act to the time of the writ, whereby damages occurred. As the corporation had never made the road good, but left the excavation in it so negligently filled up that the soil in it was continually subsiding, the year of maintenance provided by s. 32 had not begun to run.

For these reasons I think FINLAY, J., was right in rejecting the defence of the Liverpool Corporation. Within six months of the writ there was continuing neglect of their duty to make good the excavation which had withdrawn the support of the gas pipes, and damage resulting therefrom. This enables all the damage to be sued for. The case appears to me, as FINLAY, J., thought, to be on all fours with the *Ancholme Case* (2). The appeal must be dismissed with costs.

ATKIN, L.J.—The Public Authorities' Protection Act has in the past caused difficulties, and probably will so continue. It appears to me difficult to read s. 1 as though the commencement of the limitation period of six months was the accrual of the cause of action. It looks as though the legislature in using in the statute, which is in the nature of a consolidating and amending statute, the words "act, neglect, or default complained of" intended to discard the words found in some

A of the repealed Acts, "cause of action," and intended the period to run from the occurrence of the "act, neglect, or default" for or in respect of which any action is commenced. If an act is done which subsequently causes damage it appears to me that the "act complained of" in an action is the act, not the damage ; and that the damage is the legal justification for complaining of the act. This form of words leads to the possibility that a person may lose his right of action before
B ever he has acquired it, as where damage is the gist of the action and only occurs more than six months from the date of the act complained of. Apart from authority I should have thought that this absurd result is, if not entirely removed, at least much mitigated by the alternative provided at the end of the section, "in the case of continuance of injury or damage within six months next after the ceasing thereof." I find it difficult to suppose that "injury" and "damage" are intended
C to mean the same thing, though in general usage they are both capable of expressing detrimental consequences. I find it still more difficult to suppose that the word "damage" means, not the harmful effect of the act complained of, but the act itself or series of acts.

It seems desirable to recapitulate shortly the relevant variations of facts to which the words of the statute may apply. In the word "act" I include, where appropriate, "omission." (i) An act may be actionable in itself and occur once and cause immediate damage once for all : as, for instance, trespass to the person or to property. Such damage may be of very short duration, or it may continue, as for instance, a permanent maiming, or a shock to the foundations of a house which in the course of time causes the structure to crack and be unsafe. (ii) An
D act may be actionable in itself and be continuous, thereby causing continuous damage ; as, for instance, a continuous trespass either by imprisonment of the person or trespass to land. (iii) An act may only be actionable if it causes damage, and may occur once and cause immediate damage once for all ; as, in the case of negligent driving, causing damage to person or goods. Such damage, as in case (i) may be of short duration or may be continuous. (iv) An act may only
E be actionable if it causes damage, and may be continuous and cause continuous damage, as in the case of obstruction of light and other forms of nuisance, or may cause damage occurring once for all, as in the case of the breach of a continuous duty to take care, causing damage once for all. (v) Acts whether actionable with or without damage may occur only once and cause damage at a later date, and such damage may occur once or on two or more independent occasions. Special
F damage caused by a libel may illustrate the case of an act actionable in itself. Illustrations of the other class are cases of negligent breach of duty in the construction of vehicles, or dangerous chattels, intended to be used by the person injured. So are cases where an excavation is made once for all, and a subsidence
G or a series of subsidences follows at various times, each causing damage.

It is probable that the framers of the Act had not all these possible combinations under consideration ; and I agree with the expression of opinion of SCRUTTON, L.J., in *Tuckwood v. Rotherham Corpn.* (6), where he says that considerable difficulty arises from the fact that the Act of 1893 is framed in general terms and has to be applied to a large number of cases which were obviously not present to the mind of the legislature. Nevertheless, we have to consider how the Act can be applied in these varying conditions. Without the light of existing authorities I think much
H could be said for the view that the words "continuance of injury or damage" were appropriate—"injury" to the continuance of the act or the continuance of the operation of the act causing damage, not confining injury to acts actionable in themselves, and "damage" to the continuance of the harmful consequences of the act. One could surmise that while there might be good reason for imposing a limit of six months where damage was suffered and was over, it might well be thought that it was unfair to impose such a short period of limitation where damage was continuing, and it became necessary, possibly prematurely, to pre-estimate the
I damage. But I am precluded from coming to a conclusion as to this by the decision

in *Carey v. Bermondsey Metropolitan Borough* (1), which, as reported, lays down that " 'continuance of the injury or damage' means the continuance of the act which caused the damage." This plainly prevents continuance of the damage alone from extending the period of limitation. It does not define what is meant by "continuance of the act complained of." I think the words would clearly cover cases (ii) and (iv) above. Would they cover (v) where the act is done once for all, but continues to operate so as to eventually cause damage later? CHANNELL, J., whose judgment was under appeal, apparently thought they would, for he refers to cases of subsidence, and would probably have in his mind *Darley Main Colliery v. Mitchell* (7), where the facts were as suggested above ; and I think that BUCKLEY, J., was of the same opinion in *Earl of Harrington v. Derby Corpn.* (5), but I am not sure, for he refers to "new damage recurring day by day in respect of an act done, it may be, once and for all at some prior time." If one had to decide the question and came to the conclusion that the continued operation of an act done once for all was a continuance of injury or damage, this present case could easily be decided, for the damage suffered by the plaintiffs was clearly due to the continued operation of the original neglect or default of the defendants in laying their water pipe. But it becomes unnecessary to decide this if the defendants were under a continuous duty to see that the earth which formed the support of the plaintiffs' pipes was so replaced as to continue to afford an adequate support. I think that there was such a continuous duty. If so, the case falls within case (iv) as stated above ; and there was a continuance of injury or damage sufficient to take the case out of the statute. In my opinion, the necessary duty is imposed upon the plaintiffs by s. 32. In the facts that happened it would be too narrow a view of that section to hold that the plaintiffs had made good the road, or had kept it in good repair, as long as the soil broken up had continued to subside. I think therefore that the judgment of Finlay, J., was right and the appeal should be dismissed.

Appeal dismissed.

Solicitors : *F. Venn & Co.*, for Town Clerk, Liverpool ; *Finch, Jennings & Tree*, for *Syers, Dixon & Barrell*, Liverpool.

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

Re COMBE. COMBE v. COMBE

[CHANCERY DIVISION (Tomlin, J.), February 4, 1925]

[Reported [1925] 1 Ch. 210; 94 L.J.Ch. 267; 133 L.T. 473; 69 Sol. Jo. 397]

Power of Appointment—Failure to exercise—No gift over in default of exercise—Implication of trust in favour of objects of power.

Where there is a power in an instrument to appoint property among certain objects of the power, but no gift to those objects and no gift over in default of appointment, it is not an inflexible rule of construction that the law confers a gift on those objects equally or at all, but the court has to consider in each case whether, as a matter of the construction of the instrument, it was intended to exercise a trust in favour of those objects.

By his will a testator gave his property to trustees to pay the income to his wife and from and after her death or re-marriage "in trust for my son H.A.B.C. for his life and after his death in trust for such persons or person as my said son shall by will appoint but I direct that such appointment must be confined to any relation or relations of mine of the whole blood." There was no gift over in default of appointment.

Held: there was no indication in the will adequate to enable the court to conclude that the testator intended to create a trust, nor was the class mentioned such as justified a finding that the members of the class were meant to benefit in any event, and, therefore, on release of the power of appointment the property would go, subject to the life interests, as on an intestacy.

Re Weekes' Settlement (1), [1897] 1 Ch. 289, applied.

Notes. Applied: *Re Perowne*, [1951] 2 All E.R. 201. Referred to: *Re Arnold's Trusts*, *Wainwright v. Howlett*, [1946] 2 All E.R. 579; *Re Sayer Trust*, *MacGregor v. Sayer*, [1956] 3 All E.R. 600.

As to where a trust will be implied in favour of the objects of an unexercised power see 25 HALSBURY'S LAWS (2nd Edn.) 596–599, and for cases see 37 DIGEST 526–528.

Cases referred to:

- (1) *Re Weekes' Settlement*, [1897] 1 Ch. 289; 66 L.J.Ch. 179; 76 L.T. 112; 45 W.R. 265; 41 Sol. Jo. 225; 37 Digest 524, 1146.
- (2) *Burrough v. Philcox*, *Lacey v. Philcox* (1840), 5 My. & Cr. 72; 5 Jur. 453; 41 E.R. 299, L.C.; 37 Digest 523, 1142.
- (3) *Re Llewellyn's Settlement*, *Official Receiver v. Evans*, [1921] 2 Ch. 281; 90 L.J.Ch. 493; 126 L.T. 285; 37 Digest 531, 1228.
- (4) *Lambert v. Thwaites* (1866), L.R. 2 Eq. 151; 35 L.J.Ch. 406; 14 L.T. 159; 14 W.R. 532; 37 Digest 478, 756.
- (5) *Brown v. Higgs* (1799), 4 Ves. 708; 31 E.R. 366; reheard (1800), 5 Ves. 495; affirmed (1801), 8 Ves. 561, L.C.; (1813) 18 Ves. 192, H.L.; 37 Digest 526, 1168.
- (6) *Re Caplin's Will* (1865), 2 Drew & Sm. 527; 6 New Rep. 17; 34 L.J.Ch. 578; 12 L.T. 526; 11 Jur. N.S. 383; 13 W.R. 646; 62 E.R. 720; 37 Digest 528, 1193.
- (7) *Re Brierley*, *Brierley v. Brierley* (1894), 43 W.R. 36; 38 Sol. Jo. 647; 12 R. 55, C.A.; 37 Digest 528, 1187.
- (8) *Re Hughes*, *Hughes v. Footner*, [1921] 2 Ch. 208; 91 L.J.Ch. 10; 127 L.T. 117; 37 Digest 523, 1137.
- (9) *Forbes v. Ball* (1817), 3 Mer. 437; 36 E.R. 168; 37 Digest 523, 1138.
- (10) *Re White's Trusts* (1860), John. 656; 70 E.R. 582; 37 Digest 529, 1201.
- (11) *Re Eddowes* (1861), 1 Drew & Sm. 395; 5 L.T. 389; 7 Jur. N.S. 354; 62 E.R. 430; 37 Digest 527, 1179.

Adjourned Summons.

By his will, dated May 19, 1923, a testator devised and bequeathed all his property, both real and personal, to trustees upon trust for sale, and out of the proceeds of sale to pay his funeral and testamentary expenses and debts, and to stand possessed of the residue of his estate and the investments for the time being representing the same in trust to pay the income thereof to his wife during her widowhood, and from and after her death or re-marriage in trust for his son for life, and after his (the son's) death in trust for such person or persons as the son should appoint, "but I direct that such appointment must be confined to any relation or relations of mine of the whole blood." There was no gift over in default of appointment. By the present summons the son sought to have determined whether he would create a partial intestacy if he released his power of appointment, so that in the result he, as heir-at-law, and his mother and himself, as next of kin, could take the whole property subject to the life interests given to his mother and himself successively.

J. F. Carr, for the testator's grandchild, submitted that the will showed an intention to benefit a class and that the court would imply a gift to them in default of appointment. He referred to *Burrough v. Philcox* (2), *FARWELL ON POWERS* (3rd Edn.) p. 528, *Re Weekes' Settlement* (1), *Re Llewellyn's Settlement* (3), *Lambert v. Thwaites* (4).

Shebbear for a trustee.

C. W. Turner, for the testator's sister.—The will creates a trust for such persons, relations of the whole blood of the testator, as the son shall appoint, and as the son has not appointed the court will imply a gift to them in default of appointment. He referred to *Brown v. Higgs* (5), *Re Caplin's Will* (6), *Re Brierley* (7), *Re Llewellyn's Settlement* (3), *JARMAN ON WILLS* (6th Edn.) p. 650; *HAWKINS ON WILLS* (2nd Edn.) p. 77, *FARWELL ON POWERS* (3rd Edn.) p. 528, *Re Hughes* (8), 25 *HARVARD LAW REVIEW*, 12; *Forbes v. Ball* (9), *Re White's Trusts* (10).

Sir Arthur Underhill, for the plaintiff. In this case there is no definite class in favour of whom the power is to be exercised. It is actually a general power followed by a limitation on its exercise in favour of "relations of the whole blood." The case corresponds to *Re Eddowes* (11).

TOMLIN, J.—The testator died in December, 1923, and by his will, after appointing executors and trustees, one of whom was his wife, he gave all his property, both real and personal, to trustees for sale and conversion, and, after payment of his funeral and testamentary expenses and debts, to stand possessed of the residue of his estate and the investments for the time being representing the same in trust to pay the income to his wife during her widowhood and from and after her death or re-marriage,

"in trust for my son Harvey Alexander Brabazon Combe for his life and from and after his death in trust for such persons or person as my said son . . . shall by will appoint but I direct that such appointment must be confined to any relation or relations of mine of the whole blood."

The will stopped there so far as regards any disposition of the residue. The testator left him surviving, his widow, who is the first defendant in these proceedings; the son, who is the plaintiff: a daughter of that son, who is the second defendant; and he left no other issue. There is also living a sister of the testator. I understand, that for all practical purposes, that constitutes the family.

The first question I am asked to determine is whether, in the event of the son releasing his power of appointment, there will be after his death an intestacy in relation to the property, so that as a result of that release the widow and the son between them will be absolutely entitled to the entirety of the estate. This question raises a point upon which there is a certain divergence of opinion in the authorities

A cited. In FARWELL ON POWERS (3rd Edn.), p. 528, the following rule is stated, and this rule, no doubt, is taken from the earlier editions :

"If there is a power to appoint among certain objects, but no gift to those objects, and no gift over in default of appointment, the court implies a gift to those objects equally if the power be not exercised."

B The rule is stated very much in the same words in HAWKINS ON WILLS (2nd Edn.) p. 77. There is a considerable number of reported cases in which it has been held from time to time that where there is no express disposition in default of appointment under a power to appoint among a class, either a gift is implied to the class equally in default of appointment or the appointment is construed as a gift to the class in the manner the appointee selects so that the power of selection is in the nature of a trust imposed upon him, and that, failing the selection, the members of the class take equally. One of the earliest cases of that class is *Brown v. Higgs* (5), where LORD ELDON said that it was one of the most difficult and doubtful cases that had ever occurred.

D That case has had a number of successors, many of which were examined and reviewed by ROMER, J., in *Re Weekes' Settlement* (1). In that case, the will of the testatrix, which was under consideration, conferred on her husband a life interest in certain property, and there followed these words :

"and I give to him power to dispose of all such property by will amongst our children in accordance with the power granted to him as regards the other property which I have under my marriage settlements."

E ROMER, J., began by saying :

F "Now apart from the authorities, I should gather from the terms of the will that it was a mere power that was conferred on the husband, and not one coupled with a trust which he was bound to exercise. I see no words in the will to justify me in holding that the testatrix intended that the children should take if her husband did not execute the power. This is not a case of a gift to the children with power to the husband to select, or to such of the children as the husband should select by exercising the power. Am I then bound by the authorities to hold otherwise? I think I am not. The authorities do not show, in my opinion, that there is a hard and fast rule that a gift to A. for life with a power to A. to appoint among a class and nothing more must, if there is no gift over in the will, be held a gift by implication to the class in default of the power being exercised. In my opinion, the cases show (though there may be found here and there certain remarks of a few learned judges which, if not interpreted by the facts of the particular case before them, might seem to have a more extended operation) that you must find in the will an indication that the testatrix did intend the class or some of the class to take, intended in fact that the power should be regarded in the nature of a trust—only a power of selection being given, as, for example, a gift to A. for life with a gift over to such of a class as A. shall appoint."

H The learned judge then proceeds to examine the authorities, including *Brown v. Higgs* (5), *Burrough v. Philcox* (2), and a number of others. In the course of this examination, he called attention to certain statements of a general character which, he says, must be read by reference to the facts of the particular case—for instance, he refers to *Re White's Trusts* (10), and, commenting on the general statement made by WOOD, V.-C., says it was too large unless checked by reference to the case before him. Then he states his conclusion upon the examination of those cases in this way :

"I have now shown that none of the cases relied on by the applicants establish the general proposition ; and I hold that in this case there was no gift by implication to the children of Emily Mary Slade in default of appointment by her husband."

The matter, then, stands in this way. Am I to approach this will governed by an inflexible and artificial rule of construction to the effect that where I find a power of appointment to a class not followed by any gift in default of appointment I am bound to imply a gift to that class in default of the exercise of the power? Or does it stand in this way, that I must approach this will for the purpose of construction in the same spirit as I approach any other will and endeavour to construe it and arrive at the testator's meaning by examining the words expressly used, only implying those things which are necessarily and reasonably to be implied? It seems to me that if I am to read the rule as stated in FARWELL ON POWERS (3rd Edn.), p. 528, as alone governing my mental attitude in approaching this will, then I have no option but to imply a gift, because here is a power of appointment which has not been exercised, and there is no express gifts in terms to the class in default of the exercise. On the other hand, I think the judgment of ROMER, J., in *Re Weekes' Settlement* (1) indicates that my proper course is to adopt the other line.

It is said that in a recent case before SARGANT, J., what I may call the arbitrary rule was again laid down. That case is *Re Hughes* (8). There a testator appointed H.H. his executor and trustee, and gave him all his estate

"upon trust for all my children and their issue in such shares and in such manner as I shall by codicil direct or appoint, or, by failing any such direction or appointment by me, then in such shares as . . . the said H.H. shall in his discretion think fit and proper."

The testator never made a codicil, and it was held, (i) that the children and their issue living at the death of the testator were entitled to the estate, subject to the power of selection given to H.H. ; and (ii) that the power so given to him was not confined to directing in what shares members of the class were to take. If I may say so with respect, it seems to me plain that that is a case upon which, taking as a guide the principle enunciated by ROMER, J., there could only be one conclusion. There was in fact a gift "for all my children and their issue," subject to the power of selection in the executor, and, so far as that will was concerned, it was not necessary to assert the existence of any inflexible rule in order to arrive at this conclusion. It is true that in that case the learned judge referred to *Brown v. Higgs* (5), and he cited a passage from the judgment of LORD ELDON in which he says (8 Ves. at p. 570):

"It is perfectly clear that, where there is a mere power of disposing, and that power is not executed, the court cannot execute it. It is equally clear that, wherever a trust is created, and the execution of that trust fails by the death of the trustee, or by accident, the court will execute the trust. . . . But there are not only a mere trust and a mere power, but there is also known to the court a power which the party, to whom it is given, is intrusted and required to execute ; and with regard to that species of power the court consider it as partaking so much of the nature and qualities of a trust, that if the person, who has that duty imposed on him, does not discharge it, the court will, to a certain extent, discharge the duty in his room and place."

SARGANT, J., goes on :

"With regard to powers of this description the rule to be derived from *Brown v. Higgs* (5) and other similar cases is stated, and, in my judgment, concisely and accurately stated in FARWELL ON POWERS (3rd Edn.) p. 528, in the following language."

Then he reads the rule which I have already read.

It is quite plain that the learned judge is saying that that rule applies when once one has come to the conclusion that the power is not merely a power but a trust which one is bound to execute. That is not in any sense in conflict with what ROMER, J., had said, namely, that one must, in accordance with the ordinary principles of construction, first of all arrive at a conclusion whether the power is really

a trust, and, if one arrives at the conclusion that it is, then as SARGANT, J., said in the case which I am now citing, the rule in FARWELL ON POWERS applies. That seems to me to be wholly consistent from beginning to end, and I can see no justification for my departing from the rule which has been laid down by ROMER, J., and I do not find in what SARGANT, J., said anything inconsistent with it. I, therefore, propose, in construing this will, to govern myself by the principle which has been enunciated by ROMER, J.

On that footing, what am I to decide? Am I able from this language to say that in fact the testator has created for a certain class of persons a trust, and that there was a duty on the son to execute that trust, and that, if he failed to execute it, the court would execute it, and that the members of the class took equally between them? The form of this power, whether it be called a power or a trust, follows the common form. The trustees are directed to hold the property after the death of the tenant for life "in trust for such person or persons as my said son shall by will appoint." There is nothing special about the form of that. It is just the ordinary language which the ordinary conveyancer would employ for the purpose of creating a power of appointment. Pausing there, the power is perfectly general. There is no class of any sort or kind, and if the will had ended there, it is quite plain that there would have been a general testamentary power, and on the failure to exercise that general testamentary power there would have been an intestacy. But the will proceeds,

"but I direct that such appointment [i.e., any appointment made under the general power] must be confined to any relation or relations of mine of the whole blood."

That is to say, he first gives a general power and then he says: But you must confine the exercise of that power to "any relation or relations of mine of the whole blood." I have no difficulty in coming to the conclusion that there is in this will no indication adequate to enable me to conclude that a trust was intended to be created. The class which it is said are to be the beneficiaries of this power differ wholly from the classes which were the subject of discussion in the cases that were cited. These were generally the testator's children, or, at any rate, a quite definite and ascertained class. What this class would be, if it became necessary to ascertain it, I confess at the moment I am unable to say. At any rate, it does not seem to me to be such a class as justifies me in saying that the testator meant them to benefit in any event. I think it may very well be that the form of this will is deliberate, and that the testator really meant his son to have a life interest and to be able to dispose of the property afterwards provided that it was not left wholly out of the family, and that for the rest he was content to let it go as the law would make it upon an intestacy. I see no reason on the words of this will for importing into it something which is not there. I shall, therefore, declare that upon the release of the power of appointment the property will go, subject to the life interests of the widow and the son, as upon an intestacy. That renders it unnecessary to explore the question of the class in favour of which the power of appointment is exercisable.

Solicitors: *Cohen & Cohen* ; *Hempsons* ; *Graham, Son & Drewry* ; *King, Adams & Co.*

[*Reported by L. MORGAN MAY, ESQ., Barrister-at-Law.*]

Re IOAKIMIDIS' POLICY TRUSTS. IOAKIMIDIS v. HARTCUP

[CHANCERY DIVISION (Astbury, J.), May 8, 1925]

[Reported [1925] Ch. 403; 95 L.J.Ch. 24; 133 L.T. 796; 41 T.L.R. 486;
69 Sol. Jo. 662]

Husband and Wife—Assurance policy by husband for benefit of wife—Wife to benefit if surviving husband—Death of husband leaving wife surviving—Validity of trust for wife—Married Women's Property Act, 1882 (45 & 46 Vict., c. 75), s. 11.

In 1918, a husband effected with an assurance society an endowment policy on his life which was expressed to be for the benefit of his wife if he died before May 28, 1938, leaving her surviving. In that event the policy moneys were to be held in trust for her, but, if he survived that date, they were to be paid in cash to him or his executors, administrators, or assigns. The husband died in 1924, leaving his wife surviving him.

Held: the policy was an ordinary life policy with the benefit of acceleration in a specified event, and, although it was immediately payable if the husband survived the specified date, it was effected on his own life within s. 11 of the Married Women's Property Act, 1882, and, in the events which had occurred, created a valid and effectual trust for the wife under s. 11.

Notes. Referred to: *Re Fleetwood's Policy*, post p. 262.

As to endowment insurance see 22 HALSBURY'S LAWS (3rd Edn.) 290–292; and for cases see 29 DIGEST 422. For the Married Women's Property Act, 1882, s. 11, see 11 HALSBURY'S STATUTES (2nd Edn.) 801.

Cases referred to:

- (1) *Prudential Insurance Co. v. I.R. Comrs.*, [1904] 2 K.B. 658; 73 L.J.K.B. 734; 91 L.T. 520; 53 W.R. 108; 20 T.L.R. 621; 48 Sol. Jo. 605; 29 Digest 443, 3415.
- (2) *Griffiths v. Fleming*, [1909] 1 K.B. 805; 78 L.J.K.B. 567; 100 L.T. 765; 25 T.L.R. 377; 53 Sol. Jo. 340, C.A.; 29 Digest 349, 2826.
- (3) *Cleaver v. Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147; 61 L.J.Q.B. 128; 66 L.T. 220; 56 J.P. 180; 40 W.R. 230; 8 T.L.R. 139; 36 Sol. Jo. 106, C.A.; 29 Digest 369, 2969.
- (4) *Re Engelbach's Estate, Tibbetts v. Engelbach*, [1924] 2 Ch. 348; 93 L.J.Ch. 616; 130 L.T. 401; 68 Sol. Jo. 208; 29 Digest 422, 3288.

Witness Action.

On June 7, 1918, a husband effected an endowment policy on his life with the Norwich Union Life Insurance Society, which assured the sum of £1,500 under an annual premium of £78 1s. 3d. It recited that the husband had agreed to effect an insurance with the society for the benefit of his wife only in the event of his death before May 28, 1938, leaving his wife him surviving, under the provisions of the Married Women's Property Act, 1882, in the sum of £1,500. The society undertook that if the first premium should be paid within twenty-one days from the date thereof, and if the subsequent premiums were paid on each subsequent May 28, during the husband's life, until and including May 28, 1937, the society's funds therein specified should be liable, after-satisfactory proof of the husband's death should have been received by the directors of the society, or on his surviving May 28, 1938, to the payment of the sum of £1,500, such sum to be paid in cash to the husband or to his executors, administrators or assigns on his surviving May 28, 1938, or to be paid to the trustees or trustee for the time being entitled to give a receipt or discharge for the same for the benefit of the wife in the event of his death before May 28, 1938, leaving her surviving him; otherwise to be paid to the husband's executors, administrators or assigns. The first premium was duly paid by the husband, but all subsequent premiums were paid or provided by his

A wife out of moneys forming part of her separate estate. No trustee of the policy moneys was ever appointed by the husband. He died on Jan. 23, 1924, in Athens, intestate, leaving his wife surviving. On July 7, 1924, letters of administration to his estate were granted to the defendant, Geoffrey Hamilton William Hartcup, therein expressed to be the lawful attorney of the wife, who resided in Athens, for her use and benefit until she should apply for and obtain letters of administration of the estate. She never applied for any grant of administration. The husband left no estate other than the moneys secured by the policy. On July 10, 1924, the society paid to the defendant as such administrator £1,601 5s., being the amount of the policy moneys and certain bonuses which had accrued thereon, and the estate duty, £48, on that sum was paid by him. Prior to the grant of administration a creditor of the husband had entered a caveat at the Probate Registry, and only subduced such caveat on giving notice to the defendant not to part with the proceeds of the policy without satisfying his claim. He alleged that the policy had been effected, and some one or more of the premiums paid, with intent to defraud the creditors of the assured. The wife claimed that the defendant was a trustee for her of the policy moneys, and demanded that he should pay them over to her. The defendant was advised that, in the circumstances, he ought not to do so without an order of the High Court. The wife now brought this action claiming a declaration that the defendant was a trustee for her of the policy moneys and an order on him to pay them over to her. The defendant raised the questions whether the endowment policy, being effected on the husband's own life if he died before May 28, 1938, and if he survived that date payable at once, was a policy on "his own life" within s. 11 of the Married Women's Property Act, 1882, and whether the policy, being expressed to be for the wife's benefit only in the specified event, was within the section.

The Married Women's Property Act, 1882, s. 11, provides :—

" . . . A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured or be subject to his or her debts : Provided, that if it shall be proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured they shall be entitled to receive, out of the moneys payable under the policy, a sum equal to the premiums so paid. The insured may by the policy, or by any memorandum under his or her hand, appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof. . . . In default of any such appointment of a trustee, such policy, immediately on its being effected, shall vest in the insured and his or her legal personal representatives, in trust for the purposes aforesaid. . . . The receipt or receipts of a trustee or trustees duly appointed, or in default of any such appointment, or in default of notice to the insurance office, the receipt of the legal personal representative of the insured shall be a discharge to the office for the sum secured by the policy. . . ."

I G. D. Johnston for the plaintiff wife, referred to *Prudential Insurance Co. v. I.R. Comrs.* (1), and *Griffiths v. Fleming* (2).

J. W. F. Beaumont and Overton, for the defendant, referred to *Cleaver v. Mutual Reserve Fund Life Association* (3), and *Re Engelbach's Estate*, *Tibbetts v. Engelbach* (4).

ASTBURY, J., stated the facts, read the Married Women's Property Act, 1882, s. 11, and continued : It was questioned at one time whether an endowment policy, which was expressed to be for the benefit of the wife or children of the insured

husband was within the section at all. In my view, however, such an endowment policy is an ordinary life policy with the benefit of acceleration in a specified event, and I feel no doubt that it is a policy effected by the husband on his own life. In this case, the benefit expressed in the policy for the wife was operative only in the specified event of the husband dying before May 28, 1938, leaving his wife him surviving. That, in my opinion, was a policy effected by the husband on his own life, and impressed in the event which has happened with a trust for the wife. It created a statutory trust for her in that event only.

A text writer has raised the question whether a policy can be partly within and partly outside s. 11, according to the event which occurs. The policy in question is of that character. I am of opinion that, as far as the policy expressed a benefit for the wife in the event which has occurred, it created a valid and effectual trust under s. 11. There will, therefore, be a declaration that the defendant is a trustee of the policy moneys for the wife, and an order for payment to her of the balance thereof remaining after defraying estate duty, costs, charges and expenses reasonably incurred in connection with the policy, and the costs of the action.

Solicitors: Ballantyne, Clifford & Co.; Collisson, Pritchard & Barnes.

[Reported by E. K. CORRIE, Esq., Barrister-at-Law.]

NEPEAN (OTHERWISE LEE-WARNER) v. NEPEAN

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Horridge, J.), March 3, 1925]

[Reported [1925] P. 97; 94 L.J.P. 42; 133 L.T. 287; 41 T.L.R. 366]

Variation of Settlement—Nullity—Voidable marriage—Avoided marriage treated as effective marriage.

On an application for the variation of a settlement under s. 5 of the Matrimonial Causes Act, 1859 [now s. 25 of the Matrimonial Causes Act, 1950], after a decree of nullity of marriage on the ground of the incapacity of the respondent the court can treat as a marriage that which is in law no marriage at all, being a voidable marriage which has been avoided, although in the absence of an order under s. 5 the failure of consideration might have been a good defence to an action on a covenant in the settlement.

Notes. Referred to: *Clifton (Otherwise Packe) v. Clifton*, [1936] 2 All E.R. 886.

As to variation of settlements see 12 HALSBURY'S LAWS (3rd Edn.) 451 et seq., and for cases see 27 DIGEST (Repl.) 641 et seq. For Matrimonial Causes Act, 1950, see 29 HALSBURY'S STATUTES (2nd Edn.) 388.

Cases referred to:

- (1) *Re Wombwell's Settlement, Clerke v. Menzies*, [1922] 2 Ch. 298; 92 L.J.Ch. 18; 127 L.T. 295; 27 Digest (Repl.) 551, 5016.
- (2) *Dormer (Otherwise Ward) v. Ward*, [1900] P. 130; 69 L.J.P. 65; 82 L.T. 469; 48 W.R. 524; 16 T.L.R. 220; on appeal, [1901] P. 20; 69 L.J.P. 144; 83 L.T. 556; 49 W.R. 149; 17 T.L.R. 12, C.A.

Application to confirm, subject to certain agreed alterations, a registrar's report on petitions for maintenance and for variation of a post-nuptial settlement by the petitioner in a suit for nullity of marriage, Maria Gladys Nepean (otherwise Lee-Warner), who had gone through a ceremony of marriage to the respondent, Nicholas St. Vincent Nepean, on Dec. 24, 1915, and on March 27, 1923, had obtained a decree nisi of nullity on the ground of the respondent's incapacity to consummate the marriage, which decree was made absolute on Nov. 19, 1923.

A The settlement in question was executed on April 18, 1916, the petitioner's father and mother, Mr. and Mrs. Lee-Warner, being parties to it. The petitioner's father covenanted to pay her an annual sum of £150 less income tax during his life, and the petitioner's mother covenanted to pay a like sum during her life, if she should survive the petitioner's father. Mr. and Mrs. Lee-Warner had filed an answer to the petition for variation objecting that they should no longer be bound by these covenants as the consideration for them had failed, but the registrar had reported that their covenants should be read as though they had agreed to pay the annual sum of £75 and this is the only point in the case calling for a report.

C T. Bucknill (H. Farrar with him), for the petitioner, referred to *Re Wombwell's Settlement* (1), and *Dormer (Otherwise Ward) v. Ward* (2).

Noel Middleton for Mr. and Mrs. Lee-Warner.

J. M. Rivington, for the respondent.

D HORRIDGE, J.—The question raised here is whether the registrar is right in his recommendations with regard to a post-nuptial settlement made in consideration of a marriage, subsequently declared to have been null and void by reason of the respondent husband's impotency. The petitioner brought into settlement a reversionary interest in a trust fund appointed to her by her parents on her marriage, and I have no power to deal with the appointment. The respondent's interest in that fund is to be deleted, and he does not complain.

E The question I have to decide arises with regard to a covenant by the father and mother of the petitioner to pay her £150 a year during the life of the survivor of them, as to which the learned registrar recommends that their liability should be maintained to the extent of £75 a year. It is contended on their behalf that the marriage, in consideration of which they so covenanted, having been declared null and void, the consideration for their covenant has wholly failed, and they should be relieved of any further liability. I think there is a good deal to be said for the view taken by GORELL BARNES, J., in *Dormer v. Ward* (2), but the Court of Appeal in that case held that since s. 5 of the Matrimonial Causes Act, 1859, as amended by s. 3 of the Matrimonial Causes Act, 1878, extends the power of the court to deal with settled property to cases of nullity of marriage, in which there are not and could not be children, the marriage which has been annulled can, in exercising this power, be treated as though it had been valid. Thus VAUGHAN WILLIAMS, L.J., said ([1901] P. at p. 32):

G "Now generally, no doubt, it is true that the section only gives power to make orders with reference to the application of property settled, and does not give the court power to vary the settlement by treating as settled property which is not settled. But it is obvious that, inasmuch as the section applies to decrees of nullity of marriage, there must, if the section is to apply at all to nullity cases, be a power not only to make orders with reference to the application of the property settled amongst the beneficiaries contemplated by the settlement, but also for application of the property settled in favour of persons outside the settlement and under conditions outside the settlement. In other words the court must read in the settlement child or children, as meaning a child or children who are not issue of a marriage, and who are, therefore illegitimate, and must read marriage as including a connection which is no marriage at all, being a voidable marriage which has been avoided. . . . Now in my judgment the whole of this clause, and indeed the whole settlement is according to its terms conditional upon a valid marriage taking place, and though it is true that until the declaration of nullity this marriage was voidable only and not void, and that therefore that which has been done under the settlement cannot be undone, I yet think that this covenant in the settlement cannot be enforced after the decree of nullity without an order under s. 5, and I do not agree with the argument approved by GORELL BARNES, J., that the covenant was

either still in force or at an end, and that the petitioner must accept one of these alternatives, and therefore could only ask the court to enforce a legal right which has nothing to do with an application under s. 5. I think that there was a third course open to the petitioner, who, I think, had no legal right which she could enforce; for in my opinion the declaration of nullity would be a complete answer to an action on the covenant. It seems to me that the right, and the only right of the petitioner in respect of this covenant, is to apply to the court under s. 5 to make an order for the application of this £200 for her benefit."

Counsel for Mr. and Mrs. Lee-Warner contends that the cases are not on all fours, as there the covenantor was the husband, but I cannot see that this makes any difference. The point is that on an application under s. 5 the court can treat as a marriage that which is in law no marriage at all, being a voidable marriage which has been avoided, though in the absence of an order under s. 5, the failure of consideration might have been a good defence to an action on the covenant. The registrar proposes that the liability of the covenantors should be maintained to the extent of £75 only, and I accept his recommendation. The registrar's report will, therefore, be confirmed subject to the agreed alterations. The petitioner's costs will be paid by the respondent, and Mr. and Mrs. Lee-Warner must bear their own costs.

Solicitors: *Crawley, Arnold & Co.; Baker & Savigny; Dawson & Co.*

[Reported by J. A. C. SKINNER, Esq., Barrister-at-Law.]

MIKKELSEN v. ARCOS, LTD.

[KING'S BENCH DIVISION (MacKinnon, J.), October 16, 1925]

[Reported 134 L.T. 92; 42 T.L.R. 3; 16 Asp. M.L.C. 576.]

Shipping—Charterparty—Charterers to load "full and complete" cargo—Insufficient cargo loaded—Defence—Insufficiency due to unskilled labour—Notice of claim clause—Failure to observe.

Under two charterparties of June, 1924, the steamship H. was to proceed to Leningrad and there load a "full and complete" cargo of Russian timber and convey the same to an English port as specified in the bills of lading. The charterparties provided that the charterers should supply sufficient ends for broken stowage, and by cl. 5: "Any dispute arising at the port of loading shall be settled before the signing of the bills of lading, otherwise claims shall be endorsed upon the bills of lading, and if for any reason the master is prevented from so doing, he shall telegraph notice of the claim and the amount thereof to the charterers." The steamship H. performed two voyages, and on each occasion the master complained of the bad and insufficient loading, but cl. 5 was not complied with. In an action by the shipowners for dead-freight of the cargoes that should have been carried but were not carried,

Held: (i) the contract was an express and unqualified contract to load a full and complete cargo, and the fact that the bad loading was due to want of supervision or unskilled labour was no excuse; (ii) non-compliance with cl. 5 did not invalidate the claim.

Notes. Considered: *Angfartygs A./B. Halfdan v. Price and Pierce, Ltd.*, [1939] 1 All E.R. 322.

A As to stipulations in a charterparty regarding cargo and loading see 30 HALSBURY'S LAWS (2nd Edn.) 300-307, 336-344, and for cases see 41 DIGEST 336-343, 443 et seq.

Case referred to :

- (1) *Cuthbert v. Cumming* (1855), 10 Exch. 809; 3 C.L.R. 401; 24 L.J.Ex. 198; 25 L.T.O.S. 23; 3 W.R. 244; 156 E.R. 668; affirmed, 11 Exch. 405, Ex. Ch.; 41 Digest 338, 1905.

Action tried by MACKINNON, J., without a jury.

The plaintiff was the owner and the defendants were the charterers of the steamship *Huldra*. Under two charterparties dated in June, 1924, the steamship *Huldra* was directed to proceed to Leningrad and there load full and complete cargoes of Russian timber and convey the same to an English port as directed by the agents of the defendants and specified in the bills of lading. The charterers were to arrange for the loading of the cargoes and were to supply sufficient ends not exceeding $7\frac{1}{2}$ per cent. for broken stowage. The *Huldra* performed two voyages and on each occasion carried considerably less cargo than her carrying capacity. On each occasion the master complained to the agents of the defendants at Leningrad of the bad loading and short cargo. Under the second charterparty the port of destination was Great Yarmouth or Boston, as directed, and in fact, the ship was directed to proceed to Great Yarmouth. On arrival at this port, the charterers averred that their Leningrad agents had made a mistake and that Boston was the proper port. Owing to the delay that took place while arrangements were being made for the ship to proceed to Boston, the tide became unfavourable, and the steamship *Huldra* was unable to put into Boston for some days after arrival off that port. The plaintiff claimed damages for dead-freight of the cargoes that ought to have been carried, but were not carried, and also demurrage on account of the expenses incurred by the change of port of destination. The defendants pleaded as regards the claim for dead-freight that the cargoes shipped were as full and complete cargoes as were customarily shipped at Leningrad. It was further pleaded that under cl. 5 of the charterparty the plaintiff was precluded from making a claim. Clause 5 was as follows :

"Any dispute arising at the port of loading shall be settled before the signing of the bills of lading, otherwise claims shall be endorsed upon the bills of lading, and if for any reason the master is prevented from so doing he shall telegraph notice of the claim and the amount thereof to the charterers."

As regards the claim for demurrage the defendants pleaded that the expenses were incurred by the action of the plaintiff himself.

Clement Davies for the plaintiff.

Somervell, for the defendants, referred to *Cuthbert v. Cumming* (1).

MACKINNON, J., stated the facts and continued : *Cuthbert v. Cumming* (1) hardly applies. That was a contract to load a complete and full cargo of sugar and/or other produce. It did not decide that the charterer was bound to provide other produce in addition to sugar in order to fill up spaces, but it might be an authority that if cargo were loaded in receptacles customary at the port of loading, those receptacles must be used and the charterer would not be bound to fill interstices with other cargo. In the case before me the contract is an express and unqualified contract to load a full and complete cargo with sufficient ends for broken stowage. On the evidence I am satisfied that the charterers had not supplied a sufficient number of ends (in fact, $2\frac{1}{2}$ per cent. only, whereas the limit was $7\frac{1}{2}$ per cent.), and it is no answer to the claim to say that the labour was unskilled or badly supervised. That is the misfortune of the charterers. As regards cl. 5 of the charterparty, it is a common stipulation in policies of insurance that notice of loss or damage must be given within a certain time, but no one would suggest that failure to notify would invalidate the claim. I, therefore, hold that the defendants

are liable for short cargo on both voyages. As regards the change of port destination under the second charterparty the ship had proceeded to Great Yarmouth as ordered by the defendants' agents at Leningrad, and the plaintiff is entitled to reasonable remuneration for the extra services while arrangements were being made for the ship to proceed to Boston. The plaintiff, therefore, succeeds and judgment will be entered accordingly. A

Solicitors: *Botterell & Roche; Wynne, Baxter & Keeble.* B

[Reported by R. A. YULE, Esq., Barrister-at-Law.]

GOH CHOON SENG v. LEE KIM SOO C

[PRIVY COUNCIL (Lord Wrenbury, Lord Phillimore and Lord Carson), January 26, 27, February 17, 1925] D

[Reported [1925] A.C. 550; 94 L.J.P.C. 129; 133 L.T. 65]

Master and Servant—Liability of master for act of servant—Damage to neighbouring property—Fire.

When a servant does an act, which he is authorised by his employment to do, in circumstances or in a manner which are unauthorised and improper, his employer is liable for the consequences of that wrongful act. E

The appellant was the owner of a coconut, fruit, and rubber estate which was separated from the property of the respondent by waste land. Part of the duty of the appellant's servants was to collect vegetable rubbish and burn it on the appellant's land, but on the occasion in question, without any authority from the appellant, they stacked and burned it on the waste land with the result that fire spread to and damaged the property of the respondent. F

Held: the appellant was liable for the damage caused by the fire.

Viscount Bolingbroke v. Swindon New Town Local Board (1) (1874), L.R. 9 C.P. 575, distinguished.

Notes. Applied: *L.C.C. v. Cattermoles (Garages), Ltd.*, [1953] 2 All E.R. 582. Referred to: *Canadian Pacific Rail. Co. v. Lockhart*, [1942] 2 All E.R. 464; *McKean v. Raynor Bros., Ltd. (Nottingham)*, [1942] 2 All E.R. 650. G

As to the liability of an employer for the tortious acts of his servant see 25 HALSBURY'S LAWS (3rd Edn.) 535 et seq. For cases see 34 DIGEST 123 et seq.

Case referred to:

(1) *Viscount Bolingbroke v. Swindon New Town Local Board* (1874), L.R. 9 C.P. 575; 43 L.J.C.P. 287; 30 L.T. 723; 23 W.R. 47; 34 Digest 147, 1159. H

Appeal from an order of the Court of Appeal of the Straits Settlements, Settlement of Singapore (SHAW, C.J., BROWN and REAY, JJ.), dismissing the appeal of the appellant from a judgment of the Supreme Court (BARRETT-LENNARD, J.).

The action was commenced by the respondent, as plaintiff, claiming from the appellant damages alleged to have been caused by the negligence of the appellant, or his servants in kindling a fire which destroyed the respondent's pottery works at Pasir Panjang on July 28, 1922. BARRETT-LENNARD, J., gave judgment in favour of the respondent and awarded damages to be assessed by the registrar, and that judgment was affirmed by the Court of Appeal. I

Macaskie for the appellant.

Sir Malcolm Macnaghten, K.C., and *Geoffrey Lawrence* for the respondent were not called on to argue.

A Feb. 17. **LORD PHILLIMORE.**—The defendant-appellant was the owner of a coconut, fruit, and rubber estate near Singapore, and the plaintiff-respondent was the lessee of a small adjacent property upon which were certain pottery works and kilns. The respondent's property was to the north and west of the appellant's property, and the two properties were conterminous along the south-east boundary of the respondent's land as far as that extended. Then came some Crown land **B** left waste and uncultivated, wedged in between the south-west boundary of the respondent's property and the continuation of the appellant's property, from which latter it was divided by a bamboo hedge. On July 28, 1922, a fire or fires for the purpose of burning branches, jungle trees, and other vegetable rubbish was or were kindled close to the bamboo hedge, spread across the wedge of Crown land to the respondent's land, and burnt down a number of the buildings upon it. For the **C** damage thus sustained the respondent sued the appellant, alleging that the fire or fires had been negligently kindled or allowed to spread by the servants of the appellant. The appellant denied that his servants had kindled any fire, and suggested that it was kindled on the Crown side of the hedge and might have been done by squatters. From the evidence given at the trial it appeared that there were **D** three heaps of vegetable refuse fit for burning on the appellant's side of the hedge, but that light had not been set to two of these, and that the third had been burnt out probably some time before. There were also three heaps on the Crown land side of the hedge, all of which had been recently kindled, and were seen to be smouldering later on in the same day. The learned judge who tried the case came to the conclusion that the damage was caused by one or all of the fires on the Crown land and not by any fire on the appellant's land, but that the fires which did the **E** mischief had been kindled by the servants of the appellant, who had come through the bamboo hedge and made their heaps on the Crown land. He gave judgment for the respondent, referring the amount of the damages to the registrar for assessment. Appeal was taken to the Supreme Court of the Straits Settlements, where the judgment was affirmed. From this affirmance the present appeal has **F** been brought.

The first point taken is that the learned judge was wrong in holding that there was sufficient proof that the fire was kindled by the servants of the appellant. As to this matter, their Lordships can express their opinion quite briefly. Where there are concurrent findings of fact by the court of first instance and the Court of Appeal, it is only in rare cases and upon special grounds that their Lordships **G** advise that the decision should be reversed. Upon the evidence as recorded in this case there was ample ground for the decision on this point of fact, and it must stand.

The appellant, however, raised a further point in the Court of Appeal, both by his memorandum of appeal and by the argument of the counsel, to the effect that the judge was wrong in holding that, if the fires were kindled by the defendant's **H** servants, they were acting within the scope of their authority. The argument takes its foundation from the fact that the fires were not kindled on the appellant's land, but upon that of a third party, and it is said that, as this involves a trespass and, therefore, an illegality by the appellant's servants, no authority from the master can be implied. It does not appear that this point was taken at the trial, and it may be that, if it had been taken, evidence could have been adduced **I** sufficient for the court to infer that leave and licence had been given by the Crown or by somebody in occupation under the Crown to carry the rubbish through the hedge and burn it on waste spots in the uncultivated land, in which case there would have been no trespass. Their Lordships will, however, assume that there may have been a trespass. Still, they would agree with the judges of the Supreme Court that the kindling of the fires was not outside the scope of authority of the appellant's servants, and that he is responsible for the negligent way in which the fires were kindled and controlled.

The authority upon which learned counsel for the appellant principally relied was

Viscount Bolingbroke v. Swindon New Town Local Board (1). In that case the manager of the sewage farm for the local board, having extensive powers of management, when cleaning a watercourse which served as a boundary, took upon himself to cut away the bank on the further side so as to widen it, and in doing so cut down brushwood, underwood, and trees, which impeded the course of the stream. An action for the trespass being thereupon brought against the local board, it was held by the court that the manager had exceeded his authority, which, though ample for anything to be done upon the land of the local board, was confined to that land, and that the local board was therefore not responsible for his acts. Upon the construction which the court put upon the special facts of the case, the decision seems to follow ; but these facts are unlike those of the present case. To begin with, the action in that case was not for negligence, but one brought for trespass by the party upon whose land the trespass had been committed. This distinction is pointed out in the judgment of the Supreme Court. The trespass, as BROWN, J., observed, was an essential element in the acts complained of. Here it is merely an incident. There is no rule of law that it cannot be within the implied scope of authority of a servant that he should not in the course of his work commit some minor act of trespass. In the present case it is not disputed that the men working on the appellant's plantation had authority to pile the rubbish in heaps and to set fire to it, and that if the fires had been on the other side of the hedge there would have been no such defence to the action.

The principle is well laid down in some of the cases cited by the Chief Justice, which decide that

"when a servant does an act which he is authorised by his employment to do in certain circumstances or in a manner which are unauthorised and improper, in such cases the employer is liable for the wrongful act."

As the learned Chief Justice says, the manager of the plantation was authorised by his employment to burn the weeds, and that he did it in a manner and at a place which was not authorised by his employer, makes no difference. Time and place are only circumstances or incidents. It is not even suggested that it would have made any difference to the mischief done if the fires had been kindled on the appellant's side of the hedge. As regards all the cases which were brought to their Lordships' notice in the course of the argument this observation may be made. They fall under one of three heads : (i) The servant was using his master's time or his master's place or his master's horses, vehicles, machinery or tools for his own purposes : then the master is not responsible. Cases which fall under this head are easy to discover upon analysis. There is more difficulty in separating cases under heads (ii) and (iii). Under head (ii) are to be ranged the cases where the servant is employed only to do a particular work or a particular class of work, and he does something out of the scope of his employment. Again, the master is not responsible for any mischief which he may do to a third party. Under head (iii) come cases like the present, where the servant is doing some work which he is appointed to do, but does it in a way which his master has not authorised and would not have authorised, had he known of it. In these cases the master is, nevertheless, responsible. Their Lordships will humbly advise His Majesty that this appeal be dismissed with costs.

Appeal dismissed.

Solicitors : *Pyke, Franklin & Gould ; Tamplin, Tayler & Joseph.*

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

A
UNITED STATES SHIPPING BOARD v. BUNGE Y BORN
LIMITADA SOCIEDAD

[HOUSE OF LORDS (Lord Buckmaster, Lord Atkinson, Lord Sumner, Lord Wrenbury and Lord Carson), December 10, 1925]

B
[Reported 134 L.T. 303; 42 T.L.R. 174; 16 Asp. M.L.C. 577;
31 Com. Cas. 118]

Shipping—Deviation—Justification—Onus of proof—Deviation necessary in business sense to obtain fuel—Need to prove adequate supply to ship at beginning of voyage.

C
A steamship constructed to use oil fuel was chartered to carry a cargo from the River Plate to Malaga and then to Seville. By cl. 29 of the charterparty it was provided: "The steamer shall have liberty to call at any port or ports, in any order, for the purposes of taking bunker coal or other supplies . . ." After discharging at Malaga the vessel had enough oil fuel to take her to Seville, but not to any further point. No oil fuel being obtainable either at Malaga or at Seville, she called at Gibraltar to obtain oil fuel from a tank steamer which was expected to arrive, but owing to the non-arrival of the latter, the vessel proceeded to Lisbon to procure oil supplies. On a claim by the charterers for damages for the deviation:

E
Held: a deviation having clearly been established, it was incumbent on the shipowners to show that it was one which in all the circumstances of the case was justified; it was not expressly permitted by cl. 29, and if it were to be justified as being reasonably necessary in a business sense and so within the charter voyage the owners must show that all necessary steps had been taken to supply the ship with adequate oil supplies at the beginning of the voyage and of that there was no evidence; and, therefore, the charterers were entitled to succeed.

F
Decision of Court of Appeal (1924), 132 L.T. 323, affirmed.

Notes. Considered: *Hain Steamship Co. v. Tate & Lyle, Ltd.*, [1936] 2 All E.R. 597. Referred to: *Reardon Smith Line, Ltd. v. Black Sea and Baltic General Insurance Co.*, [1938] 2 All E.R. 706.

G
As to deviation see 30 HALSBURY'S LAWS (2nd Edn.) 298-297, and for cases see 41 DIGEST 483.

Case referred to:

- (1) *Glynn v. Margetson & Co.*, [1898] A.C. 351; 62 L.J.Q.B. 466; 69 L.T. 1; 9 T.L.R. 437; 7 Asp. M.L.C. 866; 1 R. 193, H.L.; 41 Digest 311, 1715.

H
Appeal from an order of the Court of Appeal (BANKES, ATKIN and SARGANT, L.JJ.), reported 132 L.T. 323.

I
By a charterparty, dated Oct. 23, 1920, and made between the appellants as owners and the respondents as charterers, the steamer *Alamosa* was chartered to carry a cargo of maize from the River Plate to a safe port in the United Kingdom or on the continent between Marseilles and Hamburg, inclusive. Subsequently it was agreed that the charterers might load a cargo for Malaga and Seville, Malaga to be the first port of discharge, and the steamer was loaded accordingly. By cl. 29 of the charterparty it was provided:

"The steamer shall have liberty to call at any port or ports, in any order, for the purpose of taking bunker coal or other supplies, to sail without pilots, to tow and be towed, to assist vessels in distress, and to deviate for the purpose of saving life or property."

The shipowners claimed demurrage and the charterers counterclaimed for freight overpaid, for short delivery, and for deviation, and the dispute went to arbitration.

The material facts as found by the umpire were these. The *Alamosa* was a steamship constructed and intended to use oil fuel. On her way from the River Plate to Malaga she put into Rio de Janeiro to bunker, and there took on board a further supply of oil fuel. After discharging part of her cargo at Malaga she had about ninety tons of oil fuel in her bunkers, which would be sufficient to enable her to reach Seville and to discharge there, but not sufficient to enable her to get away. No supplies of oil fuel were procurable either at Malaga or Seville. On her way from Malaga to Seville the vessel had to pass Gibraltar, and arrangements were made that she should obtain supplies of oil fuel from an oil tanker expected there. The *Alamosa* went to Gibraltar and waited there for two days, but as the tanker had failed to arrive, she then left and went to Lisbon, the nearest port at which oil fuel was procurable, whereby the voyage was prolonged some 300 miles. The umpire found that in going to Lisbon the master acted reasonably and he awarded, subject to the opinion of the court, that the charterers' claim for damages for deviation failed. The questions for the court were: (i) Whether upon a true construction of the charterparty and upon the facts stated the *Alamosa* was guilty of deviation by going to Lisbon for oil fuel; and (ii) whether, if there was a deviation, the contract of affreightment was displaced or avoided so as to give the charterers a good defence to the owners' claim for demurrage. The Court of Appeal held, affirming the decision of BAILHACHE, J., that cl. 29 of the charterparty must be read as giving a liberty to call for bunkers or supplies only at a port or ports on the way of the voyage, and that the vessel did deviate to an unauthorised extent in proceeding to Lisbon. The owners were, therefore, liable to the charterers in damages in respect of such deviation. The shipowners appealed.

Sir Leslie Scott, K.C., Dunlop, K.C., and Stenham for the appellants.

Kennedy, K.C., A. T. Miller, K.C., and van Breda, for the respondents, were not called upon to argue.

LORD BUCKMASTER.—This appeal comes before your Lordship in the following circumstances. The appellants are the owners of a vessel known as the *Alamosa*, and on Oct. 23, 1920, they chartered that vessel to the respondents for the purpose of carrying a cargo of maize. The voyage was from the River Plate to ports between Marseilles and Hamburg, but ultimately the actual ports of discharge were fixed as Malaga and Seville. The charterparty contained a clause—No. 29—which provided that the steamer should have

“liberty to call at any port or ports, in any order, for the purpose of taking bunker coal or other supplies, to sail without pilots, to tow and be towed, to assist vessels in distress, and to deviate for the purpose of saving life or property.”

It is only necessary, in passing, to comment upon that clause by saying that a series of decisions has established that the first right which is there conferred is liberty to call at any port or ports upon the line of route between the port of loading and the ports of discharge. Liberty to deviate for the purpose of saving life or property is not material to the present dispute. What happened to the vessel was this. She took in oil at Rio de Janeiro, but the supply was not adequate to take her to both the ports of discharge, and at the same time to clear her from the final port. She went first to Malaga, and then finding that she had not enough oil to take her outside the port of Seville, though it is found that she had enough to take her there, arrangements were made for a tank steamer to meet her at Gibraltar in order to take in further oil. The tank steamer failed to keep the appointment, and, in the result, the master took the vessel to Lisbon, some distance off the route, for the purpose of getting the necessary oil supplies.

That that was a deviation is not in dispute, but it is said that it was a deviation which is justified either under the terms that are expressed or to be implied in the charterparty. The actual dispute arose because in the course of discharging

A the charterers exceeded the stipulated time by one day and nine and a quarter hours, with the result that the owners claimed demurrage. The charterers' answer to that was that, as there had been deviation, the claim for demurrage could not be maintained, and, further, that the owners were themselves liable for the damages which the charterers had suffered by reason of the fact that the deviation had taken place. The Court of Appeal has held that the charterers were right in both
B these contentions.

On the facts it appears to me that, when once deviation has been established, as it clearly has in the present case, it becomes incumbent upon the owners to show that that deviation was one which in all the circumstances of the case was justified. It cannot be maintained that the deviation is one that can be found within the express provisions of cl. 29 to which I have referred. It must, therefore, be supported, if it can be supported at all, by the doctrine that, if the deviation was
C reasonably necessary in a business sense, then it was in the course of the voyage which the charter prescribed. If, however, that were to be established, it appears to me that it would be necessary for the owners to show that all necessary steps had been taken to supply the vessel with adequate oil supplies at the commencement of the voyage, and of this there is no evidence at all, and, in my opinion,
D for that reason alone that argument fails. Further, I desire to say that I am far from convinced that the shipowners had any right under this charterparty to deviate from their prescribed route for the purpose of obtaining the fuel that might be necessary, not only to take the ship to the port of final discharge, but to take her out of that port after the discharge had been completed. It is for these reasons
E that I think the judgment of the Court of Appeal should be affirmed, and I move your Lordships accordingly.

LORD ATKINSON.—I concur.

LORD SUMNER.—I agree. The decisions both of this House in *Glynn v. Margetson & Co.* (1), and of other courts before and since that case have invested
F clauses of this type—the words at the end of cl. 29—with a meaning which it is now impossible to shake. I think it is quite clear upon the present facts that calling at Lisbon for fuel was not within that express permission which the charterparty gives, and the implied term which is contended for ; that there was a right to go out of the way to Lisbon for that purpose in the circumstances is in conflict with the express words, and, therefore, not capable of being implied. It appears
G to me not to be such a term as is necessary to give business effect to the contract between the parties, but the very contrary. It appears to me to be a term which reasonable business men would not have agreed to if it had been brought before them, and I think the contention really proceeds upon the familiar doctrine that it would be a convenient thing to secure advantage for oneself and make somebody else pay for it—a doctrine which sometimes brings one into conflict with the law.
H It is quite a different thing from saying that, had the express clause been availed of and a call been made for oil supplies on the line of the voyage, the charterers could not have complained if the vessel had taken there more oil than the limited quantity required to complete the performance of the charter.

LORD WRENBURY.—I concur.

I **LORD CARSON.**—I also concur.

Appeal dismissed.

Solicitors : *Thomas Cooper & Co. ; Richards & Butler.*

[*Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.*]

BATCHELOR v. MURPHY AND ANOTHER

[HOUSE OF LORDS (Viscount Haldane, Lord Atkinson, Lord Wrenbury, Lord Carson and Lord Blanesburgh), November 19, 1925]

[Reported [1926] A.C. 63; 95 L.J.Ch. 89; 134 L.T. 161; 42 T.L.R. 112]

Landlord and Tenant—Lease—Option to purchase—Collateral agreement—Agreement for new lease “on same terms and conditions in all respects” as original lease.

By a lease, dated Oct. 17, 1913, premises were demised to a lessee for a term of ten and a half years, to run from Oct. 6, 1913. The lease contained an option for the lessee to purchase the premises. On Nov. 17, 1915, a memorandum was addressed to the sole executor of the lessor and signed by the original lessee and the respondents in the following terms: “In consideration of you agreeing to release me [the tenant] and accept us [the respondents] as lessees for the unexpired residue of the term in the lease dated Oct. 17, 1913 . . . we respectively agree as follows: The said H. W. C. to surrender the said lease, the [respondents] to execute a new lease for the unexpired term of eight years and six months from Oct. 6 last on the same terms and conditions in all respects as the lease of Oct. 17, 1913,” with an immaterial exception as to the amount of the rent.

Held: the option to purchase was not a term of the demise and only a collateral right, but the words in the memorandum “on the same terms and conditions in all respects as the lease of Oct. 17, 1913,” meant on the same terms and conditions as those contained in the lease of Oct. 17, 1913, or as those on which that lease was granted; those “terms and conditions” included an option to purchase; and the language used expressly carried the collateral agreement containing the option into the new lease.

Notes. Applied: *Hill v. Hill*, [1947] 1 All E.R. 54. Considered: *Re Johnston’s Application*, *Johnston v. Shobrook*, [1950] 1 All E.R. 613; *Griffith v. Pelton*, [1957] 3 All E.R. 75. Referred to: *Sherwood v. Tucker*, [1924] 2 Ch. 440.

As to options to purchase see 23 HALSBURY’S LAWS (3rd Edn.) 470-472, and for cases see 30 DIGEST (Repl.) 494 et seq., 523-526.

Appeal by the plaintiff from an order of the Court of Appeal (WARRINGTON and SARGANT, L.JJ., POLLOCK, M.R. dissenting), reported [1925] 1 Ch. 220, upon an adjourned summons taken out to determine whether the defendants were entitled to exercise an option to purchase.

The facts appear in the opinions of their Lordships.

Luxmoore, K.C., and *Bischoff* for the appellant.

Greene, K.C., and *Freeman*, for the respondents, were not called upon to argue.

VISCOUNT HALDANE.—In this case WARRINGTON and SARGANT, L.JJ., constituting a majority of the Court of Appeal, notwithstanding the dissent of the Master of the Rolls, have reversed a decision of TOMLIN, J. On consideration I have come to the conclusion that WARRINGTON and SARGANT, L.JJ., were right. The question arises between the executors of a landlord and certain persons who claim to be entitled to the residue of a lease under an agreement which contained terms which enable them, as they say, to take the benefit of an option to purchase the freehold. The question, put in other words, is whether, on the terms of a memorandum intended to provide for the grant of a new lease of the premises to the respondents, in substitution for the previous lease to another lessee, the respondents became entitled to the benefit of an option, similar to the one contained in the previous lease, for the purchase of the premises at a specified price.

The original lease was executed on Oct. 17, 1913. By it a Mrs. Batchelor demised a shop and premises at Bridlington to Herbert William Clarkson for the term of

ten and a half years, which was to commence, not from the date of the lease, but as from Oct. 6 in the same year, and was to come to an end on April 5, 1924, at a rent of £100 for the first year and afterwards at a yearly rent of £120. The lease contained a provision for an option, to be exercised by the lessee (which expression was defined as including his executors and administrators and assigns when the context so admitted) during the term by giving three calendar months' notice in writing, to purchase the fee simple free from incumbrances of the demised premises at the price of £3,000, together with interest thereon at the rate of 5 per cent. per annum from the expiration of the notice up to the time of completion. Mrs. Batchelor, the lessor, died in 1915, and by her will one John Henry Sawden and the appellant Hugh Batchelor were appointed her executors. John Henry Sawden alone proved; power was reserved to the appellant to prove, and as John Henry Sawden has died the appellant has now proved. On Nov. 17, 1915, a memorandum was signed by Clarkson, the original lessee, and by the respondents, Alfred Henry Murphy and C. L. Murphy. The terms of that memorandum were these. Clarkson asked Sawden, the executor, to release him; that he should be at liberty to surrender the lease; and that the respondents should execute a new lease for the unexpired term of eight years and six months from Oct. 6, 1915. The wording is important. This is one of the cases where the decision does not turn on abstract principles, because here they are too abstract for the facts, but upon the particular language used in the memorandum. We have got to construe the words and to say whether they gave to the respondents the benefit of the option to purchase the freehold or whether they did not. There remained something personal to Clarkson, which, although it might have been assigned by him, was not assigned by him. The language to be construed is this:

"In consideration of you [Sawden] agreeing to release me [Clarkson] and to accept us [the respondents] as lessees for the unexpired residue of the term in the lease dated Oct. 17, 1913, and made between"

Mrs. Batchelor and Clarkson and so on. It is to be observed, before I go further, that what is referred to there as being "the lease" is the document and not the demise, because the demise took effect from an earlier date, Oct. 6, 1913. "The lease," therefore, *prima facie* means the document with what it contains. The memorandum goes on:

"The said [Clarkson] to surrender the lease, the said Alfred Henry Murphy and C. L. Murphy to execute a new lease for the unexpired term of eight years and six months from Oct. 6 last on the same terms and conditions in all respects as the lease of Oct. 17, 1913, with the exception of the rent [to be reduced to £82 per year] until the cessation of the present hostilities,"

and is then to be the old rent for the remainder of the term.

As I said, the original lease contains an option to Clarkson to purchase for £3,000, and be it noted that by a provision in that document, wherever Clarkson is named the document provides that Clarkson, his executors, administrators and assigns, are to be included by the word "Clarkson," so that when the option to purchase is given to Clarkson it *prima facie* at all events means to include Clarkson's assigns. That being so, the question is what is meant in the document of November, 1915, by "the same terms and conditions in all respects as the lease of Oct. 17, 1913?". We are not dealing with a mere technical demise, we are dealing with a deed, the lease itself—a deed containing terms—and when you look at the substance of this transaction I quite agree that the option to purchase is not part of the terms of the demise; it is a collateral right. But it is a collateral right which is included in the document, which in substance is transferred. I say in substance is transferred, because if you look at the document, Clarkson could have done what he did by an assignment of his lease, or in the way which in fact he did adopt, by surrender and a new lease to be granted. There is no difference in substance between the two methods or the rights under them; it is only a different way of

carrying out the same transaction, and I am of opinion that Clarkson, in substance, transferred to the respondents. A

I come to the conclusion, with no great hesitation, that the true view is that the respondents got the benefit of that option, and, consequently, that this appeal should be dismissed with costs.

LORD ATKINSON.—I concur. I think it is perfectly plain that the word "lease" where it occurs in this memorandum means the document, and with one exception it means the old document of Oct. 17, 1913. We are then introduced to the new lease, and the new lease provides that it is to contain all the terms and conditions in all respects of the lease of Oct. 17, 1913, with the exception of the rent and the duration of the term. It is quite true that when there is a collateral agreement, it is not necessarily transferred by a transfer of the lease, but it is perfectly competent to the contracting parties, if they are so inclined, to use language which will carry in a collateral agreement just as well as any stipulation springing from the relation of landlord and tenant. In my opinion, when the parties used the words that the new lease is to contain all the terms and conditions in all respects as the lease of Oct. 17, 1913, which of course, means contained in the lease of Oct. 17, 1913, they could use no words more expressive to convey the idea that the new lease is to be a replica of the old lease save and except in the two points of duration of the time and rent. B C D

LORD WRENBURY.—But for the fact that two learned judges for whose opinion I entertain the greatest respect have formed and expressed an opinion favourable to the appellant's contention I should have thought there was no difficulty in this case. E

On Nov. 17, 1915, there was in existence a lease of Oct. 17, 1913, demising a shop for a term of ten and a half years from Oct. 6, 1913, with an option of purchase in the lessee upon giving certain notice, at the price of £3,000. That lease, therefore, was one which might run for ten and a half years or might not; whether it did or did not depended upon whether the lessee exercised his option of purchase. If at the end of, say, three years he exercised his option, the ten and a half years would then determine; in other words, the lease of Oct. 17, 1913, was not for a period of ten and a half years certain, but for a period of ten and a half years determinable in an event. That being the state of things, there was executed on Nov. 17, 1915, a document containing a passage which, to make this opinion intelligible, I think I ought to read at length: F

"The said Alfred Henry Murphy and C. L. Murphy [these are the proposed new lessees] to execute a new lease for the unexpired term of eight years and six months from Oct. 6 last on the same terms and conditions in all respects as the lease of Oct. 17, 1913," G

with an exception which it is not material to state. Upon those words I have two observations to make. The new lease is to be for the unexpired term of eight years and six months, but that term was one which might, as I have stated (if the lease of 1913 had continued), have been determined in an event, namely, that of the exercise of the option. The second observation and the more material is this. The new lease is to be on the same terms and conditions in all respects as the lease of Oct. 17, 1913. That can only mean on the same terms and conditions in all respects as those contained in the lease of Oct. 17, 1913, or on the same terms and conditions in all respects as those on which the lease of Oct. 17, 1913, was granted. I H I
"Terms and conditions" cannot be the same as a lease. The language must bear one of the meanings I have suggested. What were the terms and conditions on which the lease of Oct. 17 was granted, or what were the terms and conditions contained in it? I do not care which form of words is taken. The "terms and conditions" on which it was granted included a term that in an event the term of years should come to an end and the lessee should become owner of the freehold. The "terms and conditions" contained in the lease included a term giving the

A lessee the option of purchase. It appears to me that here by express words the parties have said that what is to be taken over by the new lessees is a tenancy with all the terms and conditions of the old tenancy, including the option.

The only other point that deserves mention is this. It is said that the executor could not create a new option. I do not think he was creating a new option, he was continuing the existing option. This new lease was to be a document, expressed in the same words as the document which contained the option. I think the option was simply continued. For these reasons I think this appeal fails and should be dismissed with costs.

LORD CARSON.—I concur that this appeal should be dismissed with costs.

C **LORD BLANESBURGH.**—I am of the same opinion. In this memorandum of Nov. 17, 1915, there are three references, two of them in terms and one in effect equally direct, to the lease so described of Oct. 17, 1913. In my opinion, as a matter of construction each of these three references is a reference to the indenture or document of that date and not to the tenancy thereby constituted. That document, which contains also an option of purchase, is described in the memorandum as a "lease," but I think there can be no question that so described the option contained in it is one of its terms, collateral to the letting though it be. When, therefore, you find, as you do, that the new "lease" is to be on the same terms and conditions in all respects as the "lease" of Oct. 17, 1913—I supply the word "contains"—it seems to me to follow by necessity of reasoning that this new lease is amongst its terms to include the provision relating to the option of purchase, which is one of the "terms" of the document of Oct. 17, 1913. If this view be taken as to the true construction of the memorandum in this regard, it follows inevitably that the order of the Court of Appeal was, as I think it was, quite right.

Solicitors: *Sharpe, Pritchard & Co., for West & Son, Bridlington; Collyer-Bristow & Co., for Stuart & Smith, Hull.*

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

Re PORTER. PORTER v. PORTER

[CHANCERY DIVISION (EVE, J.), July 10, 17, 1925]

[Reported [1925] Ch. 746; 95 L.J.Ch. 46; 133 L.T. 812]

Charity—Charitable purpose—Gift of surplus after primary invalid gift—Amount of surplus impossible of ascertainment—Uncertainty of ultimate gift.

E By a codicil to his will the testator, who died in 1924, directed his trustees after the death of his wife "to pay from his estate to the trustees of the province of Sussex masonic temple, erected by him to the memory of his deceased son S., the sum of £10,000 free of duty (to be known as the Porter Trust Fund), to be invested by them and the interest thereof applied to the maintenance and upkeep of the temple at their full and sole discretion, the balance (if any) to be applied annually in favour of any masonic charities as they might in their full discretion select."

I **Held:** a legacy for the maintenance and upkeep of such a building was not a good charitable bequest unless the gift of the annual surplus could be construed as a gift of the whole income and not of what remained after the void gift; the primary purpose of the present gift was the maintenance and upkeep of the temple, the whole income was charged with that trust, and, as the expenditure was at the sole discretion of the trustees, they might properly apply the whole to that purpose; it was impossible to ascertain whether or not there

would be any surplus after providing for the primary object ; and, therefore, the ultimate gift for the charities was too indefinite and uncertain, and the whole gift was void.

Notes. Referred to : *Re Dalziel, Midland Bank Executor and Trustee Co. v. St. Bartholomew's Hospital*, [1943] 2 All E.R. 656; *Re Coxen, MacCallum v. Coxen*, [1948] 2 All E.R. 492.

As to gifts of surplus see 4 HALSBURY'S LAWS (3rd Edn.) 272, and for cases see 8 DIGEST (Repl.) 400, 401.

Cases referred to :

- (1) *Lloyd v. Loaring* (1802), 6 Ves. 773; 31 E.R. 1302, L.C.; 8 Digest (Repl.) 651, 13.
- (2) *Chapman v. Browne* (1801), 6 Ves. 404; 31 E.R. 1115; 8 Digest (Repl.) 400, 917.
- (3) *Re Rogerson, Bird v. Lee*, [1901] 1 Ch. 715; 70 L.J.Ch. 444; 84 L.T. 200; 8 Digest (Repl.) 402, 933.
- (4) *Mitford v. Reynolds* (1842), 1 Ph. 185; 12 L.J.Ch. 40; 7 Jur. 3; 41 E.R. 602, L.C.; subsequent proceedings (1848), 16 Sim. 105; 17 L.J.Ch. 238; 10 L.T.O.S. 499; 12 Jur. 197; 60 E.R. 812; 8 Digest (Repl.) 401, 926.
- (5) *Re Birkett* (1878), 9 Ch.D. 576; 47 L.J.Ch. 846; 39 L.T. 418; 43 J.P. 111; 27 W.R. 164; 8 Digest (Repl.) 402, 932.
- (6) *Fisk v. A.-G.* (1867), L.R. 4 Eq. 521; 17 L.T. 27; 32 J.P. 52; 15 W.R. 1200; 8 Digest (Repl.) 401, 928.
- (7) *Re Taylor, Martin v. Freeman* (1888), 58 L.T. 538; 4 T.L.R. 302; 8 Digest (Repl.) 400, 919.

Adjourned Summons to determine whether a gift of £10,000 in a codicil to the will of the testator to the trustees of the province of Sussex masonic temple, to be paid after the death of the testator's widow, was valid.

The testator, William Porter, by a codicil to his will made on Aug. 17, 1920, directed his executors, on the death of his wife, who was the plaintiff, to pay to the trustees of the temple £10,000 free of duty, to be known thereafter as the Porter Trust Fund, to be invested by those trustees, the interest to be applied for the maintenance of the temple at their full and sole discretion, and the balance, if any, to be applied to masonic charities as they might think fit. He died on Jan. 9, 1924, having expended £9,289 in erecting the temple at Brighton, and the question raised on the summons was whether the legacy was good, or altogether void, or applicable cy pres.

Willoughby Williams, for the plaintiff.

Vaisey, K.C., and *E. Beaumont*, for the trustees of the temple.

Dighton Pollock, for the Attorney-General.

Gover, K.C., and *Ackroyd*, for the first defendants, referred to *Lloyd v. Loaring* (1); *Chapman v. Browne* (2), and *Re Rogerson* (3).

Vaisey, in reply, cited *Mitford v. Reynolds* (4).

Cur. adv. vult.

July 17. **EVE, J.**, read the following judgment. The testator died on Jan. 9, 1924, having expended £9,289 in or towards the cost of erecting the temple at Brighton, and the question raised by the summons is whether the legacy of £10,000 for its maintenance is good, or altogether void, or applicable cy pres. By a masonic temple is meant a hall or building devoted to masonic purposes, which include ceremonial and business meetings and banquets. In this particular instance the trusts of the premises included in this temple were declared by a deed poll, dated June 26, 1919, which provided for the use of the hereditaments subject to the trusts therein declared. The site for the temple was to be cleared, and there was to be erected a main temple for masonic ceremonials, and smaller rooms for lodge meetings and business, the costs of which were to be provided by William Porter. So that the

A gift of the testator represented the moneys to be laid out in erecting the temple and offices, and it was for the maintenance of this building that the bequest of £10,000 was made. The sole management and furnishing of the premises was to be under the control of the trustees, and the smaller rooms were also to be used for meetings of a social character, but not for party or political meetings. That was the nature of the institution for which this legacy was intended. A legacy for the maintenance and upkeep of such a building is not a good charitable bequest, and this gift, involving as it does, a perpetuity, must fail unless the gift of the annual surplus in favour of the masonic charities can properly be construed as a gift of the whole income, and not as a gift of what might remain after the void gift.

Counsel for the masonic trustees argued that the case is indistinguishable from the line of cases which are designated as "the tomb cases." He relies on the fact that this building was to be erected as, and had been intended by the testator to be, a memorial to his dead son, but that does not in any way constitute it a tomb, and having regard to the difficulty which SIR GEORGE JESSEL expressed in discovering the principle on which the decisions in the tomb cases proceeded in treating the gift of the corpus as unaffected by the direction for the maintenance of the tomb, I do not think I ought to extend their application to something which is certainly not a tomb. Then the question is: Can I arrive at any conclusion, either on the evidence before me, or by an inquiry in chambers, as to the amount of the income necessary to be applied for maintenance and upkeep, which the trustees, in the exercise of their discretion, ought not to exceed, and, treating that as all that was intended for the maintenance and upkeep of the temple, and, therefore, invalid, declare the surplus to be well settled for charitable purposes? I feel very great difficulty in adopting any such course. In my opinion, the test to be applied for the solution of this question is whether the gift of the surplus to charity is a gift of the whole income, or a gift of what (if anything) will remain after the void gift has been satisfied. Is the extent or amount of the primary gift sufficiently defined to enable the court to ascertain what was intended to be expended on it. If it is, then, although the primary gift fails, the corpus is not affected and the whole income is applicable for charitable purposes; but if, on the other hand, the first object has not been so defined that the court can fix the amount required for it, then the whole must fail because the whole income might be applied for the first object. Nor do I think it is open to me to ascertain how much is required for the void object and to declare the gift of the balance valid.

In *Re Birkett* (5), SIR GEORGE JESSEL, M.R., after stating that the case was a singular illustration of the way in which our law gets altered, proceeds as follows (9 Ch.D. at p. 578):

"I have no hesitation in saying that, if there were no authorities, I should feel very little difficulty in deciding quite in a different way from that in which I am about to decide. If there were no authorities, I should hold, where there is a gift of money upon trust to apply a portion of the income for a definite purpose, and then to apply the surplus for another purpose, that, if the first purpose were sufficiently defined to enable you to ascertain the amount of the income that would be required for it, and that purpose failed through the gift being invalid, the gift of the surplus would be unaffected beyond the amount so ascertained."

I Then, as an instance, he says that if a man were to give the income of £10,000 a year in trust in the first place to keep a tombstone in repair, which could not exceed £20, and directed the residue of the £10,000 a year to go to a charity, he should assume that good law and common sense would concur in saying that the £20 gift was void, and that the £9,980 was well given to charity. That is what counsel is asking me to do here, to hold that the gift of what is required for the masonic temple is void, but that the rest is well given to the charities. But SIR GEORGE JESSEL adds:

"If the first object is not so defined that you can reasonably ascertain the amount required, the whole must fail, because you might then apply the whole of the gift to the first object; and, therefore, if you could apply the whole of the income properly and fairly to the first object, there would, of course, be no ascertainable residue."

Authority for that proposition is to be found in *Chapman v. Brown* (2), *Fisk v. A.-G.* (6), and *Re Taylor* (7).

On which side of the line does this particular case fall? The primary purpose of the gift is the maintenance and upkeep of the temple and the whole income is charged with that trust, and, as the expenditure is at the sole discretion of the trustees, they may properly apply the whole. Is the court entitled to control this discretion and to define the limits within which the expenditure ought to be kept? Could it in fact ascertain with any certainty whether there would be any surplus or not after providing for this primary object? I do not think it would be possible; the whole income might be properly so applied, and if so there would be no available surplus. It is clear that the testator contemplated that the whole might be required. In my opinion, it results from this that the ultimate gift for the charities is too indefinite and uncertain, and I must hold that the whole gift is void.

Solicitors: *Quicke & Card*, for *Montague Williams & Son*, Brighton; *Walbrook & Hosken*, for *Brighouse, Jones & Co.*, Southport; *Long & Gardiner*, for *F. W. A. Cushman*, Brighton; *Solicitor to the Treasury*.

[Reported by A. W. CHASTER, ESQ., Barrister-at-Law.]

FORSIKRINGSAKTIESELSKABET NATIONAL (OF COPENHAGEN) v. ATTORNEY-GENERAL

[HOUSE OF LORDS (Viscount Cave, L.C., Lord Dunedin, Lord Buckmaster, Lord Phillimore and Lord Carson), April 28, 30, 1925]

[Reported [1925] A.C. 639; 94 L.J.K.B. 712; 133 L.T. 151; 41 T.L.R. 473; 69 Sol. Jo. 543; 30 Com. Cas. 252]

Insurance—Fire—"Fire insurance business"—Reinsurance—Foreign company—Deposit with Paymaster-General—Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 1 (b), s. 2 (1).

A foreign company carried on in the United Kingdom under a reinsurance treaty the business of reinsurance of fire risks,

Held: the business of reinsurance of fire risks was fire insurance business within the meaning of the Assurance Companies Act, 1909, s. 1 (b), and, therefore, the company was bound to deposit the sum laid down by s. 2 (1) of the Act with the Paymaster-General.

Notes. Referred to: *First Russian Insurance Co. v. London and Lancashire Insurance Co., Ltd.*, [1928] Ch. 922; *Re National Benefit Assurance Co., Ltd. v. English Insurance Co., Ltd.*, [1928] Ch. 74.

As to companies to which the Assurance Companies Acts apply see 22 HALSBURY'S LAWS (2nd Edn.) 418 et seq., and for cases see 10 DIGEST (Repl.) 1150 et seq. For the Assurance Companies Act, 1909, s. 1 and s. 2, see 3 HALSBURY'S STATUTES (2nd Edn.) 373, 375.

A Case referred to :

(1) *Glasgow Assurance Corpn., Ltd. (Liquidators) v. Welsh Insurance Corpn., Ltd.*, 1914 S.C. 320; 51 Sc. L.R. 271; 1914 1 S.L.T. 139; 29 Digest 48, o.

Appeal by an insurance company from an order of the Court of Appeal (BANKES, SCRUTTON and ATKIN, L.JJ.), dated May 6, 1924, affirming an order of BRANSON, J., dated July 24, 1923, on an information by the Attorney-General, claiming penalties under s. 23 of the Assurance Companies Act, 1909, from the appellants, who were a foreign company registered at Somerset House. The information stated that the appellants from April 1, 1921, to Mar. 31, 1922, had continuously carried on in the United Kingdom the business of fire insurance without having deposited with the Paymaster-General for and on behalf of the Supreme Court the sum of £20,000, as required by s. 2 of the Act of 1909, whereby they became liable under s. 23 of the Act to a penalty not exceeding £50 per day. The information claimed the sum of £18,250, but only a nominal penalty was asked for. The appellants were a Danish company registered under s. 274 of the Companies (Consolidation) Act, 1908. They carried on in the United Kingdom a direct business in marine insurance, and a reinsurance business for fire and marine risks. They contended that they were not bound to make the deposit in respect of a business which was a reinsurance business. The Crown contended that the words in s. 1 (b) of the Act "the issue of, or the undertaking of liability under, policies against loss by or incidental to fire," must refer to reinsurance, and relied on *Glasgow Assurance Co., Ltd. (Liquidators) v. Welsh Insurance Corpn., Ltd.* (1). The Court of Appeal held that the company was carrying on fire insurance business within the meaning of s. 1 (b) of the Act of 1909, and gave judgment for the Crown for a penalty of £50.

The company appealed.

The Assurance Companies Act, 1909, provides

"1. This Act shall apply to all persons or bodies of persons . . . who carry on within the United Kingdom assurance business of all or any of the following classes :— . . . (b) Fire insurance business ; that is to say, the issue of or the undertaking of liability under, policies of insurance against loss by or incidental to fire.

"2 (1). Every assurance company shall deposit and keep deposited with the Paymaster-General for and on behalf of the Supreme Court the sum of twenty thousand pounds.

"23. Any assurance company which makes default in complying with any of the requirements of this Act shall be liable to a penalty not exceeding one hundred pounds, or, in the case of a continuing default, to a penalty not exceeding fifty pounds for every day during which the default continues. . . ."

Sir John Simon, K.C., and *Blake Odgers* for the appellant company.

The Attorney-General (Sir Douglas Hogg, K.C.), *The Solicitor-General (Sir Thomas Inskip, K.C.)*, and *Bowstead*, for the respondent.

VISCOUNT CAVE, L.C.—The question to be determined on this appeal is whether the appellant company, a Danish company, which carried on in the United Kingdom the business of reinsurance and no other business, comes within the operation of the Assurance Companies Act, 1909, and so is bound to make the deposit of £20,000 required under that Act. The Act provides, by s. 1, that it shall apply to "all persons or bodies of persons, whether corporate or unincorporate"—I leave out some words which are not at the moment material—"and whether established within or without the United Kingdom, who carry on within the United Kingdom assurance business" of any of the five classes which are specified. One of those classes is "(b) Fire insurance business ; that is to say, the issue of, or the undertaking of liability under, policies of insurance against loss by or incidental to fire." The Act applies to companies whether established within or without the United Kingdom, and, therefore, the fact that the appellant company is a Danish company makes no difference to the result.

The nature of the business carried on by the appellant company is best illustrated by reference to a reinsurance treaty, as it has been called, which was put in evidence. It is only necessary to refer to the first section of that treaty. The treaty is entered into between the London and Scottish Assurance Corpn., Ltd., which is there called the ceding company, of the first part, and the appellant company, which is there called the reinsuring office, of the other part. By the first section of the treaty the ceding office undertakes to cede as from April 1, 1921, to the reinsuring office a share there specified under insurances accepted or renewed by or on behalf of the ceding office on certain property there also specified, and the reinsuring office unconditionally accepts liability for all reinsurances ceded to it under the treaty. That being the nature of the business of the appellant company, does the company carry on business which can be described as "the issue of or the undertaking of liability under, policies of insurance against loss by or incidental to fire"? It is that question which has been answered by BRANSON, J., and the Court of Appeal in the affirmative, and I cannot see my way to differ from that decision. It appears to me that there is much to be said for the view that the reinsurance premium, which is supplemented by a bordereau, is in effect a policy of insurance against loss by or incidental to fire. Apart from the special rules relating to marine insurance, there is no magic in the word "policy." In substance, the expression seems to cover a contract of insurance. It is old law that, by a contract of reinsurance, the reinsuring party insures the original insuring party against the original loss, the insurable interest of the original insurer being constituted by his policy given to the original assured; and in that view the company does, under a treaty of this character, issue to the ceding company a policy of insurance against loss by or incidental to fire. It is, I think, on that ground that ATKIN, L.J., and to some extent the other learned lords justices, based their decision. But apart from that view, even on the assumption that the reinsurance treaty is in no sense a policy, still I think it remains true that a reinsuring company, when it unconditionally accepts liability for certain insurances ceded to it under the treaty, does, at least, undertake liability under those policies. True, it does not become directly liable to the original householder who insures against fire, but it does undertake with the ceding office to take over a part of the liability under those fire policies. Your Lordships' attention has been called to certain provisions in the statute, or in the schedules to the statute, which refer not only to insurances, but to reinsurances. It does not appear to me that those passages really affect the conclusion to which I have come on the terms of s. 1; and, indeed, one of the schedules, Sched. 5, when read with s. 6 of the Act, appears to me to show that the statute itself treats the expression "assurance" as including not only insurance but reinsurance also.

On the whole I find myself in entire agreement with the decision of the courts below, and I move your Lordships that this appeal be dismissed, with costs.

LORD DUNEDIN.—I concur. I think the word "under," in s. 1, is equivalent to "in respect of"; and as regards the policy of the statute, I think it comes to no more and no less than this: "You that dabble in insurance business shall deposit a certain sum to give partial security that you shall pay your debts."

LORD BUCKMASTER.—I agree.

LORD PHILLIMORE.—I concur.

LORD CARSON.—I also agree.

Appeal dismissed.

Solicitors: *W. G. A. Edwards; Solicitor, Board of Trade.*

[Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.]

HEATON AND DUGARD, LTD. v. CUTTING BROS., LTD.

[KING'S BENCH DIVISION (Salter and Fraser, JJ.), February 4, 1925]

[Reported [1925] 1 K.B. 655; 94 L.J.K.B. 673; 133 L.T. 41; 41 T.L.R. 286]

Execution—Company—Payment to sheriff to avoid sale—Subsequent appointment of receiver by debenture holders—Title to money in sheriff's hands.

The plaintiffs recovered judgment against the defendant company for a trade debt, and the sheriff levied execution under a fi. fa. on their behalf. To avoid a sale of the goods, the defendant company, by their manager, paid to the sheriff the full amount of the debt. While the money was still in the sheriff's hands, the debenture holders of the defendant company crystallised their security by the appointment of a receiver, who laid claim to the money in the sheriff's possession.

Held: the defendant company had a right to pay to the plaintiffs a trade debt incurred in the ordinary course of their business, and, therefore, the plaintiffs were entitled to the money as against the receiver appointed by the debenture holders.

Robinson v. Burnell's Vienna Bakery Co., Ltd. (1), [1904] 2 K.B. 624, applied.

Notes. As to the effect of execution on a company's goods see 6 HALSBURY'S LAWS (3rd Edn.) 476, and for cases see 10 DIGEST (Repl.) 774-777.

Cases referred to:

- (1) *Robinson v. Burnell's Vienna Bakery Co., Ltd.*, [1904] 2 K.B. 624; 73 L.J.K.B. 911; 91 L.T. 375; 52 W.R. 526; 20 T.L.R. 284; 48 Sol. Jo. 299; 10 Digest (Repl.) 775, 5039.
- (2) *Bower v. Hett*, [1895] 2 Q.B. 337; 84 L.J.Q.B. 772; 73 L.T. 176; 44 W.R. 4; 11 T.L.R. 540; 39 Sol. Jo. 669; 14 R. 710, C.A.; 5 Digest 817, 6943.
- (3) *Collingridge v. Paxton* (1851), 11 C.B. 683; 2 L.M. & P. 654; 21 L.J.C.P. 39; 18 L.T.O.S. 140; 16 Jur. 18; 138 E.R. 643; 21 Digest 486, 649.
- (4) *Evans v. Rival Granite Quarries, Ltd.*, [1910] 2 K.B. 979; 79 L.J.K.B. 970; 26 T.L.R. 509; 54 Sol. Jo. 58; 18 Mans. 64, C.A.; 10 Digest (Repl.) 772, 5016.
- (5) *Morland v. Pellatt* (1829), 8 B. & C. 722; 3 Man. & Ry. K.B. 411; 7 L.J.O.S.K.B. 54; 108 E.R. 1211; 5 Digest 827, 7025.
- (6) *Taunton v. Sheriff of Warwickshire*, [1895] 2 Ch. 319; 64 L.J.Ch. 497; 72 L.T. 712; 43 W.R. 579; 39 Sol. Jo. 522, C.A.; 10 Digest (Repl.) 784, 5093.

Appeal from a decision of MASTER JELF.

The defendants, Cutting Bros., Ltd., carried on business at Stamford, Lincolnshire. They became indebted, in respect of a trade debt to the plaintiffs, Heaton and Dugard, Ltd., in the amount of £69 1s. 6d. The plaintiffs obtained judgment against them for that sum and £10 12s. costs. On July 29, 1924, a writ of fi. fa. was issued to the sheriff of Lincolnshire, and on Aug. 1 he levied execution. On Aug. 5, in order to avoid a sale of their goods, the defendants paid the full amount of the debt, but the sheriff, for reasons which do not arise in this case, did not immediately hand over the money to the plaintiffs, the execution creditors. The debenture holders of the defendant company held a floating charge over its assets. They gave the company a licence to continue trading in the ordinary course of its business. On Aug. 12 or 13, 1924, after the completion of the execution, they crystallised their security by the appointment of a receiver, who thereupon laid claim to the money in the sheriff's hands. The sheriff took out an interpleader summons before MASTER JELF. The master ordered payment to be made to the receiver. The execution creditors appealed.

J. G. Hurst, K.C., and F. T. Atkins for the execution creditors.

W. T. Monckton for the claimant.

Sandlands for the sheriff.

The following cases were referred to: *Bower v. Hett* (2), *Collingridge v. Paxton* (3), *Evans v. Rival Granite Quarries, Ltd.* (4), *Morland v. Pellatt* (5), *Robinson v. Burnell's Vienna Bakery Co., Ltd.* (1), *Taunton v. Sheriff of Warwickshire* (6).

SALTER, J., stated the facts, and continued: The master ordered payment to be made to the receiver, and the question is whether such order was right. It is clear that the master decided the case on a misapprehension for which he was not to blame. He decided the matter on the understanding that the sum of £69 ls. 6d. was cash which the sheriff actually took in execution, and he gave judgment in favour of the debenture holders on that footing.

Cases which deal with various possibilities have been cited in the arguments. There is the case where the floating security had been made effective and the sheriff was in possession, but the property had not been sold. If the goods were in the custody of the law and the debenture holders intervened in time they would have priority. A case was also put forward where execution was levied by a seizure of cash—as the master thought was the position in the present case—and it was argued that, while the cash remained in the hands of the sheriff, it was subject to the floating charge. Further cases were suggested, but not cited, and it is open to argument whether moneys which were the proceeds of sale and which have been paid over to the execution creditors cannot be followed by the debenture holders. No opinion need be expressed on those matters, as the present case is quite different. The debtor company had an implied licence from the debenture holders to carry on their ordinary business, and the debt of £69 ls. 6d. was an ordinary trade debt. The debt was not paid directly to the execution creditors, as might have been done, but was handed for that purpose to the sheriff. The debtor company had a right to pay a trade debt incurred in the ordinary course of business so long as the licence had not been revoked.

I am unable to distinguish the present case from *Robinson v. Burnell's Vienna Bakery Co., Ltd.* (1). An attempt has been made to distinguish it on the ground that, in that case, it was sought to pay the debt by instalments because it could not be paid at once in full, and a sale of the chattels concerned was to be held over, provided that the instalments were duly paid. It was held that those instalments were the moneys of the creditors and not of the debenture holders.. There was no such arrangement in the present case and the debtors were entitled to request the sheriff to withdraw on payment of the debt in full. But it is impossible to distinguish the two cases in principle. The decision of the master cannot, therefore, be supported. Under the circumstances the sheriff must be allowed his costs. The delay in paying over the money has made no difference, and an order will be made that no action is to be brought against the sheriff.

FRASER, J.—I agree.

Appeal allowed.

Solicitors: *Cochrane & Cripwell; Torr & Co.*, for *C. D. Coulby*, Nottingham; *Taylor, Jelf & Co.*

[Reported by T. R. F. BUTLER, ESQ., Barrister-at-Law.]

BENTON v. CAMPBELL, PARKER & CO., LTD.

[KING'S BENCH DIVISION (Salter and Swift, JJ.), June 10, 11, July 31, 1925]

[Reported [1925] 2 K.B. 410; 94 L.J.K.B. 881; 134 L.T. 60; 89 J.P. 187; 41 T.L.R. 662; 69 Sol. Jo. 842]

Auctioneer—Sale of specific chattel—Agency disclosed—Principal not named—No title in principal—Liability of auctioneer.

Auctioneers sold a motor car by auction to the plaintiff. They disclosed the fact of agency, but not the name of their principals, who, it afterwards appeared, had no right to sell.

Held: an auctioneer who sold a specific chattel, disclosing the fact of his agency but not naming his principal, did not by the mere fact of sale alone warrant his principal's title to sell, and, therefore, the auctioneers were not liable to the plaintiff.

Franklyn v. Lamond (1) (1847), 4 C.B. 637, distinguished.

Notes. Referred to: *Wilson v. Pike*, [1948] 2 All E.R. 267.

As to an auctioneer's rights and liabilities in relation to the purchaser see 2 HALSBURY'S LAWS (2nd Edn.) 86–89, and for cases see 3 DIGEST 45–48.

Cases referred to:

- (1) *Franklyn v. Lamond* (1847), 4 C.B. 637; 16 L.J.C.P. 221; 9 L.T.O.S. 246; 11 Jur. 780; 136 E.R. 658; 3 Digest 42, 295.
- (2) *Williams v. Millington* (1788), 1 Hy. Bl. 81; 126 E.R. 49; 3 Digest 38, 273.
- (3) *Robinson v. Rutter* (1855), 4 E. & B. 954; 24 L.J.Q.B. 250; 25 L.T.O.S. 127; 1 Jur. N.S. 823; 3 W.R. 405; 3 C.L.R. 1195; 119 E.R. 355; 3 Digest 39, 282.
- (4) *Holmes v. Tutton* (1855), 5 E. & B. 65; 24 L.J.Q.B. 346; 25 L.T.O.S. 177; 1 Jur. N.S. 975; 3 C.L.R. 1343; 119 E.R. 405; 3 Digest 41, 289.
- (5) *Wood v. Baxter* (1883), 49 L.T. 45; 3 Digest 41, 293.
- (6) *Hanson v. Roberdeau* (1792), Peake, 163; 3 Digest 41, 292.
- (7) *Woolfe v. Horne* (1877), 2 Q.B.D. 355; 46 L.J.Q.B. 534; 36 L.T. 705; 41 J.P. 501; 25 W.R. 728; 3 Digest 42, 296.
- (8) *Morley v. Attenborough* (1849), 3 Exch. 500; 18 L.J.Ex. 148; 12 L.T.O.S. 532; 13 J.P. 427; 13 Jur. 282; 154 E.R. 943; 39 Digest 431, 602.
- (9) *Eichholz v. Bannister* (1864), 17 C.B.N.S. 708; 5 New. Rep. 87; 34 L.J.C.P. 105; 11 Jur. N.S. 15; 13 W.R. 96; 144 E.R. 284; 12 L.T. 76; 39 Digest 431, 605.

Appeal from Birmingham County Court.

The following statement of facts is taken from the judgment of SALTER, J. The defendants were auctioneers and valuers at Birmingham and carried on a large business in the sale of motor cars by public auction. The plaintiff was a dealer in motor cars and was a frequent customer of the defendants. He received their catalogues regularly and constantly attended the weekly sales. Early in 1923, a Ford car was delivered to the defendants by the Saxton Rubber Co. with instructions to sell it by public auction. The defendants included the car in their catalogue for Feb. 13, 1923, and meantime advanced £75 to the Saxton Rubber Co. against the proceeds of sale. The defendants' catalogue was in their usual form, and was headed:

"Birmingham Motor Mart. Important sale of motor cars, &c., to be sold by auction by Campbell, Parker & Co., Ltd., auctioneers and valuers, from instructions received from various owners."

No. 6 of the conditions of sale contained in the catalogue was as follows:

"The auctioneers will not hold themselves responsible for any action that may arise, acting solely as agents between buyer and seller, and for both equitably."

The car was sold at the auction to the plaintiff, who took delivery from the defendants and paid the price to them. The defendants paid over the price to the Saxton Rubber Co. after deducting their loan and charges. The plaintiff resold the car to one Trean. It appeared later that the car was the property of one Bellingham, who had let it on hire-purchase to the Saxton Rubber Co. on the terms that it should remain his property, until all the instalments had been paid. Some of the instalments were still unpaid when the car was sold by auction. Eight or nine months after the auction Bellingham discovered his car in Trean's possession and recovered it. Trean sued the plaintiff, who settled the action for £40 and £7 7s. costs. The plaintiff then brought the present action against the auctioneers claiming £47 7s. damages, and recovered judgment for that sum. The defendants appealed.

Eaden for the defendants.

Eales and Coley for the plaintiff.

Cur. adv. vult.

July 31. **SALTER, J.**, read the following judgment.—In this case the question is whether an auctioneer who sells a chattel by auction, disclosing the fact of agency but not naming his principal, and pays over the proceeds of sale to the principal, is liable in damages to the buyer if it afterwards appears that the principal had no right to sell. [His LORDSHIP stated the facts, and continued:] The judgment is right (i) if the defendants are liable to the plaintiff as sellers on the contract of sale, or (ii) if they are agents warranting their principal's right to sell. The plaintiff relied on the first of these causes of action and succeeded on it, but both must be considered. An attempt was made to show that the defendants were dealers and that they were selling their own property. The learned judge clearly found that they were, in fact, agents, selling the property of another. I think that it is equally clear that he found, or assumed, that they were known by the plaintiff to be agents. If the fact of agency was not disclosed, the plaintiff's claim was undefended. But I think it clear from the whole judgment and from the cases cited that the learned judge treated the case as one of disclosed agency and undisclosed principal. I think there was no evidence on which any other conclusion could have been reached. Besides the catalogue and conditions there was the evidence of the plaintiff, who said that, since the sale, he had discovered that the defendants were dealers, but that, at the time of the sale, he thought that they were agents only. The case seems to have been fought in the county court, and was certainly argued before us, as a case in which agency was disclosed, and I deal with it on that footing.

When an agent purports to make a contract for a principal, disclosing the fact that he is acting as an agent but not naming his principal, the rule is that, unless a contrary intention appears, he makes himself personally liable on the authorised contract. It is presumed that the other party is unwilling to contract solely with an unknown man. He is willing to contract with an unknown man and does so, but only if the agent will make himself personally liable, if called on, to perform the contract which he arranges for his principal. The agent is presumed to agree. The liability of the agent is not joint, nor is it contingent on default by the principal. Two contracts are made in identical terms, one with the principal and the other with the agent, and the opposite party, unless prevented by some election, can enforce either, but not both.

The first question is whether this general rule applies in this case, or the circumstances are such as to rebut the presumption. Where the agency is to buy goods, whether ascertained or not, so that the liability imposed on the principal by the contract is a liability to accept and pay, there is nothing in the circumstances inconsistent with a presumption that the seller requires that the agent shall make himself personally liable to take and pay for the goods in accordance with the contract of sale, if called on, or with a presumption that the agent agrees to do so.

A So, again, if the agency is to sell unascertained goods, there is nothing inconsistent with a presumption that the buyer stipulates, and the agent agrees, that the agent will himself deliver goods in accordance with the contract of sale if called on. If he has not the necessary goods, he can procure them and make delivery. But when the agency, as in this case, is an agency for the sale of a specific chattel, which the buyer knows is not the property of the agent, it seems to me impossible B to presume that the buyer, who contracts to buy that chattel from the principal, would stipulate that the agent, if called on, shall himself sell the chattel to the buyer, and shall warrant his own title to a thing which the buyer knows is not his. It is impossible to presume that the agent would agree to undertake such a liability. The only way in which he could discharge it would be by acquiring the chattel from his principal, a thing he has no right to demand and a thing inconsistent C with the contract he has been instructed to make, by which the principal sells that chattel to the buyer. For this reason, I think that the presumption above mentioned is rebutted in the case of a sale of a specific chattel by a known agent for an undisclosed principal.

This applies to an auctioneer as to any other selling agent. An auctioneer has a special property in the chattel delivered to him for sale. He has a lien on it and on the price of it ; he has rights against the buyer, and liabilities to him which do not accrue to other selling agents. These rights and liabilities do not arise from the contract of sale, which binds only the buyer and the principal ; they arise from the contract which the auctioneer makes on his own account with the buyer. Every agent to contract, when he makes the authorised contract between his principal and the other party, makes also a contract on his own account with the other party—he warrants his authority. If he is an agent for sale, he also warrants E that he knows of no defect in his principal's title. If he is an auctioneer to whom a chattel has been delivered for sale, he gives both these warranties, he undertakes to give possession against the price paid into his hands, and he undertakes that such possession will not be disturbed by his principal or himself. There may, of course, be other terms in this contract, arising on the facts of the case. The F warranties are implied terms ; the duty to deliver and the right to receive the price are usually expressed in the conditions of sale. But whatever its terms may be, the contract is entirely independent of the contract of sale. To that contract the auctioneer who sells a specific chattel as an agent is, in my opinion, no party ; he has no right to enforce it and is not bound by it.

It is true that an auctioneer can sue the buyer for the price in his own name, and as for goods sold and delivered, but the authorities on this point, so far from showing that he can enforce the contract of sale, seem to me to show that he cannot. He can sue for the price where he has sold for a disclosed principal : *Williams v. Millington* (2). In such a case, the contract of sale, unless a contrary intention is expressed, is made with the principal only. It is clear, therefore, that the auctioneer does not sue for the price by virtue of the contract of sale. Again, so long as the auctioneer's lien is unsatisfied, the buyer cannot, in the absence of special circumstances, set off a debt due to himself from the principal against the auctioneer's claim from the price : *Robinson v. Rutter* (3) ; but if the lien has been satisfied, the buyer can rely on such set-off : *Holmes v. Tutton* (4). If the auctioneer could enforce the contract of sale, he could sue for the price so long as it remained unpaid ; no set-off of a debt due to the defendant from a third party could be set up, and no question of lien could arise. The auctioneer sues for the price by virtue of his special property and his lien, and also, in most cases, by virtue of his contract with the buyer that the price shall be paid into his hands, and not by virtue of the contract of sale. He is not the seller, nor does he undertake to discharge the liabilities of a seller, except so far as these liabilities may be included in his own contract with the buyer. Therefore, he does not warrant that the buyer will get a good title, unless such warranty is expressly or impliedly included in his own contract with the buyer. *Wood v. Baxter* (5) supports this view, and

Hanson v. Roberdeau (6), *Franklyn v. Lamond* (1), and *Wolfe v. Horne* (7), are not, I think, inconsistent with it when those cases are examined. A

In *Hanson v. Roberdeau* (6), a post obit bond had been sold by auction, the auctioneer being a known agent for an unknown principal. The bond not being assigned within the time agreed on by the conditions of sale, the buyer recovered damages from the auctioneer for breach of his contract to deliver. LORD KENYON said (1 Peake at p. 163): B

"Though where an auctioneer names his principal, it is not proper that he should be liable to an action, yet it is a very different case when the auctioneer sells the commodity without saying on whose behalf he sells it; in such a case the purchaser is entitled to look to him personally for the completion of the contract." C

The passage in STORY ON AGENCY (9th Edn.), para. 267, p. 321, is framed on this judgment. I think the meaning is that the buyer is entitled to look to the auctioneer to complete the contract by making delivery against the price in accordance with the conditions of sale.

In *Franklyn v. Lamond* (1), the plaintiff had bought at auction three hundred shares in a company, and paid the price to the auctioneers. The constitution of the company required a transfer by deed. The buyer applied to the auctioneers for the transfer. They informed him that they were agents and disclosed their principal, but never produced a transfer. The buyer recovered damages from the auctioneers for non-delivery. The declaration does not allege any contract of sale between the plaintiff and the defendants. It alleges that the defendants put up the shares for auction; that the plaintiff was declared the highest bidder; and that the defendants then agreed with the plaintiff to deliver against the price and failed to do so. It is not clear that the case was treated as one in which the fact of agency was disclosed. WILDE, C.J., said (4 C.B. at p. 644): D

"This is the simple case of parties, who have sold as principals, turning round afterwards and saying that they were merely agents in the transaction." E

COLTMAN, J., said (*ibid.*, at p. 646): F

"The defendants underlie the ordinary responsibility of a seller. Not having disclosed their principal at the time of the sale, it must be assumed that they contracted to make a good title to the things sold." G

The plaintiff had not alleged such a contract; he sued on a contract, made after the fall of the hammer, to give possession against the price. The defendants certainly underlay some of the responsibilities of a seller. They were bound to deliver. But if this sentence means that an auctioneer, who sells a specific chattel as a known agent for an unknown principal, is deemed in law to undertake to make a title himself, or to warrant his principle's title, I think, with great deference, that it requires some qualification. MAULE, J., bases his judgment on the conditions of sale and on the duty therein imposed on the auctioneers to make delivery. He says (*ibid.*, at p. 647): H

"Such being the state of the liabilities between the parties, it is quite clear that the defendants did agree to make the transfer of these shares. To enable them to enter into such a contract, it was not essential that they should be the registered proprietors. It was perfectly practicable for them to procure a transfer to be made, although they themselves might not be the actual owners of the shares." I

In both these cases, the courts were concerned with possession, not with title. I think there is nothing in either decision which implies that, if the auctioneers had procured transfers in accordance with the conditions of sale, and had paid over the purchase money, they could have been held liable to the buyer in damages if the title of the transferor had been at any time afterwards impeached. *Franklyn v. Lamond* (1), is further distinguishable in that it was not the sale of a specific

A chattel. A transfer of any three hundred shares in the company would have performed the contract.

In *Woolfe v. Horne* (7), there was a sale by auction of unclaimed property left in railway carriages on the Great Western Railway. It seems to me that the auctioneers disclosed their principal. They failed to deliver in accordance with the conditions, and were held liable in damages to the buyer. It is clear that the court did not regard them as sellers or as undertaking all the liabilities of sellers. They were held bound to deliver on their own contract with the buyers. There is nothing to suggest that the court considered them liable, not only to deliver, but also to make a good title or to warrant that their principal would do so.

In *Wood v. Baxter* (5) there was a sale by auction of implements and growing crops on a certain farm. It is clear that the auctioneer's agency was disclosed; the principal's name was not disclosed and, indeed, was withheld when demanded. The conditions stated that the sale was under a bill of sale, and provided that all implements bought were to be removed on the day after the sale "and the growing crops immediately after they arrive at maturity." The plaintiff purchased the wheat and straw then growing on certain land. When it was ripe he entered on the land under authority from the defendants and cut and threshed the crop and sold the wheat. The landlord then claimed that the straw must not be removed. It appeared that the tenant, the grantor of the bill of sale, had a right to remove the straw, but was bound afterwards to bring on the land an equivalent in manure. The buyer, without testing the validity of the landlord's claim, sued the auctioneers for the agreed value of the straw, alleging that they had sold it to him and failed to deliver. He was nonsuited, and the nonsuit was upheld in this court. The result was right in any case. The defendants had given delivery in accordance with the conditions, and if they were bound to give, or warrant, a title, there was no evidence that they had failed to do so. The infirmity (if any) of the principal's title was never proved. WILLIAMS, J., delivered a considered judgment, reviewing some of the authorities, in which he states the law as follows (49 L.T. at p. 46):

"There can be no doubt that an auctioneer, like any other agent selling goods on behalf of a principal, may, and constantly does, become himself a contracting party with the purchaser, and if he sells by auction without disclosing the name of his principal, his contract is very nearly that of an ordinary vendor, and he can sue and be sued as such upon the contract of sale. . . . The further question then arises, what is the character and extent of the contract entered into by the auctioneer when he sells without disclosing the name of his principal? The answer to this is, that it depends upon the conditions of sale, upon what is said by the auctioneer at the time, upon the surrounding circumstances, and upon the nature of the subject-matter of the sale. In the first place, it would certainly be going too far to say that an auctioneer, selling without disclosing the name of his principal, makes himself a contracting party in the same way and to the same extent that another agent selling for an undisclosed principal does. The auctioneer sells, not as an owner having a right to sell by virtue of his own right of property, but as an auctioneer empowered and intrusted by his employer to sell. If he is selling live stock or implements in the market place, or furniture in a room, the extent of his contract would ordinarily be to delivery goods to the buyer; if he were selling shares in a joint-stock company, it would be to procure a transfer to the purchaser; if he were selling timber stacked in a yard or loaded on board ship, or growing crops on a farm, it would be in each case to give such constructive delivery as according to the nature of the subject-matter was practicable and usual. Upon making such delivery, his obligation would ordinarily be fulfilled. For example, upon such a contract there would not be necessarily implied any warranty of title in the goods, though he might, of course, like anyone else, by his conduct or by declaration at the time of the sale, afford evidence of actual warranty of title: *Morley v. Attenborough* (8), and *Eichholz v. Bannister* (9). An auctioneer who

sells goods not as owner but as auctioneer only, though not naming his principal, does not, without more, warrant the title to the goods sold ; he does no more than engage that he is in fact instructed and authorised by his principal to sell, as for example in the present case under the powers of a bill of sale ; but he does not guarantee the validity of the bill of sale, nor the title of his employer to the goods. In fact, whenever the question is raised as to the extent of the contract that the auctioneer enters into when he sells goods by auction, this question must be determined, as in other cases, upon the evidence as to the conduct and declarations of the auctioneer, the nature of the subject-matter of the sale, and the surrounding circumstances."

After assuming that the auctioneer's principal had no right to sell the straw, the learned judge continued (*ibid.*, at p. 48) :

"These being the facts, it seems to us that there was no evidence of any breach of contract by the defendants ; the growing crop was in fact delivered to and taken possession of by the plaintiff and cut and harvested by him, and his difficulty arose not from the non-delivery of the goods by the defendants to him, but from the interference of a third person (who disputed the title of the bill of sale holder to sell the straw to be removed from the farm) who put forward a claim either well founded or ill founded to have the straw consumed on the farm."

A. L. SMITH, J., clearly agreed with WILLIAMS, J., that the auctioneers were not bound to give, or to warrant, a title. He says (*ibid.*) :

"In my judgment the defendants in this case did give to the plaintiff all that they had contracted and were bound to give him, viz., the proper and requisite authority to enter upon the farm, and to cut and harvest and carry away the crop."

The only remaining question is whether the defendants, as a matter of law and by the mere fact of sale, warranted the Saxton Rubber Co.'s right to sell, and if not, whether they gave such a warranty in fact. The first point is decided by *Wood v. Baxter* (5), and I can see no ground on which a warranty could be implied in law. The auctioneer cannot question his principal about his right to sell, and the buyer is well aware of the auctioneer's position. As regards warranty in fact, I do not think it was even suggested that the words "from instructions received from various owners" constituted a warranty of the title of every principal, and certainly there was no such finding by the learned judge.

In my opinion, the appeal must be allowed, and the judgment for the plaintiff be set aside, and judgment entered for the defendants.

SWIFT, J.—I agree.

Appeal allowed.

Solicitors: McKenna & Co., for Philip Cohen, Slater & Tomkins, Birmingham; Nash, Field & Co., for Blewitt & Co., Birmingham.

[Reported by T. R. F. BUTLER, Esq., Barrister-at-Law.]

Re BARRATT. NATIONAL PROVINCIAL BANK, LTD.

v. BARRATT

[CHANCERY DIVISION (Eve, J.), May 12, 1925]

[Reported [1925] Ch. 550; 94 L.J.Ch. 345; 133 L.T. 133]

Will—Tenant for life and remainderman—Gift of leasehold and furniture and shares to wife for life with remainder to others—Intention—Exclusion of rule in Howe v. Earl of Dartmouth.

A testator bequeathed the residue of his property, which consisted of a leasehold house and furniture and shares in a company, to his wife for her life, and directed that after her death the property should be sold and the proceeds divided into five equal portions among his three daughters and two others, of whom four were infants.

Held: on the true construction of the will the testator intended to exclude the operation of the rule in *Howe v. Earl of Dartmouth* (1), and, therefore, the tenant for life was entitled to enjoy the residuary estate in specie.

Collins v. Collins (2) (1833), 2 My. & K. 703, applied.

Notes. As to trusts for life and in remainder see 33 HALSBURY'S LAWS (2nd Edn.) 116 et seq., and for cases see 44 DIGEST 197 et seq.

Cases referred to:

(1) *Howe v. Earl of Dartmouth*, *Howe v. Aylesbury* (1802), 7 Ves. 137; 32 E.R. 56, L.C.; 44 Digest 197, 265.

(2) *Collins v. Collins* (1833), 2 My. & K. 703; 39 E.R. 1113; 44 Digest 202, 317.

(3) *Pickering v. Pickering* (1839), 4 My. & Cr. 289; 8 L.J.Ch. 336; 3 Jur. 743; 41 E.R. 113, L.C.; 44 Digest 201, 302.

(4) *Stanier v. Hodgkinson* (1903), 73 L.J.Ch. 179; sub nom. *Stainer v. Hodgkinson*, 52 W.R. 260; 48 Sol. Jo. 143; 44 Digest 202, 312.

(5) *Re Evans' Will Trusts*, *Pickering v. Evans*, [1921] 2 Ch. 309; 91 L.J.Ch. 29; 125 L.T. 822; 65 Sol. Jo. 753; 44 Digest 204, 335.

(6) *Vaughan v. Buck* (1841), 1 Ph. 75; 6 Jur. 23; 41 E.R. 559, L.C.; 44 Digest 203, 319.

(7) *Re Bland*, *Miller v. Bland*, [1899] 2 Ch. 336; 68 L.J.Ch. 745; 44 Digest 210, 380.

Adjourned Summons.

The testator by his will, after appointing the plaintiffs his executors and directing them to get in his outstanding estate and to pay all his debts and funeral and testamentary expenses, gave all the residue of his property, which consisted of a leasehold house and furniture and shares in a company, to his wife for her life. He directed that, after her death, the same should be sold and the proceeds be divided into five equal parts, and that one of such parts should go to each of his three daughters and two others, of whom four were infants. This summons was taken out in order to ascertain whether the rule in *Howe v. Earl of Dartmouth* (1) was applicable to the case as between tenant for life and remainderman.

J. V. Nesbit appeared on the summons.

Binnie, for the widow and three daughters, referred to *Collins v. Collins* (2), *Pickering v. Pickering* (3), and *Stanier v. Hodgkinson* (4).

Swords, for the infants, referred to *Re Evans' Will Trusts* (5), *Collins v. Collins* (2), and *Vaughan v. Buck* (6).

EVE, J.—The question in this case is whether by the language he has used the testator has evidenced an intent to exclude the operation of the rule in *Howe v. Earl of Dartmouth* (1). The language is as near as can be the same as is to be found in *Collins v. Collins* (2), where SIR JOHN LEACH is reported as having decided

that "it was the intention of the testator that his widow should enjoy the leasehold property for her life"; but a difficulty is occasioned by the discovery of counsel for the infants that *Collins v. Collins* (2) was never decided in the manner reported, and that the words I have quoted were a dictum made in the course of some interlocutory application: see *Vaughan v. Buck* (6). A few years afterwards, however, a very similar will had to be considered by LORD COTTENHAM in *Pickering v. Pickering* (3), and, after a statement to the effect that the case was as near to the case he was considering as any two cases could be, he took occasion to add that he entirely concurred in *Collins v. Collins* (2), and thought it would be a violation of the testator's intention not to allow the wife to enjoy the income of the property as it was. At later dates those two cases have been followed by STIRLING, J., in *Re Bland* (7), and by BUCKLEY, J., in *Stanier v. Hodgkinson* (4). There is, therefore, ample authority for the proposition that a will framed as was the will in *Collins v. Collins* (2) evidences an intention that the tenant for life shall enjoy the property in specie, and, this will being so framed, I have no difficulty in holding that the testator intended his property to remain unconverted during the widow's lifetime, and to give her the enjoyment of it in specie.

Solicitors: *Martin & Co.*

[Reported by A. W. CHASTER, ESQ., Barrister-at-Law.]

ABRAHAM'S v. MACFISHERIES, LTD.

[KING'S BENCH DIVISION (Fraser, J.), January 14, 15, 26, 1925]

[Reported [1925] 2 K.B. 18; 94 L.J.K.B. 562; 133 L.T. 89]

Landlord and Tenant—Lease—Forfeiture—Covenant not to assign, underlet or part with possession of part of premises without consent—Breach—Subletting of part of premises—No notice of breach—Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 14 (1), (6) (i).

By s. 14 of the Conveyancing Act, 1881, "(1) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach . . . (6) This section does not extend—(i) To a covenant or condition against the assigning, underletting, parting with the possession, or disposing of the land leased. . . ."

By a lease, dated Jan. 1, 1924, of two shops with flats and tenements above them, the lessees covenanted that they would not assign, transfer, underlet or part with possession of the premises or any part thereof, other than an underletting of the upper part for residential purposes only, without previous consent in writing of the lessor, such consent not to be unreasonably withheld. The lessees agreed to sublet one of the shops to a company of wine merchants subject to the lessor's consent. A draft sub-lease was prepared, and the company was allowed to occupy the premises, execute certain repairs, and carry on their business. The lessor refused consent to the sub-lease and claimed to recover possession of the premises for breach of covenant. The lessees

A contended that they had not parted with possession of the premises and that no notice as required by s. 14 of the Conveyancing Act, 1881, had been served on them.

B **Held:** the lessor was entitled to recover possession of the premises, because (i) the lessees were in breach of the covenant in that they had parted with possession of part of the premises; and (ii) the exception in s. 14 (6) (i) of the Act of 1881 relating to a covenant against parting with possession of the land, also applied to a covenant against parting with possession of part of the land.

Judgment of SCRUTTON, L.J., in *Russell v. Beecham* (1), [1924] 1 K.B. 525, not followed.

C **Notes.** The Conveyancing Act, 1881, s. 14, has been replaced by s. 146 of the Law of Property Act, 1925: see, in particular, s. 146 (8).

Followed: *Carrington Manufacturing Co. v. Saldin* (1925), 133 L.T. 432.

As to relief against forfeiture see 23 HALSBURY'S LAWS (3rd Edn.) 674 et seq., and for cases see 31 DIGEST (Repl.) 512 et seq. For the Law of Property Act, 1925, s. 146, see 20 HALSBURY'S STATUTES (2nd Edn.) 739.

D Cases referred to:

- (1) *Russell v. Beecham*, [1924] 1 K.B. 525; 93 L.J.K.B. 441; 130 L.T. 570; 40 T.L.R. 66; 68 Sol. Jo. 301, C.A.; 31 Digest (Repl.) 548, 6703.
- (2) *Barrow v. Isaacs & Son*, [1891] 1 Q.B. 417; 60 L.J.Q.B. 179; 64 L.T. 686; 55 J.P. 517; 39 W.R. 338; 7 T.L.R. 175, C.A.; 31 Digest (Repl.) 547, 6696.
- E** (3) *Jackson v. Simons*, [1923] 1 Ch. 373; 92 L.J.Ch. 161; 128 L.T. 572; 39 T.L.R. 147; 67 Sol. Jo. 262; 31 Digest 548, 6702.
- (4) *Church v. Brown* (1808), 15 Ves. 258; 33 E.R. 752, L.C.; 31 Digest (Repl.) 409, 5384.
- (5) *Varley v. Coppard* (1872), L.R. 7 C.P. 505; 26 L.T. 882; 36 J.P. 694; 20 W.R. 972; 31 Digest (Repl.) 416, 5446.
- F** (6) *Grove v. Portal*, [1902] 1 Ch. 727; 71 L.J.Ch. 299; 86 L.T. 350; 18 T.L.R. 319; 46 Sol. Jo. 296; 31 Digest (Repl.) 414, 5436.
- (7) *Crusoe d Blencowe v. Bugby* (1771), 3 Wils. 234; 2 Wm. Bl. 766; 95 E.R. 1030; 31 Digest (Repl.) 435, 5630.
- (8) *River Wear Comrs. v. Adamson* (1877), 2 App. Cas. 743; 47 L.J.Q.B. 193; 37 L.T. 543; 42 J.P. 244; 26 W.R. 217; 3 Asp. M.L.C. 521, H.L.; 36 Digest (Repl.) 166, 890.
- G** (9) *Eastern Telegraph Co. v. Dent*, [1899] 1 Q.B. 835; 68 L.J.Q.B. 564; 80 L.T. 459; 15 T.L.R. 296; 43 Sol. Jo. 366, C.A.; 31 Digest (Repl.) 547, 6697.
- (10) *Elliott v. Boynton*, [1924] 1 Ch. 236; 93 L.J.Ch. 122; 130 L.T. 497; 40 T.L.R. 180; 68 Sol. Jo. 236, C.A.; 31 Digest 623, 7371.

H **Action** for recovery of premises for breach of covenant, and mesne profits. The facts are set out in the judgment.

H. M. Givven and W. Lawson Campbell for the plaintiff.

F. T. Barrington-Ward, K.C., and W. H. Cartwright Sharp for the defendants.
Cur. adv. vult.

I Jan. 26. **FRASER, J.**, read the following judgment.—This is an action of forfeiture of a leasehold interest by reason of an alleged breach of a covenant contained in an indenture of lease dated Jan. 1, 1924. The lease was for a term of fourteen years from March, 25, 1924, at a rent of £400 per annum, payable quarterly, the first payment to be made on June 24, 1924. It contained a covenant by the defendants, as lessees, that they would not assign, transfer, underlet or part with the possession of the said premises or any part thereof other than an underletting of the upper part thereof for residential purposes only, without previous consent in writing by the lessors, but that such consent should not be unreasonably, arbitrarily

or vexatiously withheld. The lease also contained a proviso for re-entry on breach of covenant. On April 10, 1924, the lessor's interest in the premises became vested in the plaintiff. The premises consist of two shops, Nos. 34 and 35, Thayer Street, in the parish of St. Marylebone, in the County of London, with flats and tenements above the shops. The entrance to the staircase leading to the flats and tenements is by a door at the left-hand side of the front of the shop, No. 35. The plaintiff alleges that, in breach of the covenant, the defendants have assigned or underlet or parted with the possession of the said premises or of part thereof without the previous consent in writing of the plaintiff. In her statement of claim she sets out the particulars on which she relies, that "The business of a wine and spirit merchant was being carried on upon the said premises, from about the month of July until the month of September, 1924, by some person or company other than the defendants, which person or company were in possession of the said premises, and over the door was exhibited in block letters the notice 'J. G. Mauroux, licensed to sell wines and spirits to be consumed off the premises, 1924'." The plaintiff claims possession of the said premises and mesne profits, or, alternatively, rent up to the date of the issue of the writ and the mesne profits thereafter. The defendants raise two defences. First, that they have neither assigned nor underlet nor parted with the possession of the premises, nor any part thereof; and, secondly, they say that they rely on s. 14 of the Conveyancing Act, 1881, and that no notice as thereby required has been served on them.

The defendants are a well-known company carrying on the business of fish-mongers and poulterers, having some four hundred shops in the provinces and about a hundred shops in London. They were given possession of 34, Thayer Street, at or about March 25, 1924, and of 35, Thayer Street, about June 24, 1924. The defendants apparently desired to retain possession of the shop No. 34 for the purposes of their own business, and to let No. 35, the lock-up shop as it was called. The upper part of the buildings consisted of the flats and tenements which I have mentioned, and were in the occupation of tenants subject to the Rent Restriction Acts. With a view to letting the lock-up shop, the defendants instructed their agents, Messrs. James and Brotherstone, to let this shop. After some preliminary negotiations, on June 5, 1924, the defendants' agents wrote to J. G. Mauroux, Ltd.:

"We confirm arrangement made with you to-day to take above shop [No. 35] at a yearly rental of £225, exclusive of rates and taxes. The landlords to allow you six months' rent free in lieu of repairs."

On June 12, 1924, Mr. Mauroux on behalf of the company wrote to the defendants' agents:

"I hereby offer to take the above premises on a full repairing lease for fourteen years or as near that period as possible, and to pay rent of £225 per annum . . . for the first three years, thereafter the rent to be £250 per annum exclusive, provided certain repairs are carried out, or, alternatively, I am allowed two quarters rent in lieu of same."

On June 18, 1924, the solicitors for J. G. Mauroux, Ltd., wrote to the defendants' agents, enclosing their clients' cheque for £35, and adding that they understood £22 10s. on account of rent was to be credited to their clients in December. On the same date the defendants' agents replied acknowledging the above cheque. They stated that a schedule of repairs must be submitted for the superior landlord's approval before any repairs could be undertaken, and that they had handed the key to Mr. Mauroux's representative, who had been asked to return it to defendants. The specification for repairs was duly sent to the defendant's agents, and from them to the defendants. On June 20, 1924, the defendants wrote to their agents:

"We do not consider that the works contained in the specification will necessitate any reference to our superior landlord. In these circumstances, provided Mr. Mauroux understands that any works done by him prior to agreement as to draft lease and to our receiving licence from our superior landlord to sublet

A to him are carried out on his own responsibility, we have no objection to his commencing the work. It must be distinctly understood that, should any hitch arise, he must surrender possession immediately upon request."

A copy of this letter was forwarded to J. G. Mauroux, Ltd. On June 23, 1924, the defendants wrote to their agents :

B "We regret to inform you that our landlord has withheld his consent for the subletting of the above premises. We have, however, placed the matter in the hands of our solicitors. . . ."

The next day the defendants wrote to Mr. Mauroux's solicitors to the same effect. On June 26, 1924, the defendants' solicitor sent to Mr. Mauroux's solicitors the draft sub-lease in duplicate "subject to all necessary consents being duly forthcoming" ; and on June 30, 1924, they wrote stating they had no doubt that sufficient references could be furnished to render the withholding of the licence unreasonable. The draft lease approved was returned by Messrs. Mauroux's solicitors on the same date. On July 21, 1924, the defendant's solicitor wrote to Mr. Mauroux's solicitors :

D "I send the counterpart lease for your client to execute. It cannot, however, be proceeded with until the requisite licence is forthcoming, and my clients have not yet received adequate references to submit to their superior landlord. As soon as the licence is forthcoming, the matter can be completed."

On Aug. 6, 1924, the defendants' solicitor wrote to Mr. Mauroux's solicitors to the effect that, if their clients failed to produce acceptable references, the proposed subletting must fall through, and, if their client had taken possession of the premises, he must vacate them. On Sept. 17, 1924, the defendants' solicitor wrote to Mr. Mauroux's solicitors that he had been threatened with proceedings by his lessor's solicitors owing to Mr. Mauroux being in occupation without the lessor's consent ; and on the next day he wrote to the effect that he was definitely instructed to call on their client forthwith to vacate the premises. On Sept. 22, 1924, Mr.

F Mauroux's solicitors wrote that they had on that day received a visit from a representative of the defendants, who had told them that the defendants required possession of the premises on that day ; but that they could not comply with his demand, and would resist any attempt at forcible occupation. The defendants' solicitor replied the next day, referring to his letter of June 20, 1924, which set out the terms on which Mr. Mauroux was in temporary occupation ; and stated that, G for their own protection, the defendants intended to exclude Mr. Mauroux from the premises after the close of business on that day. On the same date, Mr. Mauroux's solicitors wrote declining to give up possession during their client's absence from England.

I have read that correspondence because I felt bound to do it. It is necessary, of course, to consider the correspondence in this case as well as the facts which H were proved in evidence. I want to say a word or two about the evidence. It is not necessary for me to say very much, but on behalf of the plaintiff Mr. Moore was called, Mr. Moore being a clerk to Messrs. Rowe and Maw. Among other things, he says he approved the draft sub-lease and had it executed by Mr. Mauroux, and about July 23 he says :

I "I went to the premises while Mr. Mauroux was there, actually in possession. On that date I went to investigate the repairs, saw, when there, a shop fairly well filled with a stock of wines. The manageress and her assistant were sitting in the shop. The door was open and there was every appearance of a business being carried on."

Then he produced a notice which was put in evidence. He said he observed a notice displayed outside the premises. This notice, which I have here, appears to be of importance. It is headed : "35, Thayer Street, Marylebone" ; then stamped after it had been printed, apparently : "Opening on July 5, 1924." The printed

part goes on: "Opening, Saturday, June 28, 1924, as a French wine and spirit shop." It is obvious that the date of opening apparently, so far as this was concerned, judging from the fact that these other words appear stamped on the document, appears to have been delayed. The notice goes on: "On that occasion we will sell during eight days only"—and then there is a reference to a large quantity of wine, 100,000 bottles of so and so, 100,000 bottles of something else, and so on—a great variety of wines. Then the notice deals further with the wine that is proposed to be sold, and the terms on which it can be had. At the end it says: "J. G. Mauroux, Ltd., Great Fenchurch Buildings, London, E.C.3." Mr. Moore says that Mr. Mauroux and another gentleman, a surveyor, and two employees of the defendants, came in while he was there. There was a notice above the door with Mr. Mauroux's name, saying that Mr. Mauroux was licensed to sell wines and spirits to be consumed off the premises. A photograph was produced and put in before me, and the witness stated that there was a notice like that over the door, that is, with these words which I have already read, and they appear on the photograph: "On Oct. 3 I went there with representatives of MacFisheries to fetch away books of account left there by the manageress. The stuff was underneath the counter." By that, of course, he was referring to wine. He went on to say: "The stock was depleted since July. The next door was one of MacFisheries' shops. Afterwards the defendants forcibly took possession." Then he made a reference to the key and says the key was kept there; that Mr. Mauroux had a key while he was there for his manageress; that he was in possession of the ground-floor shop and room at the back, and also the basement in which there was a considerable cellar. Then he said he had the books and he referred to the £22 10s. paid as a deposit by Mr. Mauroux, and also refers to the value of the repairs as £112 10s.; that he thought all the repairs were not satisfactory, but a substantial amount of repairs was done, and that the £22 10s. had never been returned. On behalf of the defendants, Mr. Bigham was called, and also Mr. Barber, who looked after the fish shop, No. 34.

On the correspondence and on the evidence certain facts emerge which seem to me to be quite clear. I think that here there was clear parting with the possession of part of the premises by the defendants. The handing over of the key, one knows, has not always been held to be evidence of parting with possession. No doubt the key was in the possession of Mr. Mauroux and his manageress, and they were in possession for a considerable time. Mr. Mauroux was in possession of the premises, he had the key, his name was over the door. There was a clear breach of the covenant. It is true that the cheque given by Mr. Mauroux to the defendants' agents was never cashed, but it remained with the agents. On the facts, it was a case of this kind: Repairs had been done to the knowledge of the defendants. Terms of underletting had been agreed. The defendants were saying to Mr. Mauroux "Go in and carry on your business. But if any hitch occurs later on then you will have to give up possession." There was a breach of the covenant not to part with possession. That disposes of the first point taken by the defendants.

The second point raised by way of defence in this action presents considerable difficulty. The defendants rely on s. 14 of the Conveyancing Act, 1881, and say that no notice as thereby required has been served on them. They contend that, even if they did part with the possession of part of the premises, that is not a breach of a covenant against the parting with the possession of the premises and does not come within the exception in s. 14 (6). On the one hand, it was urged on me on behalf of the defendants that I was bound to follow the judgment of SCRUTTON, L.J., in *Russell v. Beecham* (1), in which the learned lord justice held that a covenant against parting with possession of part of the premises is a different covenant against parting with the possession of the premises, and that the former covenant was not within the exception in s. 14 (6), of the Conveyancing Act, 1881, and that, therefore, a notice under sub-s. (1) was necessary before the plaintiffs

A could enforce a right of entry for a breach of it. In that case, the other members of the Court of Appeal expressed no opinion on this particular point. BANKES, L.J., said ([1924] 1 K.B. at p. 532):

B "I will take the second point first. It was said that a notice was necessary, because this case did not fall within the exceptions in sub-s. (6) (i), which provides that sub-s. (1) is not to extend to a covenant or condition against the assigning, underletting, parting with the possession, or disposing of the land leased; it was urged that a covenant not to part with possession of the whole of the demised premises and a covenant not to part with possession of part of the demised premises are two separate and distinct covenants; that there has been no parting with possession of the whole of the premises but only a parting with possession of part of the premises, and that sub-s. (6) contains no exception of a covenant not to part with possession of part of the premises, and therefore before a lessor can insist on a forfeiture for breach of that covenant a notice under s. 14 (1) is necessary. Speaking for myself, if it were necessary to decide upon the merits of that argument I should like to give further consideration to it, because the results of accepting it would be very far-reaching. But I do not propose to offer any opinion upon this question."

D ATKIN, L.J., said (*ibid.* at p. 539):

"Upon the ground relied on by SCRUTTON, L.J., and by the construction of s. 14 of the Conveyancing Act, 1881, I prefer to say nothing one way or the other."

E On the other hand, my attention was drawn by counsel for the plaintiff to numerous cases decided since the Conveyancing Act, 1881, in which the point of law as decided by SCRUTTON, L.J., would have been a defence in each of the cases referred to and it was said that it is significant that no reference was made by any of the eminent judges in these cases to this point, nor was the point taken as a defence by any of the experienced counsel who appeared on behalf of the defendants in these cases. In particular, reliance was placed on the observations of KAY, L.J., in the Court of Appeal in *Barrow v. Isaacs* (2), as showing that the learned lord justice had at the time prominently in his mind s. 14 of the Conveyancing Act, 1881, and, in particular, the provisions of sub-s. (6) of that section. The judgment of SCRUTTON, L.J., in *Russell v. Beecham* (1) does not bind me, although, of course, I am bound to, and do, treat it with the utmost respect. It would appear from the report of that case that the point now under consideration was the last point raised by the respondents' counsel in their argument, and that the attention of the court was not directed to the line of cases to which I have referred above as having been cited to me on behalf of the plaintiff in the present action. In his judgment, SCRUTTON, L.J., refers to *Jackson v. Simons* (3), in which ROMER, J., held that a covenant against sharing possession was another and a different covenant from a covenant against assigning, underletting or parting with possession, and was not included in the exception in sub-s. (6), and, therefore, notice was necessary before the forfeiture could be enforced. SCRUTTON, L.J., then proceeds (*ibid.* at p. 536):

I "The covenant in the present case is not against sharing possession; it is against parting with the premises or any part thereof. The question is whether a covenant against parting with possession of part of the premises is included in a covenant against parting with the possession of the land leased. I might have been slow in coming of myself to a conclusion on this question; but I find that in *Church v. Brown* (4), LORD ELDON, whose doubts were said to be more valuable than other men's certainties, said that a covenant not to part with possession of premises would not restrain the tenant from parting with a part of the premises; these covenants having always been construed by courts of law with the utmost jealousy to prevent the restraint from going

beyond the express stipulation. The question was whether a covenant against assigning was a usual covenant in a lease. LORD ELDON argues, if that is a usual covenant, is a covenant against underletting, which is another and a different covenant, also a usual covenant? And, if it is, is a covenant against parting with possession a usual covenant? And, if it is, what of yet another and different covenant—namely, a covenant not to part with a part of the premises? Is this also to be considered a usual covenant? I am content to follow LORD ELDON, and to hold that a covenant not to part with a part of the premises is a different covenant from a covenant against parting with the possession of the premises; that, therefore, a notice was required before a forfeiture could be enforced, and, consequently, that the action fails."

In the view of SCRUTTON, L.J.'s observations as to LORD ELDON's dictum in *Church v. Brown* (4), I may usefully refer to a dictum of the eminent judge SIR JAMES SHAW WILLES in *Varley v. Coppard* (5). In that case, two persons, partners in trade, were assignees of a lease which contained a covenant by the lessee for himself and his assigns that he would not, neither should his executors, administrators, or assigns, assign the demised premises without the consent in writing of the lessor. On the dissolution of the partnership, one of the assignees assigned all his interest in the premises to the other. It was held by WILLES, J., that there was a breach of the covenant, and the learned judge, in giving judgment, used these words (L.R. 7 C.P. at p. 507):

"The covenant, though it relates to the estate of the two, necessarily involves the interest of each: it means that neither of them shall assign the whole or any part of his interest without consent; otherwise, a tenant might assign all but a sixty-fourth part. . . . I cannot think that the assignment of the sixty-three parts would be anything but a breach of the covenant."

It is important, however, to emphasise and bear in mind that the question which I have to decide is the construction to be given to a section in an Act of Parliament, and not to a particular covenant in a lease. It is, of course, clear on the cases that, in a lease, a covenant not to part with possession of the demised premises means the whole of the demised premises and is not broken by an assignment of part. But in the words of JOYCE, J., in *Grove v. Portal* (6) ([1902] 1 Ch. at p. 731):

"the reason of that, no doubt, is that these covenants have always been construed with the utmost jealousy to prevent the restraint from going beyond the express stipulation."

In *Crusoe v. Bugby* (7), the judgment is to this effect:

"The courts have always held a strict hand over these conditions for defeating leases. Very easy modes have always been countenanced for putting an end to them."

In construing a statute, the object is to ascertain the meaning of the legislature and, in order to ascertain the true meaning, it is necessary to ascertain the circumstances with reference to which the words were used and what was the object appearing from those circumstances which the legislature had in view: see *River Wear Comrs. v. Adamson* (8) and particularly the observations of LORD BLACKBURN. The object of s. 14 is to give relief to lessees in case of forfeiture by making it compulsory for landlords to give notice of any breaches of covenant by which forfeiture has been incurred and enabling them to remedy the loss caused by such breaches before the forfeiture can be enforced. The exceptions in sub-s. (6) are made to cover cases where the breach cannot be remedied specifically, and such cases logically include cases where possession of part of the premises has been parted with as well as cases where possession of the whole of the premises has been parted with. In my opinion, it would be an anomaly to construe the exception in such a way as to exclude from it the former cases since the lessee cannot

A remedy the breach any more easily in the one case than in the other. In this connexion, the history of the legislation in regard to relief against forfeiture which is dealt with by KAY, L.J., in *Barrow v. Isaacs* (2), seems to me very material. In my opinion, it is in accordance with the spirit of the Act and the history of the law as to relief against forfeiture to construe the language of sub-s. (6) in the wider meaning, so that a covenant against parting with the possession of part of the premises is within the exception in sub-s. (6).

B A further, and, in my opinion, a strong, argument against the construction placed on the statute by SCRUTTON, L.J., is the point taken on behalf of the plaintiff in the present action which I have noticed above, namely, that since the Conveyancing Act, 1881, there have been in the Court of Appeal and the courts of first instance numerous actions for forfeiture consequent on parting with possession of part only of the premises, and that in not one of those cases has the point been raised that no notice has been given under s. 14: see, for instance, *Barrow v. Isaacs* (2), and particularly the passage in reference to this section in the judgment of KAY, L.J.; *Eastern Telegraph Co. v. Dent* (9), and *Elliott v. Boynton* (10). It has, in fact, been tacitly assumed that such a defence would not be successful, and this practice, which has held for a considerable number of years, is an argument as to the general understanding of the section.

D So far as I can ascertain from the text-books, the practice of conveyancers appears also to support the view which I have indicated above as to the true construction and effect of sub-s. (6) (i) of s. 14. See, for instance, the marginal note on p. 691 of KEY AND ELPHINSTONE'S PRECEDENTS OF CONVEYANCING (5th Edn.), which was edited by the late SIR HOWARD ELPHINSTONE, one of the conveyancing counsel of the court. That note refers to s. 14 (6), and states that a covenant that the lessee will not assign, underlet or part with the possession of the premises or any part thereof, is excepted out of s. 14 of the Act.

E In conclusion, therefore, I respectfully differ from the judgment of SCRUTTON, L.J., in *Russell v. Beecham* (1), and I hold that the second point which the defendants have raised by way of defence also fails. The plaintiff is entitled, therefore, to succeed in his action. Accordingly, I give judgment for the plaintiff (i) for possession of the two shops and premises known as Nos. 34 and 35, Thayer Street, St. Marylebone, in the County of London; (ii) arrears of rent up to date of issue of writ and mesne profits from that date up to to-day.

F Judgment for plaintiff.

Solicitors: *Harris, Chetham & Cohen; Janson, Cobb, Pearson & Co.*

[Reported by T. W. MORGAN, ESQ., Barrister-at-Law.]

Re PARISHES OF GUSSAGE ALL SAINTS AND GUSSAGE ST. MICHAEL, DORSET

[PRIVY COUNCIL (Viscount Cave, L.C., Lord Parmoor and Lord Wrenbury), March 20, 1925]

[Reported 69 Sol. Jo. 493; 144 L.T. 656, n.]

Ecclesiastical Law—Union of benefices—United opposition to scheme.

A scheme for the union of two benefices will not be confirmed on special reference to the Judicial Committee if there is united opposition by the inhabitants to it, even though it has the possibility of saving manpower and the opportunity of providing a larger income for the incumbent of the combined parishes.

Notes. The Union of Benefices Act, 1919, was repealed by the Union of Benefices Measure, 1923 (No. 2), s. 44, except as regards anything done under that Act prior to July 14, 1924 (the date of the passing of the 1923 measure), and any proceedings under that Act in any matter pending at that date.

Applied: *Re Union of Benefices of Great Massingham and Little Massingham, Norfolk*, [1931] All E.R. Rep. 769; *Re Thelnetham and Hinderclay Benefices*, [1933] All E.R. Rep. 936.

As to the union of benefices and parishes see 13 HALSBURY'S LAWS (3rd Edn.) 298 et seq., and for cases see 19 DIGEST 408-410.

Reference under the Union of Benefices Act, 1919. This was a special reference to the Judicial Committee to consider a proposal for the union of the two parishes of Gussage All Saints and Gussage St. Michael in the diocese of Salisbury under one incumbent. The population of Gussage All Saints was 343 and of Gussage St. Michael 250. The facts appear in the judgment of the Board.

Maugham, K.C., for the appellants.

Dighton Pollock for the respondents.

VISCOUNT CAVE, L.C.—This scheme comes before the board recommended by the commissioners appointed to inquire into the matter and approved by the Ecclesiastical Commissioners, and it has in its favour the possibility of the saving of manpower if the two benefices are united and also the opportunity of providing a larger income for the incumbent of the two parishes. On the other hand there is the circumstance, which, in my opinion, occurs for the first time, that, with the exception of the vicar of Gussage All Saints, who would not desire his personal interest to weigh in the matter, both parochial church councils are unanimously against the union, and the union is also opposed by all the inhabitants over sixteen in both parishes, with the exception of seven persons, these seven including the vicar of Gussage All Saints, and his wife. Of course the wishes of the inhabitants, however strong, are not the sole matter to be taken into account. Where it appears to the persons who have to deal with the matter on a report that there are considerations in favour of union which are sufficiently strong to outweigh the strong preponderance of local feeling, it is the duty of the commissioners to weigh all the considerations and see on the whole what is the correct decision to arrive at.

It is worth noting that in this case each of the two parishes in question has a very large area, something like 3,000 acres, and that in neither case is the population large; but each of them has at present an income of something between £300 and £400 a year net, an income which, though not large, is nevertheless sufficient, properly supplemented by local contributions, to sustain an incumbent for the parish. Therefore, it is not a case in which one of the parishes in question is so poor that it would be undesirable in the interests of religion to leave it standing by itself.

A There is also this further observation to be made. When the inquiry was adjourned, their Lordships adjourned it partly in order that the diocesan committee to be appointed under the Measure of the National Assembly of the Church, which was then expecting shortly to receive the approval of Parliament, might, when appointed, consider the whole question and give their views to the board. The Measure has now been passed, the committee has been appointed and has met and has given some consideration to this proposal, but that committee has not expressed any opinion either for or against the union of the two benefices as a question by itself. That being so, their Lordships have to come to the best conclusion that they can on the materials that they have, and on the whole they have come to the conclusion that they ought not to affirm his scheme. The question of dealing with the outlying portions of the parishes will of course be dealt with on its merits quite apart from this decision.

Solicitors : Peacock & Goddard ; Miles, Jennings, White & Foster.

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

THE JUPITER

[COURT OF APPEAL (Bankes and Atkin, L.JJ., and Lawrence, J.), February 9, 1925]

[Reported [1925] P. 69; 94 L.J.P. 59; 133 L.T. 85; 16 Asp. M.L.C. 491]

Admiralty—Jurisdiction—Action in rem—Claim for possession—Foreign vessel—Foreign parties—Impleading foreign sovereign State—Discretion of court.

The plaintiffs, who owned the steamship *Jupiter*, were a company incorporated under Russian law prior to the Russian revolution. By decrees of the Soviet government in 1918 and 1919, private property in shipping was abolished and the shares in the plaintiff company were annulled. The plaintiff company had moved its business to France, and persons appointed by the French courts administered its affairs. In 1924, by a contract of sale made in London, an English company, as agents for the Soviet government, purported to sell the *Jupiter* to the defendants, an Italian company. The Soviet government undertook to indemnify the defendants against any claims made against them in respect of the *Jupiter*, prior to the delivery of the ship to the defendants. The plaintiff company, through its French administrators, brought an action in rem against the *Jupiter* claiming possession. The defendants entered an appearance and moved to set aside the writ on the grounds (i) that the action being between foreigners for possession of a foreign ship and having been initiated without the consent of the defendants and without any request from a representative of the foreign State of which either party was a national, the Admiralty Court had no jurisdiction, or ought not to exercise any jurisdiction it possessed, to entertain such an action; (ii) that, the Russian company having ceased to exist, the persons instructing the plaintiffs' solicitors had no authority; (iii) that the action impleaded a foreign Sovereign State.

Held: (i) the court had jurisdiction to entertain the action, and, in the circumstances of the case, there was no reason why the court should not exercise its discretion and entertain the case; (ii) the action did not implead a foreign sovereign State; (iii) the question of authority to maintain the action was one of jurisdiction and not of plea, and was a matter to be referred to the judge at the trial.

Notes. As to disputes as to the possession of a ship see 1 HALSBURY'S LAWS (3rd Edn.) 51, 52, and for cases see 1 DIGEST, 112-115.

Cases referred to:

- (1) *The Jupiter*, [1924] P. 236; 93 L.J.P. 156; 132 L.T. 624; 40 T.L.R. 815; 16 Asp. M.L.C. 447, C.A.; Digest Supp.
- (2) *The Martin of Norfolk* (1802), 4 Ch. Rob. 293; 1 Digest 112, 169.
- (3) *The Johan and Siegmund* (1810), Edw. 241; 1 Digest 116, 213.
- (4) *The Sea Reuter* (1811), 1 Dods. 22; 1 Digest 112, 170.
- (5) *The Agincourt* (1877), 2 P.D. 239; 47 L.J.P. 37; 1 Digest 116, 216.
- (6) *The Evangelistria* (1876), 2 P.D. 241; 46 L.J.P. 1; 35 L.T. 410; 25 W.R. 255; 3 Asp. M.L.C. 264; 1 Digest 112, 171.
- (7) *Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co.*, [1921] 3 K.B. 532; 90 L.J.K.B. 1202; 125 L.T. 705; 37 T.L.R. 777; 65 Sol. Jo. 604, C.A.; 11 Digest (Repl.) 616, 438.
- (8) *The Annette, The Dorg*, [1919] P. 105; 88 L.J.P. 107; 35 T.L.R. 288; Digest Supp.
- (9) *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse*, [1925] A.C. 112; 93 L.J.K.B. 1098; 132 L.T. 99; 40 T.L.R. 837; 68 Sol. Jo. 841, H.L.; 10 Digest (Repl.) 1297, 9151.

Appeal from a decision of LORD MERRIVALE, P., refusing to set aside a writ and subsequent proceedings in an action in rem.

The following statement of facts is taken from the judgment of the learned President delivered on Jan. 19, 1925: The *Jupiter* was a vessel which was trading in the autumn of 1924, and no doubt had for years been trading, in a course of trade which brought her from time to time to English ports. She was for many years the property of what, under Russian law, was a lawful trading concern, which was described in one of the affidavits here by its Russian name. Down to the downfall of the autocracy which held sway in Russia for so many generations, the proprietary of the vessel here in question carried on its business with its seat of management at Petrograd, its business headquarters at Odessa, and with its ships registered at Odessa. Until 1918, the *Jupiter* was being managed in the ordinary course of trade by the managers of her proprietors. In January, 1918, there was issued in the name of the Soviet Republic a decree which abolished, or purported to abolish, private property in shipping; and by a subsequent decree in March, 1919, all the shares in the company which owned the *Jupiter* were declared annulled and the company was extinguished, or purported to be extinguished. The *Jupiter* was on the high seas and she continued her trading. Her owners—those at least who had been her owners, her proprietors so far as they were still in being and so far as there was a proprietary interest in any individual—as to part of them at any rate—would appear to have become refugees and to have taken up their abode in France. In France steps were taken at French law, at the instance of those persons, to provide for the management of the *Jupiter* and other vessels which had been the property of the body of proprietors already mentioned. The state of things brought about by sundry decrees of commercial tribunals in France—and, in particular, tribunals in the Mediterranean (the Tribunal of Commerce at Marseilles being the latest of them) was such that, down to December, 1922, this vessel was under the direction of administrators who were subject to the control of French tribunals and appointed at the instance of persons for the time being registered in France, though it was not known whether or not they were domiciled in France. In September, 1922, the *Jupiter* in the course of her trading was in this country; and she came to be laid up at Dartmouth and was in charge of her captain. Her captain attorned to the Soviet Government. He handed over the possession of the *Jupiter* to the representatives in London of the Soviet administration and held possession by their direction for them. As a result of that transaction, a suit was instituted by arrest of the vessel claiming on behalf of those with whom

A the now plaintiffs were concerned to assert the rights of the old proprietors, or those of them who survived, in the *Jupiter*. That action was met by a motion for a stay of proceedings on the ground that, by that action, a foreign sovereign power was being impleaded. There could be no question but that that was a true allegation. The result of the motion was that in the Admiralty Court the action was stayed, and in the Court of Appeal the judgment of HILL, J., was affirmed (*The Jupiter* (1)). Following on that transaction, the Soviet administration entered into a contract which had been produced, under which the administration purported by their agents, the Arcos Steamship Co., Ltd., domiciled in London, to sell and transfer to an Italian corporation the vessel *Jupiter* and all interests in her. It was to be a sale on an undertaking to break up the vessel. It was coupled with an agreement by the vendors to indemnify the purchasers against all claims in British or Italian courts by third parties claiming in respect of the *Jupiter* by reason of matters occurring prior to the delivery of the ship. The ship was delivered to the purchasers under that agreement, and apparently transferred by those purchasers to its present owners. It was held at the present time by an Italian transferee. The proprietary interests which were assailed were the interests which purported to have come into being with an agreement of Sept. 18, 1924, between the Arcos Steamship Co., Ltd., and the Cantiere Olivo Società Anonima. In these circumstances, the present action was commenced by the plaintiffs, the Compagnie Russe de Navigation à Vapeur et de Commerce, by writ in rem directed to the steamship *Jupiter*, by which they claimed to have possession of the *Jupiter* decreed to them. In due course an unconditional appearance was entered on behalf of the "owners of the steamship *Jupiter* and/or the Cantiere Olivo Società Anonima," and bail was given in a sum of £8,000. The plaintiffs delivered a statement of claim, by which they claimed a declaration pronouncing them to be the lawful owners of the vessel and possession of her. Time was asked for the defence. Security for costs was asked and given. The defendants then gave notice of the present motion to set aside the writ and subsequent proceedings, on the following, amongst other grounds: (i) that the action was between foreigners for possession of a foreign ship, and had been instituted without the consent of the defendants, and without any request from a representative of the foreign State of which either party was a national, and that the court had no jurisdiction or ought not to exercise any jurisdiction it possessed to entertain such an action; (ii) that, by a nationalisation decree of the Soviet government, the *Jupiter* had become their property, and that the plaintiff company had ceased to exist; (iii) that the action impleaded the Soviet government, which had sold the *Jupiter* free of incumbrances and maritime liens. It was further contended, when the motion came on for hearing on Dec. 12, 1924, that the persons instructing solicitors for the plaintiffs, Messrs. William A. Crump & Son, had no authority. The learned President accordingly gave leave to add as plaintiffs General Bourgois and two other persons appointed by the French courts to manage the business of the Compagnie Russe de Navigation à Vapeur et de Commerce. On Jan. 19, 1925, the learned President dismissed the motion, granting leave to appeal.

The defendants appealed.

Dunlop, K.C. (*Dumas* with him), for the defendants, referred to *The Martin of Norfolk* (2), *The Johan and Siegmund* (3), *The Sea Reuter* (4), *The Agincourt* (5), *The Evangelistria* (6), and *Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co.* (7).

G. P. Langton and *K. S. Carpmael*, for the plaintiffs.

BANKES, L.J.—This appeal from a judgment of the President raises several important questions. In an action brought in rem against the steamship *Jupiter*, the plaintiffs raise the question as between themselves and all persons interested in the *Jupiter* as to the ownership and the right to possession of that vessel, and they claim a declaration covering both those points. Appearance was entered

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unconditionally, and the matter proceeded for a time ; bail was asked for and
given, and then the defendants who had entered an appearance and who claim to be
the owners of the vessel by purchase from the Soviet Government of Russia lodged
this motion in which they seek to get the writ and all subsequent proceedings set
aside. In their notice of motion they set out the grounds at length. It is not
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necessary to refer to them particularly ; there are nine of them, and they do not
include a suggestion that the action is frivolous or vexatious or an abuse of the
process of the court ; they are all matters going to the jurisdiction of the court.
The President decided that the action should proceed, and, generally, I am in
entire agreement with the reasons which he has given for his decision, and with
his decision itself.

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Counsel for the defendants has taken three points in support of his argument that
the President's view was wrong. His first point, as he originally formulated it,
was that, the action being an action in rem between two foreigners relating to the
title of a foreign ship, the Admiralty Court has no jurisdiction ; but he modified
that in the course of the argument, and he admitted that the court had jurisdiction,
but he sought to establish that there is an accepted rule that the court will not
exercise its jurisdiction unless with the consent of the accredited Minister of the
country to which the disputants belong, or if both disputants consent. On that
point we have been referred to a number of authorities, some of which were decisions
of LORD STOWELL early in the last century. I do not propose to refer to them ;
there are three of them between the years 1802 and 1811. I do not think that
LORD STOWELL there lays down any rule indicating that he thought the court had
no jurisdiction, but he did undoubtedly express the opinion that the court did not
exercise that jurisdiction in the absence of these consents or requests, and he gave
as his reason the fact that such disputes would have to be decided, or might have
to be decided, according to foreign law, the ascertainment of which was in those
days a matter of difficulty. He also indicated that the foreigners might not be
content with the view of the law which was taken by an English judge. I think
matters have progressed very far since that time, and it is common practice now
for these courts to adjudicate on disputes between foreigners and to ascertain
the foreign law as a matter of fact and apply it ; and I think myself that, if the
question ever had to be discussed at length, which is not the case here, there is
a great deal to be said for the view of HILL, J., as expressed by him in *The Annette*
(8), in commenting on the decisions of LORD STOWELL to which I have referred.
But in regard to this first point of counsel for the defendants, when once the admis-
sion is made that the court has jurisdiction it becomes a matter of mere discretion
on the part of the court whether it will or will not exercise it, and in this case
I entirely agree with the view of the President that, having the jurisdiction, the
court should not refuse to exercise it. That disposes of the first point.

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The second point is that indirectly the foreign sovereign State is impleaded in
this dispute. That argument is founded on this view of the matter : it is said that
the plaintiffs are claiming this vessel on the ground that they, a Russian company,
were the original owners of this vessel registered at Odessa, and that they always
continued to be and remained the owners. The defendants say : "No, that is
not so. Owing to the legislation of the Soviet government your title to the vessel
has been destroyed ; and by the course of Soviet legislation the vessel became the
property of the Soviet government, and they sold her to us." It is true, as the
President pointed out, that, in the sale to the defendants on behalf of the Soviet
government, an indemnity was given against any claim that might be made
to the vessel, but, although that is the fact, it seems to me that the President's
view is right ; even under those circumstances it is not true to say that the foreign
sovereign State is impleaded in this action, although one may see, as the President
saw, great difficulties in the way of the plaintiffs ultimately getting over the point
raised by the assertion, if it is proved, that the vessel became the property of the

A Soviet government and that they sold her to the defendants. That, in my opinion, disposes of the second point.

The third point is one about which it is necessary to be careful, because of the decision in *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse* (9). In that case, one of the disputes between the parties was whether the plaintiffs had any authority to commence the action or prosecute the action in the name of the Russian bank. Incidentally, a point was taken whether or not that contention ought to have been raised by motion, and whether it was competent for the defendants to raise the contention by plea. That matter was discussed in this court, and on that point there was a difference of opinion, but ultimately the question was settled by the House of Lords definitely deciding that the point ought to have been taken by preliminary motion in accordance with a decision given some time ago by WARRINGTON, J., as he then was, and that it was not competent for the defendants to raise it by plea. In these circumstances, it seems to me that we ought to be careful to protect the right of the parties here, and, although this question of authority cannot be raised by plea, it ought to be one of the matters to be decided on the trial; and I think it is competent for us under those circumstances to refer so much of this motion as relates to the question of authority to the judge at the trial, so that he may be properly seised of the matter which the parties desire to raise on this point. All that I need say about the question is that I certainly do not think it is made so plain that this court ought to shut the plaintiffs out from a full consideration of that question, as well as the other matters which are, to some extent, connected, and to some extent involve consideration of the Soviet legislation.

E I think, therefore, that the order of this court should be that so much of the appeal as relates to matters other than the authority of the plaintiffs to maintain the action must be dismissed, and that so much of the appeal as relates to an application involving the authority of the plaintiffs should be referred to the judge at the trial. The appeal will be dismissed. Plaintiffs' costs in any event.

F **ATKIN, L.J.**—I agree. The first question is as to the jurisdiction of the court to entertain this claim for possession by one foreigner against another foreigner in respect of a ship that is within the territorial jurisdiction. It appears to me now reasonably plain that there is jurisdiction in the court to entertain such claim. I think there was jurisdiction before the Admiralty Act, 1840, and, in my opinion, there is statutory jurisdiction by that Act.

G The only question that is left is whether or not there is a discretion in the court to decline to exercise jurisdiction in such cases, and, if so, whether that jurisdiction ought to be so exercised in this case. As to that, the law seems to me still to obtain that the court, in such a case, has a discretion whether it will exercise its jurisdiction or not, and in cases where the parties both belonging to a foreign State have merely taken the occasion of the ship being temporarily here to get a question of title, which depends on the municipal laws of another country, determined by the courts of this country, the court may, in the exercise of its discretion, decline to do so. But, in the facts of this case, there seems to me to be no reason why the court should not exercise its discretion and entertain the suit. The vessel has been in this country for a period of years, and the question arises in respect of her disposition by a contract entered into in this country by a limited company of this country—the Arcos Shipping Co., Ltd.—and, although questions may arise as to the right of title of the vendors to the defendants, yet it appears to me to be a case which can properly be tried in this country, and I see no reason for interfering with the discretion of the learned President in that respect.

I The other question arises on the suggestion that this writ seeks to implead directly or indirectly a foreign sovereign. To my mind that is not the case. So far as the persons interested who have entered appearance are concerned, the defendants, who contend they are the owners, are alleged to be, and undoubtedly are, an Italian

company, and it is only as against them that the plaintiffs seek to have possession. The Russian Government do not claim at the moment to be the owners or to have the right of possession, though they do say apparently that they passed their title to the defendants. Under those circumstances, it seems to me to be a mere question of fact or of law whether or not the defendants, who are not a sovereign State, have in fact got a title to this ship, and no question, therefore, of impleading the foreign sovereign arises. It was put in another way. It was said that, inasmuch as a declaration of the foreign sovereign must be taken to be conclusive as to title, and inasmuch as there is an affidavit in which the representative here of the Soviet Government says that they had a title in the ship but conveyed it to the defendants, it is frivolous and vexatious to make a claim contrary to that assertion. It appears to me that that is a question which raises points of difficulty which require further elucidation of the facts. I am not satisfied at present that the law is quite as plain as was suggested by counsel for the defendants, and, in any case, the document which vouches for the delivery of the title of the ship to the defendants does not purport to convey the title from the Russian Government to the defendants, but from, as I say, an English company, the Arcos Shipping Co., Ltd., and they are the people who give the indemnity.

The third point raises an interesting question about the authority to use the name of the Russian company to sue. In respect of that, the matter will eventually have to be regarded from several points of view. It may be that the Russian company is dissolved, and in that case it, of course, could not sue. That is a matter of plea. It may be that the Russian company, though not dissolved, has no longer property in the ship, because the property may have been nationalised and passed to the Russian Government. That, again, is not a matter of jurisdiction; it is a question of plea. But it may be that the Russian company, having the property in the ship, have not in fact given any authority to sue, because their administrative powers may be in the hands of persons other than those who did give the authority to sue, whoever they may be. That is not a matter of plea, and is now decided to be a matter of motion, but it seems to me plainly to depend on the determination of facts which are not before the court at the present moment, and may require careful investigation, and, therefore, if that matter arises in the course of the litigation, I think it ought to be determined by the Admiralty Court. There is the further point as to the other parties who have been added by amendment. As to that, again there is no question of jurisdiction, but merely the question whether those persons have the right to sue or not.

For these reasons, it appears to me that, at the present stage, the learned President was right in refusing this motion, and I think, therefore, this appeal should be dismissed.

LAWRENCE, J.—I agree.

Appeal dismissed.

Solicitors: *Wynne, Baxter & Keeble; William A. Crump & Son.*

[*Reported by* GEOFFREY HUTCHINSON, ESQ., *Barrister-at-Law.*]

ELLIOTT v. BAX-IRONSIDE AND ANOTHER

[COURT OF APPEAL (Bankes, Scrutton and Sargant, L.JJ.), June 19, 1925]

[Reported [1925] 2 K.B. 301; 94 L.J.K.B. 807; 133 L.T. 624; 41 T.L.R. 631]

B *Bill of Exchange—Indorsement—Indorsement by directors made at request of drawer—"F. Co.; A. and B, directors"—Bill already accepted by company—Liability of indorsers—Principals or agents—Admissibility of extrinsic evidence—Bills of Exchange Act, 1882, (45 & 46 Vict., c. 61) s. 26 (2).*

By the Bills of Exchange Act, 1882, s. 26 (2): "In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted." A bill of exchange was accepted by Fashion Fair Exhibition, Ltd., a limited company, as follows: "Accepted payable at the W. Bank, B. I. and R. M. directors, Fashions Fair Exhibitions, Ltd." At the request of the drawer the bill was indorsed on its back by the same two directors as follows: Fashions Fair Exhibitions, Ltd., B. I. and R. M. directors." The directors had been expressly authorised by the company to accept the bill, but no express authority had been given them to indorse the bill on the company's behalf. In an action by the drawer against the directors as indorsers of the bill,

Held: (i) if the indorsement were to be read in the same way as the acceptance, namely, that the directors were signing as agents of the company, it would add no value to the bill but would be superfluous, whereas if it were read as being made by the directors in order to give their personal security the bill would be given an additional commercial value, and under s. 26 (2) of the Bills of Exchange Act, 1882, the latter construction should be adopted as being that "most favourable to the validity of the instrument"; (ii) on construction, the word "directors" in the indorsement were words of description only and not sufficient to indicate that the directors were signing as agents of the company; (iii) (SARGANT, L.J., doubting) it was permissible to consider the circumstances in which the indorsement was made: *Macdonald v. Whitfield* (1) (1883), 8 App. Cas. 733, and *Gerald McDonald & Co. v. Nash & Co.* (2), [1924] A.C. 625, applied; and the evidence was that the plaintiff would only enter into the transaction on the terms that the bill should be indorsed by the directors, who thereby made themselves personally liable; and, therefore, the plaintiff was entitled to succeed in the action.

Notes. Considered: *Kettle v. Dunster and Wakefield* (1927), 43 T.L.R. 770; *Britannia Electric Lamp Works, Ltd. v. Mandler & Co., Ltd., and Mandler*, [1939] 2 All E.R. 469.

As to determining whether a signature to a negotiable instrument is made as agent or as principal see 3 HALSBURY'S LAWS (3rd Edn.) 174-175, and as to the admissibility of extraneous evidence on the point see, *ibid.*, 165. For cases on these subjects see 6 DIGEST 308-316. For the Bills of Exchange Act, 1882, s. 26 see 2 HALSBURY'S STATUTES (2nd Edn.) 519.

Cases referred to:

- (1) *Macdonald v. Whitfield* (1883), 8 App. Cas. 733; 52 L.J.P.C. 70; 49 L.T. 446; 32 W.R. 730, P.C.; 6 Digest 308, 2060.
- (2) *Gerald McDonald & Co. v. Nash & Co.*, [1924] A.C. 625; 93 L.J.K.B. 610; 131 L.T. 428; 40 T.L.R. 530; 68 Sol. Jo. 594; 29 Com. Cas. 313, H.L.; Digest Supp.
- (3) *Dutton v. Marsh* (1871), L.R. 6 Q.B. 361; 40 L.J.Q.B. 175; 24 L.T. 470; 19 W.R. 754; 1 Digest 646, 2665.
- (4) *Leadbitter v. Farrow* (1816), 5 M. & S. 345; 105 E.R. 1077; 1 Digest 643, 2635.

(5) *Lindus v. Melrose* (1858), 3 H. & N. 177; 27 L.J.Ex. 326; 31 L.T.O.S. 36; 4 Jur. N.S. 488; 6 W.R. 441, Ex. Ch.; 1 Digest 645, 2655. A

Appeal from an order of GREER, J., sitting without a jury.

The defendants, Sir Henry Bax-Ironside and R. A. Mason, were directors of a company known as Fashions Fair Exhibitions, Ltd., which was formed with a capital of £400 for the purpose of holding a fashions exhibition at the White City, Shepherd's Bush. Mason, besides being director, was also managing director of the company. In January, 1924, the company entered into an agreement with the plaintiff to erect for the purposes of the exhibition certain stalls, show-stands, and mannequins' dressing rooms at a cost of £2,750. Of this amount £2,000 was to be paid by two bills of exchange for £1,000 each, and Sir H. Bax-Ironside and Mason were expressly authorised by a minute of a board meeting of the company dated Jan. 31 to accept the two bills on behalf of the company. The plaintiff not being satisfied with the liability of the company by itself wrote on Feb. 8 to the defendant Mason setting out the terms of the contract and stating with reference to the two bills of exchange: "These drafts are to be indorsed by your company's directors on the back." In his reply to the plaintiff's letter of the same date Mason added: "I enclose herewith two drafts for £1,000 each, payable on March 4 and 14 respectively, duly indorsed by two directors of the company as requested by you." No express authority had been given by the company to the defendants to indorse the bills on their behalf in addition to accepting them. The form of acceptance was in these terms: "Accepted payable at the Westminster Bank, Ltd., Piccadilly Branch, H. O. Bax-Ironside, Ronald A. Mason, directors, Fashions Fair Exhibitions, Ltd." The indorsement was: "Harold H. Elliott, Fashions Fair Exhibitions, Ltd., H. O. Bax-Ironside, Ronald A. Mason, directors." In the case of the acceptance the name of the company was in writing, but in the case of the indorsement it was affixed by a rubber stamp. An action was brought against the defendants as indorsers of one of the bills. The defendants pleaded that the indorsement was that of the company, and not of the directors personally. In his evidence Sir H. Bax-Ironside said that he had no intention of rendering himself personally liable on the bill but that he had simply signed on the back with the idea of guaranteeing that the company would pay the bill. The defendant Mason admitted that he knew that the plaintiff required the indorsement to enable him to discount the bill but that he (Mason) did not intend by his signature of the indorsement to guarantee payment of the bill when due. It was contended on behalf of the defendants that the intention of the parties must be gathered from the terms of the document, that evidence as to what had passed between them was inadmissible, and that the indorsement could not be treated as binding the defendants personally. GREER, J., held that as the plaintiff wanted a better security than that of the company by stipulating for the personal indorsement of the defendants, the indorsement must be treated as being the personal indorsement of the defendants, although they had signed as directors of the company. B

Judgment having been given for the plaintiff, the defendants appealed. C

Schiller, K.C., and *Willoughby Jardine* for the defendants. D

Norman Birkett, K.C., and *F. A. Holt* for the plaintiff were not called upon. E

BANKES, L.J.—This is an appeal from a judgment of GREER, J., and it raises a question as to the construction which is to be put upon a bill of exchange. The case of the plaintiff is that he is entitled to sue these defendants, on the ground that they made themselves personally liable as indorsers of the bill. The defendants' case is that, having regard to the form in which their signatures were affixed or annexed to or placed upon that document, on a true construction of the document they are not personally responsible, because the signatures which they placed upon the document were merely the signatures of agents for and on behalf of the company, of which they were directors, as principal. Speaking for myself, I think that there is nothing in the form of the signatures on the back of the bill which is F

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A conclusive as a matter of law that the signatures are "for and on behalf of the company." There is the mere statement of the names plus the fact that they are those of directors. It seems to me that when signatures appear upon a document, bill of exchange, or promissory note, in that form, so far as there is any authority, the authority favours the view that the word "directors" is a word of description merely, and I think that it might be almost enough to rest the decision in this case on COCKBURN, C.J.'s, statement of the law in *Dutton v. Marsh* (3). It is quite true that in that case the form of the document was this: "We, the directors of the Isle of Man Slate and Flag Co., Ltd., do promise to pay John Dutton the sum of . . ." Then followed four signatures. The Chief Justice, after pointing out that a signature may be a signature as agent on behalf of the company or it may be the signature of individuals, and what it is depends on whether the document indicated that the words are words of description merely, or words indicating a position of agency, says (L.R. 6 Q.B. at p. 364):

"If, therefore, in this case it had simply stood that the defendants, described as directors, but without saying 'on behalf of the company' signed the promissory note, it is clear they would have been personally liable, and could not be considered as binding the company."

D However, I do not rest my judgment upon that, because, no doubt, there are a number of cases in the books, all of which depend upon their own particular facts, and in some of which it may be said that COCKBURN, C.J., in laying down the rule as he did there, was perhaps laying it down without sufficient elasticity. I prefer to rest my judgment on the view taken by GREER, J., in the court below. He starts by saying that there is nothing in the form of the signature which is conclusive as a matter of law that it is the signature of the company, and then he says that, assuming the view is accepted that the signatures on the face of the document and on the back of the document are both signatures of the company, such a construction will render the signatures on the back of the document of practically no value whatever. It might just as well not have been there. I think, taking that view and applying that view, even accepting the argument of counsel for the defendants, that that view assumes a patent ambiguity, still that does not prevent the operation of sub-s. (2) of s. 26 of the Bills of Exchange Act, 1882, which says:

"In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted."

G I cannot doubt that, applying the subsection to this case, the construction that the signature on the back of the bill is the signature of the directors is the one most favourable to the validity of the instrument, into whosoever's hands it comes.

H I go farther, and I think that in a case such as this it is admissible to take into consideration the circumstances existing at the time the document came into existence for the purpose of construing the language which is used by the parties. I think that *Macdonald v. Whitfield* (1) and *Gerald McDonald & Co. v. Nash & Co.* (2) are both cases where, in the House of Lords, the principle has been recognised that in a case such as this it is permissible to have regard to the surrounding circumstances in order to interpret the language used, not, of course, for the purpose of contradicting the instrument, but for the purpose of interpreting it. What were the circumstances existing at the time? It is manifest that the plaintiff would only enter into this transaction upon the terms that the drafts were to be indorsed "by your company's directors on the back." It is true that there is no evidence that that was communicated to one of these two defendants, although it was communicated to the other, but what impresses me more than anything is the fact that the signature of the directors on the back of the document, being required in order to establish personal liability against them, the person who places or procures the signatures being placed upon the front and upon the back of the document adopts

two different forms which the signatures shall take. I do not attach so much importance to the question whether the name of the company appears above or below that of the directors—that may be because of the position occupied upon the bill by the signature itself—but I do attach great importance to the distinction between the use of ink in the one case and the use of the stamp in the other, accompanied as it was by one of the defendants putting himself to a considerable amount of trouble in order to bring about that difference. When one couples that with the evidence of the two defendants, and of Sir H. Bax-Ironside particularly, it does seem to me plain that although they adopted the position that they were not to be held personally liable—which is very often adopted in the sense that ultimately, if anybody was called upon to pay, the money would not come out of their pockets because somebody else would provide it—yet they quite clearly recognised that they were putting their names on the bill for the purpose of guaranteeing that the company should perform its obligation and pay the bill when it became due. For any one of those three reasons I think that the judgment of the learned judge can be supported, and I think it is entirely in accordance with the facts and the law. I think that the appeal fails and must be dismissed with costs.

SCRUTTON, L.J.—I have come to the same conclusion. When a person puts his name on a bill with an addition, there are two classes of cases into which the addition may fall. The addition may be such as to show that he is contracting as agent for another, putting his name on the bill as agent for another, excluding any personal liability of his own. When a man signs "For and on behalf of Jones as agent" he is clearly not undertaking any personal liability of his own as a principal, but is purporting to make Jones liable. On the other hand, there is a class of case where the man puts after his signature a description for the purpose of showing who he is and how he comes to sign: "So and so, churchwarden." In one of the cases where there was a question about a parish, it was held that the fact that the person who put his name on the document describes himself as churchwarden did not mean that he was signing as agent for the parish, and had no personal liability, but merely was an explanation of how he came to put his name on the document. In the early cases **LORD ELLENBOROUGH**, in a picturesque passage in *Leadbitter v. Farrow* (4), gave his judgment in this way (5 M. & S. at p. 349):

"Is it not a universal rule that a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it for another, or by procuration of another, which are words of exclusion? Unless he says plainly, 'I am the mere scribe,' he becomes liable."

That is put in a less picturesque way, perhaps, by **COCKBURN, C.J.**, in *Dutton v. Marsh* (3) to which my Lord has referred:

"The effect of the authorities is clearly this, that where parties in making a promissory note or accepting a bill describe themselves as directors, or by any similar form of description but do not state on the face of the document that it is on account or on behalf of those whom they might otherwise be considered as representing—if they merely describe themselves as directors, but do not state that they are acting on behalf of the company—they are individually liable. But, on the other hand, if they state they are signing the note or the acceptance on account of or on behalf of some company or body of whom they are the directors and the representatives, in that case, as the case of *Lindus v. Melrose* (5) fully establishes, they do not make themselves liable when they sign their names, but are taken to have been acting for the company, as the statement on the face of the document represented."

Those were pre-codification cases, and when Parliament came to codify and to some extent alter the law they codified it in this way in s. 26 of the Bills of Exchange Act, 1882:

A “(1) Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon ; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability. (2) In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted.”

B I look at this document. It is accepted by two directors, with the name of the company, and I find on the back an indorsement of the names of the same two directors describing themselves as directors, with a stamp of the name of the company above. If both the acceptance and the indorsement are to be read in the same way, the indorsement is valueless. One adds nothing whatever to the bill by its being indorsed by a man who is already an acceptor. He is adding no value to the bill at all. He has already accepted, and adds no additional value to the bill by putting an indorsement on. If, on the other hand, the company having accepted a bill, two directors put their names on as indorsers in order to give their personal security, an additional commercial value is given to the bill, and in one's experience it is a very frequent commercial document that one does find—a bill accepted by a company and indorsed by directors. Therefore, I find here a document with signatures on it which may be those of principals or agents, and I construe it in the way most favourable to the validity of the instrument.

E But I go a little farther than that. According to the somewhat technical rules laid down in TAYLOR ON EVIDENCE, s. 1148, the court is not restricted to the perusal of a certain instrument or paper. All contemporaneous writings relating to the same subject-matter are admissible in evidence, provided only that they be of equal solemnity with the principal document and no oral testimony be required for the purpose of connecting them therewith. I find a document signed by one of the defendants answering a letter from the plaintiff: “I enclose herewith two drafts for £1,000 each, payable on March 4 and 14, duly signed by two directors of the company as requested by you.” Turning to see what that “as requested by you” refers to in the letter which is answered, I find: “These drafts are to be indorsed by your company's directors on the back,” and I think I am entitled to take that into account as confirming the view I have arrived at, that the company's directors were undertaking personal liability when they put those two signatures on the back. If it is allowable to go farther (I do not know whether it is or not), it is eminently satisfactory to find that the defendant Sir H. Bax-Ironside himself thought he was incurring a liability by putting his signature on the back because he thought he was guaranteeing the bill. For these reasons, and especially for the first two, I agree with the judgment of GREER, J., and I also agree with the way in which he puts liability on the two defendants.

H **SARGANT, L.J.**—I am of the same opinion. I prefer to found my judgment merely on the contents of this particular bill. With regard to the question how far oral evidence is admissible to show whether these two persons were signing as directors or in their individual capacity, I entertain some doubt. It seems to me that *Macdonald v. Whitfield* (1) does not go as far as it is said to go, but only relates to the admissibility of oral evidence to determine the relationships as between the successive indorsers or the acceptor and the indorser of a bill. As regards *Gerald McDonald & Co. v. Nash & Co.* (2), a case in the House of Lords last year, I feel that counsel for the defendant and my two brethren were so very familiar with that case that they spoke to each other in a kind of mental shorthand which was too quick for me altogether, and I have not been able to get hold of all the implications in that rather complicated case.

I Looking at this instrument itself, I think that the decision of the learned judge and the grounds on which he rested it are right. It is quite clear here, where the

signature by way of acceptance is to be considered, that the directors are signing as on behalf of the company, and not in their individual capacity for the reason that the bill is directed to Fashions Fair Exhibitions, Ltd., showing that they were the persons who were intended to accept the bill. Therefore, when you get the words: "H. O. Bax-Ironside and Ronald A. Mason, Fashion Fair Exhibitions, Ltd.," preceded by the words "accepted payable, Westminster Bank," it is perfectly clear to my mind that that is an acceptance by those individuals in their representative capacity and "on behalf of the company," and is in no way referable to their individual capacity. That being so, there is to be found on the back of the bill this endorsement: "Fashions Fair Exhibitions, Ltd., H. O. Bax-Ironside, Ronald A. Mason," and that form of words, for the reason I have given, is not to be treated as being precisely identical with the form of words in which the bill is accepted. Looking at this indorsement, it seems to me that you have to consider whether it falls within the two classes of case dealt with by COCKBURN, C.J., in *Dutton v. Marsh* (3). In my judgment, it falls between the two classes, and it seems to me impossible to say, looking at that indorsement alone, whether it is an indorsement "on behalf of the company" or an indorsement by individuals.

I go a little farther, and I say that if that indorsement stood alone in those terms, with nothing else to lead me to the contrary conclusion, I should be rather inclined to think that it was an indorsement on behalf of the company and not an indorsement on behalf of the individual directors. But when you find that it is an indorsement of an instrument on the face of which there is an already existing liability on behalf of the company to which no addition would be made by reading the indorsement as creating an equivalent liability on the part of the company, I think that that is sufficient to determine the interpretation of those words of indorsement and to show that they are words of indorsement intended to create a further liability which can only be effective by reading them an indorsement creating individual liability, and with regard to that I agree with what has been said as to the effect of s. 26 (1) and (2), of the Bills of Exchange Act, 1882.

Appeal dismissed.

Solicitors: *Sutton, Ommannney & Oliver. Cohen, Dunn & Co.*

[Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.]

Re COLLINS. Ex parte SALAMAN

[CHANCERY DIVISION (Astbury, J.), May 18, 1925]

[Reported [1925] 1 Ch. 556; 95 L.J.Ch. 55; 133 L.T. 479;
[1925] B. & C.R. 90]

Bankruptcy—Property available for distribution—Property in reputed ownership of bankrupt—Contracts for personal service—Mortgage of contracts—No notice to debtors—Money earned before bankruptcy—Bankrupt employed by trustee to complete contracts—Money earned after bankruptcy—Validity of mortgage as against trustee—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 38 (c).

A bankrupt had carried on a practice as a surveyor, employing a substantial staff of clerks, and as an assessment specialist had entered into contracts with public bodies for personal service. He and his clerks valued his clients' property for rating purposes, gave expert evidence on appeals, and he was remunerated by a percentage of the amount of the reduction of assessments obtained by him. He mortgaged these contracts and the sums to become due on completion thereof, and the mortgagee, by arrangement with the bankrupt, gave no notice to the debtors, so as not to imperil the bankrupt's business position. The bankrupt used to collect the moneys when due in his own name, and hand them over to the mortgagee. At the date of the bankruptcy some moneys were due on completed contracts, but had not been paid, while other contracts were not completed and the money due under them was as yet unearned. The trustee employed the bankrupt and some of his staff to carry out the uncompleted contracts and earn the moneys payable thereunder. The trustee claimed all sums due on completed contracts at the commencement of the bankruptcy, contending that they were "in the order or disposition of the bankrupt" and were "debts due, or growing due, to the bankrupt in the course of his trade or business" within the meaning of s. 38 (c) of the Bankruptcy Act, 1914, and also all sums which had since become or would in future become due under contracts completed and to be completed after the commencement of the bankruptcy.

Held: the bankrupt's practice was a business carried on by him for the purpose of gain, and so, as the mortgagee had deliberately given no notice of his mortgage to the bankrupt's clients, the sums already due at the commencement of the bankruptcy were "at the commencement of the bankruptcy in the . . . order or disposition of the bankrupt, in his trade or business" within s. 38 (c): the mortgage of the sums which became due only after the commencement of the bankruptcy was an assignment of the future receipts of the bankrupt's business accruing after the commencement of his subsequent bankruptcy, and so was inoperative as against the trustee; and, therefore, as regarded both classes of sums received the trustee succeeded in his claim.

Rutter v. Everett (1), [1895] 2 Ch. 872, and *Re Neal* (2), [1914] 2 K.B. 910, applied.

Re Jones, Ex parte Nichols (3) (1883), 22 Ch.D. 782 and *Wilmot v. Alton* (4), [1897] 1 Q.B. 17, applied.

Notes. As to assignment of after-acquired property by a bankrupt see 2 HALSBURY'S LAWS (3rd Edn.) 324, as to personal earnings of a bankrupt during his bankruptcy see *ibid.* 432–434, as to assignment of a bankrupt of his debts see *ibid.* 444, and as to incomplete assignments thereof see *ibid.* 564: for cases on these subjects see 5 DIGEST 694–697, and 726–729, and for the Bankruptcy Act, 1914, s. 38, see 2 HALSBURY'S STATUTES (2nd Edn.) 373.

Cases referred to :

- (1) *Rutter v. Everett*, [1895] 2 Ch. 872; 64 L.J.Ch. 845; 73 L.T. 82; 44 W.R. 104; 39 Sol. Jo. 689; 2 Mans. 371; 13 R. 719; 5 Digest 774, 6657.
- (2) *Re Neal, Ex parte Trustee*, [1914] 2 K.B. 910; 83 L.J.K.B. 1118; 110 L.T. 988; 58 Sol. Jo. 536; 21 Mans. 164; 5 Digest 775, 6659.
- (3) *Re Jones, Ex parte Nichols* (1883), 22 Ch.D. 782; 52 L.J.Ch. 635; 48 L.T. 492; 31 W.R. 661, C.A.; 5 Digest 640, 5754.
- (4) *Wilmot v. Alton*, [1897] 1 Q.B. 17; 66 L.J.Q.B. 42; 75 L.T. 447; 45 W.R. 113; 13 T.L.R. 58; 4 Mans. 17, C.A.; 5 Digest 696, 6126.
- (5) *Re Davis & Co., Ex parte Rawlings* (1888), 22 Q.B.D. 193; 37 W.R. 203; 5 T.L.R. 119, C.A.; 5 Digest 696, 6125.

Bankruptcy Motion.

Collins, the bankrupt, was a surveyor and valuer with a large practice, and employed a staff of five clerks. The main part of his practice was as an assessment specialist, in which capacity he advised municipal and other undertakings and large corporations with regard to rating assessments on their property, for which purposes he valued the property and gave expert evidence on their appeals. He made contracts with these bodies under which he was remunerated by a percentage of the amount of the reduction of the assessments which was obtained with his assistance. In some cases he had a small retaining fee. Between Jan. 18, 1922, and Aug. 17, 1923, the bankrupt had effected twenty-two mortgages of these contracts, and of the sums which would become due on the completion thereof, to secure large advances. The mortgagee gave no notice of these mortgages to the persons with whom the contracts were made, at the request of the bankrupt, so as not to imperil his business position. When any money became due under the contracts for work completed, the bankrupt collected the money and gave a receipt for it in his own name, and handed it over to the mortgagee. On July 12, 1924, a receiving order was made against the bankrupt on his own petition, and on Aug. 7 he was adjudicated bankrupt. A trustee was appointed by the creditors, and his appointment was certified by the Board of Trade on Aug. 11. At the date of the receiving order, which constituted the act of bankruptcy, large sums were still due under the mortgages. Some moneys were due on completed contracts for percentages, and some contracts were still uncompleted, so that the percentages had not been earned. On Sept. 3, 1924, the trustee gave notice to all the persons with whom contracts existed to pay their debts to him, and on Sept. 11 the mortgagee gave notice of his mortgages to the same persons. After the adjudication, the bankrupt and some of his staff were engaged on salaries by the trustee, so as to complete the uncompleted contracts, of which some were now completed, and some were still in course of completion. The mortgagee claimed that the amounts which had been actually earned on the contracts completed at the date of the receiving order, and also the amounts subsequently earned and which would be earned on the contracts uncompleted at that time, were subject to his mortgages. The trustee contended that the amounts earned at the date of the receiving order were in the order and disposition of the bankrupt, and that the amounts earned since that date were earned on behalf of the trustee, and that none of these amounts were subject to the mortgages. On Feb. 26, 1925, the trustee served a notice of motion on the mortgagee, which was amended on April 6, and, as so amended, asked for (a) a declaration that the moneys comprised in the mortgages, so far as they had been earned by the bankrupt before the commencement of the bankruptcy, were debts due or growing due to him in the course of his trade or business, and were at the commencement of the bankruptcy in the possession order or disposition of the bankrupt in his trade or business by the consent and permission of the true owner, and that in such circumstances the bankrupt was the reputed owner thereof, and accordingly they formed part of the bankrupt's property divisible among his creditors, and vested in the trustee; and (b) a declaration that the mortgages, so far as the sums purported to be assigned had not been earned at the commencement

A of the bankruptcy, were inoperative, and of no effect against the trustee, and that such sums when earned formed part of the bankrupt's property divisible amongst his creditors, and vested in the trustee.

By Bankruptcy Act, 1914, s. 38 :

B The property of the bankrupt divisible amongst his creditors, and in this Act referred to as the property of the bankrupt, . . . shall comprise the following particulars . . . (c) All goods being, at the commencement of the bankruptcy, in the possession, order or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner under such circumstances that he is the reputed owner thereof ; provided that things in action other than debts due, or growing due, to the bankrupt in the course of his trade or business shall not be deemed goods within the meaning of this section.

C *Clayton, K.C.* and *Harold Murphy* for the trustee, referred to *Rutter v. Everett* (1), *Re Neal* (2), *Ex parte Nichols* (3), *Wilmot v. Alton* (4).

E. W. Hansell for the mortgagee, referred to *Ex parte Nichols* (3), *Wilmot v. Alton* (4), *Re Davis & Co.* (5).

D **ASTBURY, J.**, stated the facts and continued: The question which I have to determine divides itself into two heads, first with regard to the moneys due under contracts completed before the receiving order ; and, secondly, with regard to moneys due or to become due under contracts not then completed, but subsequently completed by the trustee, who employed, and is employing, the bankrupt and some of his clerks for that purpose.

E With regard to the first class I am of opinion that the debts mortgaged were in the order and disposition of the bankrupt at the commencement of his bankruptcy. In *Rutter v. Everett* (1) it was held that

F "in order to take book debts out of the order and disposition of an assignor the assignee must give notice to the debtors, and take every possible step to obtain possession of the debts. A mortgagee of book debts, who, without notice of any act of bankruptcy by the mortgagor, gives the debtors notice of his assignment, is entitled to the protection conferred by the Bankruptcy Act, 1883, s. 49 (Bankruptcy Act, 1914, s. 45). Although, from the absence of notice, consent on the part of the true owner to a debt remaining in the order and disposition of a bankrupt is *prima facie* to be inferred, the inference will be rebutted if the true owner takes every possible step to obtain possession of the debt, or if his failure to obtain possession is not attributable to his own fault."

G In this case the mortgagee not only took no steps to obtain possession of these debts, but deliberately agreed with the bankrupt that, in order to save his credit and assist his business, no notice to the debtors should be given. A similar result is shown in *Re Neal* (2). For these reasons I think that the trustee is entitled to the declaration he seeks under the order and disposition section with regard to such of these debts as became due on contracts completed before the receiving order.

H The second class is perhaps more difficult to decide. At the date of the receiving order a large number of these mortgaged contracts were uncompleted. It is quite true that to some extent the persons who had been employing the bankrupt relied on his personal skill and capacity, but only to a certain extent. He was carrying on business as a surveyor with a substantial staff of clerks, and he and these clerks between them carried out these various contracts. When the bankruptcy started the trustee had to decide whether he would or would not carry out these uncompleted contracts, and earn the moneys subsequently payable thereunder on completion. He decided to do so, and for that purpose he employed the bankrupt at a weekly salary, and also some of his clerks, and he has completed some contracts, and is in course of completing others. No case of "order and disposition" arises, or is relied

on, with regard to this second set of contracts, but the trustee rightly contends that these debts, arising from his completion of these various contracts, were not debts owing to the bankrupt which could be mortgaged in the way I have mentioned. On this point the trustee specially relies on *Ex parte Nichols* (3) and *Wilmot v. Alton* (4). In *Ex parte Nichols* (3) it was held that

"An assignment by a trader of the future receipts of his business, even if made for value, is, as regards receipts accruing after the commencement of his subsequent bankruptcy, inoperative as against the title of the trustee in the bankruptcy."

There the bankrupts, who carried on the business of the Alexandra Palace, were entitled from time to time to part of the moneys received for joint rail and admission tickets issued by a railway company under a contract with them. They assigned the future receipts of that business; the bankruptcy intervened, and the trustee stepped in as regards the business. BOWEN, L.J., said:

"These payments in futuro were not property of the bankrupts which they could assign as against the title of the trustee in their bankruptcy."

Now that is very fully dealt with in *Wilmot v. Alton* (4). In that case

"a trader who carried on the business of a theatrical costumier contracted with a company to supply dresses for a ballet and keep them in repair for the sum of £40 a week for twelve weeks, commencing from a certain date. She subsequently charged her right and interest under the contract in favour of the plaintiff as security for an advance made by him. The dresses were duly supplied to the company under the contract, but before any moneys became payable under it the trader became bankrupt"

and it was held,

"that the charge in favour of the plaintiff gave no title as against the defendants, the trustees in bankruptcy, to moneys which might become due under the contract after the bankruptcy."

LORD ESHER, M.R., said:

"In my opinion, the true construction of the contract is that she would be entitled to be paid at the end of each week, if during the week she had done all that was required, or had been ready and willing to do all that might have been required under the contract. Therefore, to entitle her to payment of the moneys payable under the contract, she had to perform onerous conditions during the whole of the period mentioned. During the period contemplated by the contract she became bankrupt. The effect of that was that she could no longer fulfil the contract. The trustee in bankruptcy in such a case may, if he thinks it for the benefit of the estate, carry on the business and the contracts; but he is not obliged to do so. He would have a right to say that he would not have anything to do with the contract. If the trustee in this case had done so, no moneys not already accrued due under the contract could after that become payable to any one under it. After the bankruptcy, therefore, no money would have become payable under the contract, unless the trustee had elected to go on with it, and to perform the conditions which by the terms of it were to be performed by the bankrupt."

Subject to one question, which I will deal with, that seems to me to apply entirely to the present case. RIGBY, L.J., said:

"Though the circumstances of this case are very different from those which existed in *Ex parte Nichols* (3), I think that the principle which is applicable to the two cases is the same. Where a person, who has entered into contracts in the course of his business, ceases to carry on business on account of bankruptcy, there is an important distinction, for the present purpose, between cases in which, the consideration for the contract having been wholly executed

A by the bankrupt on his part, a sum of money becomes due to him under the contract, and cases of executory contracts in which the money will not be earned under the contract unless the person contracting continues to carry on business and fully performs his part of the contract, which has only been partially performed at the date of the bankruptcy. In the latter class of cases the bankrupt cannot create greater rights in favour of an assignee from him than he has himself; it rests with the trustee to say whether the business is to be carried on and the contract performed or not, and, if he elects to perform it, he has a right to the consideration for such performance when it becomes due. That is the fair principle which appears to me applicable to the present case."

C That is decisive of this question, except as to one point taken by the mortgagee, if that point is sound. He says that this is not a case of a trader carrying on a business within the meaning of these authorities, but a case where moneys may become payable in the future under certain contracts made in reliance on the bankrupt's personal skill and personal work. There are two answers to that: In the first place it is perfectly plain that the bankrupt in the present case carried on a business. It is quite true there was a certain amount of technical skill involved in the carrying on of this business, but it was, nevertheless, a business carried on by him for the purpose of gain, he and a staff of clerks doing the necessary work; secondly, having regard to that fact, the authorities I have referred to completely cover the point. I was told, I have no doubt accurately, that there is no reported case quite similar to the present, but, for the reasons I have given, the order and disposition clause covers the first set of cases I have mentioned, and the ratio decidendi in *Ex parte Nichols* (3) and *Wilmot v. Alton* (4) covers the second. There must, therefore, be a declaration in the terms of the notice of motion.

Solicitors: *Stephenson, Harwood & Tatham; Moeran & Co.*

[Reported by E. K. CORRIE, Esq., Barrister-at-Law.]

F

Re CLARK. CLARK v. CLARK

G [CHANCERY DIVISION (Tomlin, J.), December 9, 1925]

[Reported [1926] Ch. 833; 95 L.J.Ch. 325; 135 L.T. 666;
70 Sol. Jo. 344; [1926] B. & C.R. 77]

Bankruptcy—Forfeiture clause in will—Life interest in income—Bankruptcy of life tenant—Discharge conditional on judgment in favour of official receiver—Judgment unsatisfied—Effect of discharge.

H A testator left a fund "on trust to pay to my son . . . so much of the annual income thereof accruing due in his lifetime as would not, although the same were payable to him, be by his act or default or operation of law so disposed of as to prevent his personal enjoyment thereof and to apply so much of the said annual income thereof as would, if the same were payable to him, be disposed of as aforesaid for the benefit of his wife . . ." In 1914 a receiving order was made against the son and he was subsequently adjudicated bankrupt. In July, 1922, he was granted his discharge from bankruptcy conditionally on his consenting to judgment being entered against him for £50 in favour of the official receiver. Some of the £50 had not yet been paid.

I **Held:** (i) the son's discharge from bankruptcy, being conditional on his payment of a sum part of which remained unpaid, did not operate to put an end to the forfeiture clause; (ii) where there was a trust of a fund under the terms of which the trustees were bound to apply the income of the fund in a

particular way on a given future contingency, the person who took the income as a result of that trust on the happening of the contingency had an interest capable of vesting in his trustee in bankruptcy, and the son's interest would have so vested but for the forfeiture clause; as the bankruptcy was still continuing despite the son's discharge, the forfeiture remained operative in respect of each instalment accruing due so long as the bankruptcy continued.

Re Sampson, Sampson v. Sampson (1), [1896] 1 Ch. 630, explained.

Notes. As to construction of forfeiture clauses on bankruptcy see 2 HALSBURY'S LAWS (3rd Edn.) 415, and for cases see 5 DIGEST 653-673. As to forfeiture on alienation of gifts by will see 34 HALSBURY'S LAWS (2nd Edn.) 421-423, and for cases see 44 DIGEST 1231-1236.

Cases referred to:

- (1) *Re Sampson, Sampson v. Sampson*, [1896] 1 Ch. 630; 65 L.J.Ch. 406; 74 L.T. 246; 44 W.R. 557; 40 Sol. Jo. 353; 44 Digest 1115, 9663.
- (2) *Robertson v. Richardson* (1885), 30 Ch.D. 623; 55 L.J.Ch. 275; 33 W.R. 897; 5 Digest 665, 5905.
- (3) *Metcalfe v. Metcalfe*, [1891] 3 Ch. 1; 60 L.J.Ch. 647; 65 L.T. 426; 7 T.L.R. 558, C.A.; 5 Digest 655, 5850.
- (4) *Kearsley v. Woodcock* (1843), 3 Hare, 185; 1 L.T.O.S. 410; 8 Jur. 120; 67 E.R. 348; 5 Digest 653, 5835.
- (5) *Re Greenwood, Sutcliffe v. Gledhill*, [1901] 1 Ch. 887; 70 L.J.Ch. 326; 84 L.T. 118; 49 W.R. 461; 44 Digest 1234, 10665.
- (6) *Re Jenkins, Williams v. Jenkins*, [1915] 1 Ch. 46; 84 L.J.Ch. 349; 44 Digest 1234, 10664.

Adjourned Summons raising the question whether the income of a trust legacy should be paid to a bankrupt who had been granted a conditional discharge or applied for the benefit of his wife and children.

The testator by his will made in 1896 appointed T. F., C. R. M., and his son, the bankrupt to be the executors and trustees thereof. After certain bequests he devised and bequeathed all his real and the residue of his personal estate to his trustees on trust to sell and convert, and out of the proceeds and his ready money to pay his funeral and testamentary expenses and debts and the legacies thereby bequeathed, and on further trust to hold a sum of £15,000 in favour of the bankrupt and his wife and issue

"upon trust to invest the same and to pay to my said son C. E. Clark [the bankrupt] so much of the annual income thereof accruing due in his lifetime as would not, although the same were payable to him, be by his act or default or by operation of law so disposed of as to prevent his personal enjoyment thereof and to apply so much of the said annual income thereof as would, if the same were payable to him, be disposed of as aforesaid for the benefit of his wife, children, or other issue for the time being in existence or some one or more of those objects if any and if none,"

then, as therein mentioned, in such proportions at such times and in such manner as his trustees should in their absolute discretion think fit, and the testator gave directions therein as to the disposal of the £15,000. He soon died, and the trust legacy of £15,000 was duly set aside and invested in the names of his trustees. In 1915 the bankrupt retired from the trusts of the will. C. R. M. died in 1922, and M. M. was appointed a trustee in his place. In 1897 the bankrupt married the plaintiff, C. H. Clark. There were four children of the marriage, two of whom were plaintiffs in the present proceedings. In 1914 a receiving order in bankruptcy was made against the bankrupt and he was subsequently adjudicated a bankrupt. The trustees thereupon ceased to pay to him the income of the trust legacy, and applied such income from time to time for the benefit of his wife and children. In July, 1922, he was granted his discharge from bankruptcy conditionally on his

A consenting to judgment being entered against him for a sum of £50 in favour of the official receiver. Some of that amount had not yet been paid. From July, 1922 to May, 1924 the trustees of the will, acting on the view that the forfeiture was no longer operative, paid the income of the trust legacy to the bankrupt. After May, 1924 they paid it on the joint receipt of the bankrupt and his wife, it having been suggested that with regard to the income the forfeiture was still operative.

B *Spens, K.C.*, and *C. E. Harman* for the wife and children of the bankrupt, referred to the Bankruptcy Act, 1914, s. 167, *Robertson v. Richardson* (2), *Metcalf v. Metcalfe* (3), *Kearsley v. Woodcock* (4), *Re Sampson* (1).

Beebee for the bankrupt, referred to *Re Greenwood* (5), *Re Jenkins* (6).

C **TOMLIN, J.**—In this case I have to determine whether, on the true construction of the will of the testator, who died on June 13, 1896, and in the events which have happened, there is operative to-day in respect of the income of a trust legacy of £15,000 a forfeiture which is said to have taken place by reason of the bankruptcy in June of 1914 of the first defendant to the summons, the tenant for life under the trusts of the legacy in question. [His Lordship dealt with the facts, and continued:] The clause in the will is in a somewhat unusual form. It is not in the
D common form of a trust to pay the income to the beneficiary until the happening of some event whereby such income belonging to him absolutely would become vested in some other person. It is a trust to pay to the son

“so much of the annual income thereof accruing due in his lifetime as would not, although the same were payable to him, be by his act or default or by
E operation of law so disposed of as to prevent his personal enjoyment thereof.”

That must mean that it is a trust in relation to which there has to be considered, when any income accrues due, whether or not at that point of time the same has been so disposed of either by his own act or default or by operation of law as to prevent his personal enjoyment thereof. In these circumstances it is necessary to consider what is the effect on the clause of the bankruptcy followed by the discharge. Bankruptcy vests in the trustee in bankruptcy the property of the bankrupt
F subject to the limitation which appears in s. 38 of the Bankruptcy Act, 1914. Under s. 38:

“The property of the bankrupt divisible amongst creditors, and in this Act referred to as the property of the bankrupt, shall not comprise”

G certain particulars, that is, trust property, tools of trade, and so on,

“but it shall comprise the following particulars: (a) All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge.”

And by s. 167 of the Act:

H “‘Property’ includes money, goods, things in action, land, and every description of property, whether real or personal and whether situate in England or elsewhere; also obligations, easements, and every description of estate, interest, and profit, present or future, vested or contingent, arising out of or incident to property as above defined.”

Perhaps it would be difficult to find a phrase more comprehensive than that.

I The question, therefore, arises whether on the bankruptcy there was any property which vested in the trustee in bankruptcy. If there was, it seems to follow that, notwithstanding the discharge, in respect of any instalment of income accruing due after the discharge so long as the bankruptcy remains in operation, the title of the trustee would, but for the provisions of the forfeiture clause, prevail with regard to anything that the bankrupt takes, and that, therefore, there must be in respect of each instalment an operative forfeiture. But it is said on behalf of the bankrupt that in fact the interest which he takes under the trust in question is nothing more than a mere *spes successionis* or some interest (if “interest” is the right word),

or some possibility in the nature of a spes successionis ; that there was nothing which in fact vested in the trustee upon the bankruptcy, and that, therefore, inasmuch as the bankrupt obtained his discharge in July, 1922, the title to each instalment of income accruing after the date of that discharge is a new title acquired or devolving after the discharge and not passing to the trustee at all. It has been urged by counsel for the bankrupt that the interest is in the nature of the interest of the next of kin or of a husband who may become entitled to a right by courtesy or even of beneficiaries whose only interest arises under the exercise of a power. In all those cases, it is plain that there is no property right before the event which gives rise to the interest ; that is, either the death of the intestate, or the succession of the wife in possession to the estate, or the exercise of the power. And so here, it is said, there is no interest or title until in fact the event happens on which it is determined how the money is to go. I invited some explanation from the Bar as to what is the test by which the court can determine whether a case falls on one side of the line or the other ; that is to say, whether it is one of these mere possibilities or whether it is really a property interest. I did not get (perhaps it was not possible to give it) any explanation as to what the true test should be, and, for my part, I do not propose to attempt to suggest a test myself. I am, however, satisfied that, where there is a trust of a fund under the terms of which the trustees are bound to apply the income of the fund in a particular way on a given future contingency, the person who takes the income as a result of that trust on the happening of the contingency is a person who has an interest of a kind which is capable of vesting in his trustee in bankruptcy. My attention was called to *Kearsley v. Woodcock* (4). Whatever be the particular result of that case, it shows that the interest of the bankrupt which arose in the fund as the result of the forfeiture occasioned by his bankruptcy was an interest which vested in his trustee. So here, it seems to me that on construction there is created an interest of a kind which vests in the trustee, and that the test therefore must be as to each block of income which accrues whether there is or is not still in operation the trustee's interest, and if it is in operation, then in regard to that block of income there is a forfeiture, and the income must be applied under the trust which arises on the forfeiture. This construction of the clause does not in the least render the clause an inoperative clause. There may well be events in which it will take effect precisely in its terms. For example, if the bankruptcy was annulled to-morrow, the provision in regard to income accruing thereafter would apply and in regard to those subsequent instalments of income there would be no forfeiture, notwithstanding the bankruptcy, unless and until there happened some subsequent event which operated to create a new forfeiture.

It has been urged on behalf of the bankrupt that I am precluded from arriving at the conclusion which I have indicated, or, if not precluded, that I shall be rash in doing so, in view of some measure of guidance which has been afforded to me by the judgment of STIRLING, J., in *Re Sampson* (1). The terms of the trust in that case were in fact identical with the terms of the trust here ; indeed, it is, I am told, the only case in the books where this particular form of trust is to be found. But the matter which STIRLING, J., had to consider in that case was a different matter from that which I have to consider. In that case the trustees had in their hands a sum representing income due and payable to the son of the testator, who was the person entitled to receive the income under the terms of the trust similar to that in this case. Having that money in their hands, "they were served by the creditors of the son with a garnishee order attaching the money in their hands, and in pursuance thereof they paid over the money to the creditors. On an application by the son's wife to recover it from the trustees, held, that the trusts of the income during the son's life were valid in law ; that the time at which the destination of any instalment of income was to be determined was the moment at which that instalment either became due or was in the hands of the trustees ready for application under the trusts of the will ; that the son's title

A to the money accrued on April 16, 1895"—that is when the trustees received it—"and that the plaintiff consequently never became entitled to the benefit of the discretionary trust in her favour." It seems to me that the conclusion come to in that case is in all respects in accord with the view which I have ventured to take of the meaning of this clause. The learned judge determined precisely what I had determined, namely, that the time at which the destination of any instalment

B of income was to be determined was the moment at which that instalment either became due or was in the hands of the trustees, and he further held that in that case the garnishee order affecting the money in the hands of the trustees had come at a period of time too late to create a forfeiture ; in other words, the money was at home, and no question of forfeiture could arise after it was at home. That is the effect of the decision. There is nothing in the decision which is otherwise than

C consistent with the conclusion at which I have arrived in the present case. It is said, however, that there are some expressions of the learned judge, admittedly obiter, which indicate that in this case I ought to take another view. If I were satisfied that STIRLING, J., had expressed a view which was inconsistent with the conclusion at which I have arrived, I should certainly not arrive at that conclusion except after the most anxious consideration of anything which he had said. The

D learned judge says this :

"The trusts . . . are to me novel in form They are not, perhaps, altogether happily expressed ; but the object of the testator appears to be that a vested right or interest should not arise in the income except as it accrued due, i.e., such right or interest was not to arise as to any portion of the income

E until (at the earliest) such portion either accrued due or came to the hands of the trustees, and then only as to such portion. When some portion of the income accrues due or comes to the trustees' hands, the testator directs this portion to be dealt with in one or two ways, according as the son has or has not done or suffered an act which would prevent his personal enjoyment of it."

That seems to me to be in accord with the view which I myself have taken of the

F clause, and I may observe that the learned judge uses the phrase "that a vested right or interest should not arise in the income except as it accrued due." If I am to give a literal interpretation to the language of the learned judge I think that the phrase "vested right or interest" necessarily implies that until it is vested it is contingent, and that that is in fact what he means, that the right or interest does not become vested until the income has accrued due and the events

G have happened which determine in which of two directions the income is to go. However, it is said that there is a later passage which is inconsistent with that, where the learned judge, after referring to the cases connected with restraint on anticipation and the question at what period the fund is affected by the restraint, says :

"This, however, is not a case of the rights of married women for whose benefit the restraint on anticipation was devised, nor is it in strictness one in which anticipation or alienation is retained ; the question rather is whether the son ought to be treated as having acquired any title to any portion of the income until it has actually reached his hands ; or whether a right to income vests in him at an earlier date."

I That sentence read in vacuo may no doubt, be used to support the view that there is no title, contingent or vested, until the income has actually reached his hands, but I think it is plain, reading the judgment as a whole, that the learned judge there is using the word "title" in the sense of that indefeasible title which arises only on the happening of a particular event. I think I am bound to read this passage in relation to its context, and read in relation to the earlier passage to which I have referred, it leaves no doubt in my mind as to the meaning of the learned judge. That meaning seems to me to be not inconsistent with what I have said. I do not think there is anything in the case, either by decision or by statement

obiter, which prevents me from reaching the conclusion at which I arrive, or which ought to induce me to hesitate in doing so. A

I, therefore, hold that on the true construction of the will, and in the events which have happened there has, up to date at any rate, been a forfeiture, and that so long as the bankruptcy continues that forfeiture will remain operative in respect of each instalment.

Solicitors: *Collyer-Bristow & Co.*, for *Hearfield & Lambert, Hull*; *Jaques & Co.*; *Bell, Brodrick & Gray*. B

[Reported by L. MORGAN MAY, Esq., Barrister-at-Law.]

BRIDGES v. GRIFFIN

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Shearman, JJ.), May 5, 1925] C

[Reported [1925] 2 K.B. 233; 94 L.J.K.B. 728; 133 L.T. 177;
89 J.P. 122; 41 T.L.R. 523; 69 Sol. Jo. 558; 28 Cox, C.C. 7]

Food and Drugs—Milk—Adulteration—Deficiency in fat—Cream rising to top of churn—Abstraction of milk sold from bottom of churn—Sale of Food and Drugs Act, 1875 (38 & 39 Vict., c. 63), s. 6—Sale of Milk Regulations, 1901, reg. 1. E

The appellant, who was an inspector under the Sale of Food and Drugs Acts, bought from a roundsman in the employment of the respondent a pint of new milk, which was alleged to have been drawn off by a tap at the bottom of the churn. The milk so bought was found on analysis to be deficient in milk fat to the extent of 46·3 per cent. A summons was taken out against the respondent for selling milk not of the nature, substance, and quality of the article demanded, and the justices dismissed the summons. On appeal F

Held: if a seller of milk places milk in a receptacle and leaves it to stand well knowing that in the ordinary course of nature the cream in the milk will rise to the top, and then sells milk which is drawn from the bottom of the churn and is found to be deficient in milk fat, he is guilty of selling milk not of the nature, substance, and quality of the article demanded as required by s. 6 of the Act. G

Dyke v. Gower (1), [1892] 1 Q.B. 220 and *Penrice v. Brander* (2), 1921 S.C. (J.) 63, considered. H

Notes. The Sale of Food and Drugs Act, 1875, was repealed by the Statute Law Revision Act, 1953. The law on the subject is now governed by the Food and Drugs Act, 1955, and by regulations made or continued under that Act, particularly the Milk and Dairies Regulations, 1949 to 1954, and the Sale of Milk Regulations, 1939. Section 2 of the 1955 Act corresponds to s. 6 of the 1875 Act.

As to the sale of milk see 17 HALSBURY'S LAWS (3rd Edn.) 534 et seq. and for cases see 25 DIGEST 88 et seq. and 127 et seq. For the Food and Drugs Act, 1955, see 35 HALSBURY'S STATUTES (2nd Edn.) 91 and for the Sale of Milk Regulations, 1939, S.R. & O. 1939 No. 1417 and Milk and Dairies Regulations, 1949 to 1954, see 9 HALSBURY'S STATUTORY INSTRUMENTS. I

Cases referred to:

(1) *Dyke v. Gower*, [1892] 1 Q.B. 220; 61 L.J.M.C. 70; 65 L.T. 760; 56 J.P. 168; 8 T.L.R. 117; 17 Cox, C.C. 421, D.C.; 25 Digest, 92, 174.

- A** (2) *Penrice v. Brander*, 1921 S.C.(J.) 63; 58 Sc.L.R. 307; 25 Digest 130, 508 ii.
 (3) *Bowen v. Jones* (1917), 86 L.J.K.B. 802; 117 L.T. 125; 81 J.P. 178; 15 L.G.R. 517; 25 Cox, C.C. 757, D.C.; 25 Digest 130, 505.
 (4) *Kings v. Merris*, [1920] 3 K.B. 566; 90 L.J.K.B. 161; 124 L.T. 150; 85 J.P. 68; 18 L.G.R. 775; 26 Cox, C.C. 649, D.C.; 25 Digest 130, 506.
B (5) *Hunt v. Richardson*, [1911] 2 K.B. 446; 85 L.J.K.B. 1360; 115 L.T. 114; 80 J.P. 305; 32 T.L.R. 560; 60 Sol. Jo. 588; 14 L.G.R. 854; 25 Cox, C.C. 441, D.C.; 25 Digest 128, 492.
 (6) *Knowles v. Scott*, 1918 S.C. (J.) 32; 25 Digest 130, 508i.
 (7) *Few v. Robinson*, [1921] 3 K.B. 504; 91 L.J.K.B. 42; 126 L.T. 94; 85 J.P. 257; 66 Sol. Jo. (W.R.) 15; 19 L.G.R. 708; 27 Cox, C.C. 113, D.C.; 25 Digest 128, 495.

C **Case Stated** by justices for Gloucestershire.

At a court of summary jurisdiction sitting at Stow-on-the-Wold an information was preferred by Jack Bridges (hereinafter called the appellant) under the Sale of Food and Drugs Act, 1875, s. 6, against Joseph Griffin (hereinafter called the respondent) for that he on Sept. 8, 1924, at the parish of Stow-on-the-Wold, in the county of Gloucester, by the hands of his servant, John William Oakley Robinson, did unlawfully sell to the prejudice of one Jack Bridges, the purchaser, a certain article of food, to wit, milk, which was not of the nature, substance, and quality of the article demanded by the purchaser. On Nov. 13, 1924, the said court of summary jurisdiction dismissed the information.

E At 9.30 a.m. on Sept. 8, 1924, the appellant purchased a sample of new milk which was being sold for the respondent by his employee, John William Oakley Robinson, in Union Street Stow-on-the-Wold. The quantity purchased was one pint. The appellant thereupon divided the said sample into three parts. One part was handed to the county analyst, another he handed to the said John William Oakley Robinson, and the third part he retained. The appellant subsequently received the analyst's report, dated Sept. 19, 1924, showing that the said sample was deficient in milk fat to the extent of 46.3 per cent. The appellant showed the report to the respondent, who remarked that he had given instructions to the said John William Oakley Robinson always to stir the milk before starting his round, and this the latter had failed to do. Upon the hearing of the information the portion of the sample retained by the appellant was produced, and upon the evidence before them the justices found: (i) That the sample was deficient in fat to the extent shown by the analyst's report. (ii) That at about 7.30 a.m. on Sept. 8, 1924, the said milk in the same state as it came from the cows was put in the churn from which the sample was subsequently taken, and from that time until the sample was taken no one had access to the churn or could have tampered with the milk. On the part of the appellant it was contended that the milk was not of the nature, substance, and quality demanded, as required by the Sale of Food and Drugs Act, 1875, s. 6. On the part of the respondent it was contended that, even though the milk was not of the nature, substance, and quality required by law, the presumption of adulteration or abstraction raised by a deficiency of milk fat or of other solids by the regulations dated Aug. 6, 1901, was rebutted by evidence that nothing had been added or subtracted from the said milk by anyone during the whole period from the milking to the delivery to the purchaser. The justices' **I** attention was directed to the following decisions: *Bowen v. Jones* (3), *Kings v. Merris* (4). The justices, being of opinion that the contention of the respondent was established, dismissed the information.

Porter, K.C., and *R. C. Hutton* for the appellant.

R. A. Willes for the respondent.

LORD HEWART, C.J.—This Case is somewhat compendiously stated, but it is apparent from what is contained in it and from what has been said at the Bar that the real question which is raised by the Case is the question indicated by

two passages in the Case itself. The respondent, Joseph Griffin, was charged with having unlawfully sold, by the hand of his servant, to the prejudice of the appellant, milk which was not of the nature, substance, and quality of the article demanded by the purchaser. The justices dismissed the information, and they state that, after the appellant had asked for new milk and had received from the hand of the respondent's servant what was sold as being new milk and it had become known to the respondent that the milk had been analysed, the respondent said that he had given instructions to his servant always to stir the milk before commencing his round, and that the servant had failed so to do. The justices found that the sample was deficient in fat to the extent shown by the analyst's report, and that the milk in the state in which it came from the cow was put in the churn (from which the sample was subsequently taken) at about 7.30 a.m. on Sept. 8, 1924, and from that time until the sample was taken no one had access to the churn or directly tampered with the milk. The contention on the part of the appellant was that the milk which he received was not of the nature, substance, and quality demanded as required by s. 6 of the Sale of Food and Drugs Act, 1875. It is reasonably clear, and the argument has proceeded upon the footing, that the real question involved in the case is this: whether there can be said to be an abstraction of milk fat from the milk sold when all that has happened is that the seller has put new milk in some receptacle and then allowed the cream in that milk to rise and collect at the top of the milk and he has afterwards sold as new milk some milk which by reason of the construction of the receptacle has been drawn from near the bottom of the receptacle.

It is important to see how that question arises. The charge made against the respondent was that there had been a sale of milk which was not of the nature, substance, and quality of the article demanded. Under s. 4 of the Sale of Food and Drugs Act, 1899, the Board of Agriculture have power to make regulations. Regulations have been made but the regulations are only for the purpose of raising a presumption that the milk is not genuine, and they are not and do not purport to be an enumeration of all the ways in which the purchaser's allegation may be established. They merely provide a convenient short-cut. Section 4 (1) of the Sale of Food and Drugs Act, 1899, under which the regulations are made, provides as follows:

"The Board of Agriculture may, after such inquiry as they deem necessary, make regulations for determining what deficiency, in any of the normal constituents of genuine milk . . . or what addition of extraneous matter or proportion of water, in any sample of milk . . . shall for the purpose of the Sale of Food and Drugs Act raise a presumption, until the contrary is proved, that the milk . . . is not genuine. . . ."

The Board of Agriculture have accordingly made regulations (Sale of Milk Regulations, 1901), reg. 1 of which provides that

"Where a sample of milk . . . contains less than 3 per cent. of milk fat it shall be presumed for the purposes of the Sale of Food and Drugs Acts, 1875 to 1899, until the contrary is proved, that the milk is not genuine by reason of the abstraction therefrom of milk fat or the addition thereto of water."

The regulation does not purport to contain a definition of genuine milk; its function is to offer a mode of proof that the sample of milk is not genuine. In the present case an analyst's certificate was put in evidence, and it showed a deficiency of milk fat in the milk sold to the extent of at least 46.3 per cent. of that which should have been present.

The sample of milk had, therefore, only about one half of the milk fat which it ought to have had. It is to be observed upon the wording of that regulation, that when the analyst's certificate shows a certain result it is presumed until the contrary is proved that the milk is not genuine by reason of the abstraction of milk fat or the addition thereto of water. It is clear that the milk there referred to

A and about which the presumption arises is the milk which has been sold and not the milk in bulk. In the present case, the analyst's certificate having been put in, the burden of proof shifted to the respondent to show that the milk was genuine milk, and thereupon the respondent undertook to establish the defence which was put forward successfully in *Hunt v. Richardson* (5)—in other words the defence that the milk that was sold was sold in the condition in which it came from the cow. It is to be observed that in *Hunt v. Richardson* (5) nothing was added to or subtracted from the milk that was sold. In the words of LAWRENCE, J.:

"In this case it is found as a fact that the milk in question was when sold the morning product in its natural condition of a herd of good cows. It had nothing abstracted from it and nothing added to it. It was genuine new milk."

C In these cases the important moment to look at is the moment of sale, and the important milk is the milk that is sold. The question is whether the milk when sold was itself in the condition in which it came from the cow. The justices have found that the defence was made out merely because when the milk was put in the churn some time before the sale it was in the same condition as that in which it came from the cow. There is, however, no finding that the milk which was sold was at the time of sale in the condition in which it came from the cow. What is said is that the milk was allowed to stand and the cream to rise to the top and that the milk was drawn out of a tap some distance down the churn near the bottom and that the cream had risen from it.

E *Dyke v. Gower* (1), which was decided in 1892, is a similar case to the present one. There a retail milk seller poured into a pail eight barn gallons of unskimmed milk which she sold therefrom in small quantities to her customers, dipping it out of the pail from time to time with a measure. The sale of the contents of the pail extended over several hours, and during the whole of that time, owing to the neglect of the seller to keep the milk stirred, the cream was continuously rising to the surface. When not more than two quarts of milk remained in the pail an inspector purchased a pint of milk which was served to him from the pail and which upon analysis showed a deficiency of 33 per cent. of fatty matter. The seller did not disclose the deficiency to the inspector. It was found that the deficiency was entirely due to the manner in which the earlier customers had been served and the seller was found guilty of an offence against s. 9 of the Sale of Food and Drugs Act, 1875, in selling the milk without disclosing its condition. LORD COLERIDGE, C.J., in the course of his judgment, said:

G "A milk seller had milk sent up to her from the country in comparatively large quantities; she poured it into a pail and sold it in small quantities to her customers, for that purpose dipping it from time to time out of the pail with a measure. It is a matter of common knowledge that, unless milk is frequently stirred, there is a tendency on the part of the cream or fatty matter of the milk to rise to the top, leaving the lower portion of the milk denuded of the fat which it originally contained. The milk seller sold the milk in that condition."

A little later the Chief Justice went on to say:

I "In the course of the sale of the greater portion of the pail, owing to a neglect to keep the milk stirred, there had been, unconsciously perhaps, abstracted from the milk its fatty matter to an extent which injuriously affected its quality."

What was done in that case was said to be abstraction of fatty matter. But abstraction from what? The abstraction which is in question in the section is the abstraction of milk fat from that portion of milk which is sold. It was not by the dipping of the measure into the churn that the cream was taken out of that milk. The abstraction of the cream from the milk that was sold was due to natural causes. The cream rose to the top before the sale took place.

What is the difference in principle between that case and the present one? The charge against this respondent is that he sold milk which was not genuine. What is the real difficulty in the view that if a person places milk in a receptacle well knowing that if it is left without being stirred the cream in the milk will rise to the top, and leaves it without being stirred till the cream has risen, and then sells milk drawn by means of a tap from the lower portion of the churn, he cannot be heard to say that the milk so sold is in the same condition as that in which it came from the cow? The matter has been discussed in two cases in Scotland. In *Knowles v. Scott* (6) the Lord Justice-General (LORD STRATHCLYDE) said:

"I am very far from saying that it might not be abstraction of milk fat from the milk to allow it to stand for some time and, without removing the cream from the top, to serve customers with the milk from the bottom of the can. I can conceive of circumstances in which I would be prepared to hold that that was abstraction."

In the particular circumstances of that case the decision was in favour of the appellant, but that was because there was no statement of fact in the case that it was the practice, by some well-known method, to restore the milk to its original condition. That expression of opinion was followed in *Penrice v. Brander* (2). In that case a farmer was charged with contravening s. 6 of the Sale of Food and Drugs Act, 1875, by selling sweet milk which was not genuine in the sense that it contained less than 3 per cent. of milk fat. The alleged deficiency of fat was established, but it was also proved that the milk had not been directly tampered with, the deficiency being due to the milk having stood for some time in the cans and to the samples having been drawn from the tap at the bottom after the cream had risen. It was further proved that sellers of milk recognised the necessity of redistributing the milk fat, and that the method which the accused instructed his servant to follow, but which his servant omitted on the occasion in question, was to draw off a quantity of milk from the bottom of the can and to pour it in at the top before proceeding to sell the milk. The Sheriff-Substitute held that the offence had been proved, and the appeal against that decision was dismissed. The Lord Justice-Clerk (LORD SCOTT DICKSON) said (1921 S.C. (J.) at p. 65):

"The case is really concluded, I think, by *Knowles v. Scott* (6). It is true that the decision in that case was in favour of the accused; but I think it is apparent, from the opinions delivered, that that was solely due to the fact that the case did not contain a finding that there was a well-known method of redistributing the fat in the milk which the accused had failed to adopt. In the present case we have a finding to that effect, and I have no doubt but that the judges who decided *Knowles' Case* (6) in favour of the accused would have decided the present case in favour of the prosecutor, had it come before them."

A little later the learned judge said:

"In this case I think we have enough to show that there has been abstraction, for, although there was no artificial means used except confining the milk in a closed vessel, the necessary result was that, by the operation of the laws of gravity, the milk fat in the shape of the cream ascended to the top, and people who got the milk drawn off from a tap at the bottom got—at any rate for some time—milk of poorer quality than that produced by the cow."

LORD DUNDAS gave judgment to the same effect. LORD ORMDALE said (*ibid.* at p. 67):

"The peculiarity of the case seems to me to be this, that the process of abstraction was, in a sense, a natural one which required no artificial aid from the seller of the milk and did not receive any assistance from him. But this process of abstraction was not necessarily a permanent withdrawal from the

A milk of the milk fat, and could be rectified by the seller by the simple process of remixing ; and it is the appellant's failure to apply that process which makes him, in my opinion, liable to conviction."

B In other words, we are remitted to the phrase employed in 1892 in *Dyke v. Gower* (1), where LORD COLERIDGE used the words "owing to a neglect to keep the milk stirred." The Scottish decision is not binding upon this court, but it is entitled to respect, and the reasoning on which it is based harmonises well with the judgment in *Dyke v. Gower* (1). In these circumstances I do not think it was open to the justices to find that the sample of milk sold to the appellant was at the time of sale in the condition in which it came from the cow. The analyst's certificate having been proved, there was a presumption which was not rebutted that the milk was not genuine. In the result I think that the appellant's contention was right—namely, that the milk sold to him was not of the nature, substance, and quality of the article demanded, as required by s. 6 of the Sale of Food and Drugs Act, 1875. The respondent knew what result might follow if certain steps were not taken, and he accordingly instructed his servant to stir the milk before starting on his round, but the servant failed to do so. There was no suggestion that the method which was proposed for remixing the milk was impracticable ; what was put forward before the justices was that these precautions were not taken because the instructions which the appellant gave to his servant were not carried out. In my opinion, the justices came to an erroneous conclusion and the appeal must be allowed.

E **AYORY, J.**—I agree. In view of the facts which have been stated to the court and the arguments which have been put forward, I think we are bound to assume that the milk which was sold to the inspector was drawn off from the churn by a tap at the bottom of the churn and that the deficiency in milk fat of the milk so sold was due to the fact that the cream in the milk had risen and collected at the top. In these circumstances, the only question is whether, the purchaser having asked for new milk, the article supplied to him was of the nature, substance, and quality of the article demanded. In other words, was it new milk? Regulation 1 of the Sale of Milk Regulations, 1901, only gives rise to a presumption ; it does not say what milk is ; it does not say that milk is genuine if there has been no abstraction of milk fats or addition of water. It merely provides that an analyst's certificate that the sample of milk contains less than 3 per cent. of milk fat raises a presumption, until the contrary is proved, that the milk is not genuine by reason of the abstraction therefrom of milk fat or the addition thereto of water. But it leaves it open to the vendor to rebut that presumption, and, just as the vendor may rebut it by showing that the milk is in the same state as it came from the cow, so also the prosecution may show that even though there has been no interference with the milk by the hand of man, nevertheless the milk is not genuine new milk. I think that gets rid of the difficulty as to whether or not there has been abstraction. It is true that s. 9 of the Sale of Food and Drugs Act, 1875, appears to contemplate the abstraction by a person from an article of food of any part of it so as to affect injuriously its quality, substance, or nature, and it may be that the Sale of Milk Regulations, 1901, contemplate the same thing, but even if they do the purchaser of milk is not bound to show that there has been some personal interference with the milk by the hand of man. It may be that the collection of the cream at the top of the milk is due to natural causes, but if the cream does collect at the top of the milk it is the duty of the vendor by stirring the milk to see that the milk at the bottom of the churn has its proper proportion of cream. I should have been prepared to follow the decision in the Scottish case of *Penrice v. Brander* (2), and more especially the judgment of LORD ORMDALE, who said :

"The peculiarity of the case seems to me to be this, that the process of abstraction was, in a sense, a natural one which required no artificial aid from the

seller of the milk and did not receive any assistance from him. But this process of abstraction was not necessarily a permanent withdrawal from the milk of the milk fat, and could be rectified by the seller by the simple process of remixing; and it is the appellant's failure to apply that process which makes him, in my opinion, liable to conviction."

I only wish to add that in my view the decision which we are giving does not in any way conflict with the decision in *Hunt v. Richardson* (5). In that case no question arose as to milk fat having been abstracted from the milk that was sold. I agree that this appeal ought to be allowed.

SHEARMAN, J.—I am of the same opinion, but I desire to add a few words to what has been already said. The summons in this case was under s. 6 of the Sale of Food and Drugs Act, 1875, for unlawfully selling to the prejudice of the purchaser milk which was not of the nature, substance, and quality of the article demanded by the purchaser. In all these cases one has to start with the decision in *Hunt v. Richardson* (5). In that case the judges were trying to reconcile conflicting decisions. In considering the effect of that case one must also take into consideration the decision in *Few v. Robinson* (7), where the judges agreed in laying down what *Hunt v. Richardson* (5) really did decide—namely, that in order to create an offence under s. 6 of the Act of 1875 it must be shown that the milk has been adulterated either by the addition of some foreign substance or the abstraction of one of its constituent elements. In the present case the only evidence given of the adulteration was the production of an analyst's certificate showing a deficiency of milk fat to the extent of 46·3 per cent. The explanation given by the respondent was that the milk had been put into a churn and that, contrary to his instructions, it had not been stirred, and consequently the cream in the milk had risen to the top, whereas the milk that had been sold was drawn from the bottom of the churn by means of a tap. The Sale of Milk Regulations, 1901, provide that

"Where a sample of milk . . . contains less than 3 per cent. of milk fat it shall be presumed for the purposes of the Sale of Food and Drugs Acts, 1875 to 1899, until the contrary is proved, that the milk is not genuine, by reason of the abstraction therefrom of milk fat, or the addition thereto of water."

It is said that that presumption has been rebutted in the present case because there is a finding by the justices that the milk was put into the churn in the same state as it came from the cow, and from that time until the sample was taken no one had access to the churn or could have tampered with the milk, and that consequently there had been no abstraction of milk fat from the milk. I cannot agree with that contention. What is abstraction? We have the decision of the Divisional Court in *Dyke v. Gower* (1). In that case a milk seller put a quantity of milk into a pail and sold it in small quantities to customers by dipping it from time to time out of the top of the pail with a measure, and owing to the fact that the sale of milk extended over several hours the cream in the milk was continuously rising to the top; owing to the failure of the seller to keep the milk stirred, the upper portion of the milk that was sold contained more cream than the lower portion. It was held that, owing to the neglect of the seller to keep the milk stirred, there had been—unconsciously perhaps—abstracted from the milk at the bottom of the pail its fatty matter to an extent which injuriously affected its quality. That is the converse case to the present case, because here all that was done was to pour new milk into a churn and allow it to stand, with the result that the cream in the milk rose to the top, and then to sell milk which was drawn from the bottom of the churn by means of a tap. I think it cannot be said that the respondent did not abstract the milk fat from the milk as sold. He put the milk into the churn, well knowing the fat in the milk would rise to the top of the milk unless it was kept stirred. That is the only thing that was done here. The presumption that milk is not genuine by reason of the abstraction therefrom of milk

A fat can be rebutted, but it is not rebutted if some fat has been abstracted from the milk, and in the present case there was evidence that some fat had been abstracted from the milk sold to the appellant. I agree that the appeal must be allowed.

Appeal allowed : Case remitted.

Solicitors : Gibson & Weldon, for Wellington, Clifford & Matthews, Gloucester;
B Smiles & Co., for Steel & Broom, Stow-on-the-Wold.

[Reported by J. W. WALKER, Esq., Barrister-at-Law.]

C

BARNARD v. EVANS

D [KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Shearman, JJ.), July 28, 1925]

[Reported [1925] 2 K.B. 794; 94 L.J.K.B. 932; 133 L.T. 829; 89 J.P. 165;
 41 T.L.R. 682; 28 Cox. C.C. 69]

Animal—Dog—Trespass—Cruelty—Unjustified wounding—Protection of Animals Act, 1911 (1 & 2 Geo. 5, c. 27), s. 1 (1).

E

The respondent, who was a farm labourer, saw a dog playing in a field in the occupation of his employer, and, on the instructions of his employer and without attempting otherwise to drive the dog out of the field, he shot at the dog with the intention of killing it. The dog received flesh wounds and for some days suffered substantially in consequence of the wounds. On a summons against the respondent under s. 1 (1) of the Protection of Animals Act, 1911, for cruelly ill-treating the dog,

F

Held: there was no justification for the act of the respondent and the case must be remitted to the justices with a direction to convict.

Notes. As to injury to dogs see 1 HALSBURY'S LAWS (3rd Edn.) 689, para. 1314 and for cases see 2 DIGEST (Repl.) 372 et seq. For the Protection of Animals Act, 1911 see 1 HALSBURY'S STATUTES (2nd Edn.) 905.

G

Cases referred to :

- (1) *Powell v. Knight* (1878), 38 L.T. 607; 42 J.P. 597; 26 W.R. 721; 2 Digest (Repl.) 393, 637.
- (2) *Armstrong v. Mitchell* (1903), 88 L.T. 870; 67 J.P. 329; 19 T.L.R. 525; 20 Cox, C.C. 497; 2 Digest (Repl.) 392, 634.
- (3) *Hooker v. Gray* (1907), 96 L.T. 706; 71 J.P. 337; 23 T.L.R. 472; 21 Cox, C.C. 437; 2 Digest (Repl.) 393, 639.
- (4) *Vere v. Lord Cawdor* (1809), 11 East, 568; 103 E.R. 1125; 2 Digest (Repl.) 374, 510.
- (5) *Miles v. Hutchings*, [1903] 2 K.B. 714; 72 L.J.K.B. 775; 89 L.T. 420; 52 W.R. 284; 20 Cox, C.C. 555; 2 Digest (Repl.) 375, 520.

I

Case Stated by justices for the county borough of Merthyr Tydfil.

On March 3, 1925, an information was preferred by the appellant, Thomas Barnard, an inspector in the employment of the Royal Society for the Prevention of Cruelty to Animals (hereinafter called the appellant), under the Protection of Animals Act, 1911, s. 1, against Edward Evans (the respondent), for that he did on Jan. 12, 1925, at Merthyr Tydfil, cruelly ill-treat a certain animal, to wit, a dog, by shooting at and wounding the same, contrary to the said statute. The justices dismissed the information on March 3, 1925.

At the hearing of the information the following facts were proved or admitted: A
 The respondent was a farm labourer in the employ of William Evans, a farmer.
 On Jan. 12, 1925, a spaniel dog belonging to one Robert Evans, went into a field B
 in the occupation of William Evans, the respondent's employer. There were two
 fields between the house occupied by the owner of the dog and the field where the
 dog was seen. The dog whilst in this field was playing with another dog, but it
 was alleged that when the respondent saw it was chasing fowls. The respondent
 had a gun and shot the dog, intending to kill it. The dog ran away for a short
 distance, and then fell and crawled to its home. On examination it was found
 that a number of shots had penetrated the body of the animal and the upper parts
 of the right hind-leg and of the right fore-leg, causing flesh wounds which were
 bleeding. There was no doubt that the animal suffered in consequence of the
 wounds and that the suffering lasted for some days. There was no hedge round
 the field in question, and no attempt was made by the respondent to drive the
 dog out of the field by other means before he shot at it. The respondent shot at
 the dog with intention to kill it by the instructions of his master. On behalf of
 the appellant it was contended that the shooting at and wounding of the dog in
 the circumstances were not justifiable because the dog was not doing any damage
 at the time; that the respondent used more force than was required to drive the
 dog away; and that the respondent caused the animal unnecessary pain and suffering.
 On behalf of the respondent it was contended that the respondent was justified
 in shooting at the dog, which was trespassing on his employer's property and was
 worrying his master's sheep and fowls, and the justices' attention was directed to
 the following decisions of the High Court: *Powell v. Knight* (1), *Armstrong v.* C
Mitchell (2), and *Hooker v. Gray* (3). The justices found (i) that the respondent
 had shot at the dog with intent to kill it; (ii) that as a result of the shooting sub-
 stantial suffering was caused to the dog; (iii) that it was not necessary to use
 a shot-gun to drive the animal out of the field. They were of opinion that in
 view of the decisions of the High Court referred to it was not open to them to
 convict the respondent, and they, therefore, dismissed the information. The
 appellant appealed. D

Goddard, K.C., and *F. J. Tucker* for the appellant. E

The respondent did not appear. F

LORD HEWART, C.J.—I have no doubt that this appeal ought to succeed. G
 The justices found that the respondent shot at the dog with intent to kill it, and
 that as the result of the shooting it was cruelly ill-treated, and that it was not
 necessary to use a shot-gun to drive the dog away. In these circumstances the
 justices would have convicted, but they were induced to think that some decision
 or other prevented them from convicting. The law, as I understand it, in such
 a case is to be found in *Vere v. Lord Cawdor* (4), where it is laid down, as it is
 laid down in many other cases, that the question is whether there was necessity. H
LORD ELLENBOROUGH says in that case:

"The question is, whether the plaintiff's dog incurred the penalty of death
 for running after a hare in another's ground? And if there be any precedent
 of that kind which outrages reason and common sense, it is of no authority
 to govern other cases. There is no question here as to the right to the game. I
 The gamekeeper had no right to kill the plaintiff's dog."

It should be observed that in that case it had been argued by eminent counsel for
 the defendant that the justification need not allege that the killing was a necessary
 means of preserving the hare. That case decides that to shoot an animal in such
 circumstances without justification is to commit an offence. Apparently undue
 stress was laid on the decision in *Hooker v. Gray* (3), which turned upon special
 facts and was said to come within the case of *Powell v. Knight* (1), where the

A question was not argued and decided, but assumed. A distinction is to be drawn between such a case and a case where a person is charged with unlawfully and maliciously destroying somebody's property. As was said by CHANNELL, J., in *Miles v. Hutchings* (5) ([1903] 2 K.B. at p. 717):

B "The existence of a malicious intention would be negated if the appellant wrongly, but honestly, believed that it was necessary to shoot at the dog in order to drive him away; but while the justices have found that the shooting was unnecessary, they have found nothing as to the appellant's bonâ fide belief."

C In my opinion the justices were led by a true instinct when they desired to convict, and they were misled when they were induced to believe that there was any decision of this court or any other court which prevented them from so doing. The case must go back to the justices with a direction to convict.

D **AVORY, J.**—I am of the same opinion. I think the expression "cruelly ill-treat" applies to a case where a person wilfully causes pain to an animal without justification for so doing. In this case it is not proved, it is not even alleged, and it is not stated in the case, that the dog was in fact chasing fowls; it is only said that it was alleged that, when the respondent saw it, it was chasing fowls. There is no distinct finding in the case, even if the dog were chasing fowls, that the respondent was justified in resorting to this extreme measure. I agree that the case should be remitted with a direction to convict.

E **SHEARMAN, J.**—I am of the same opinion. I think the case is of considerable importance because the opinion has got abroad that, if dogs are shot when trespassing, that does not come within the Protection of Animals Act, 1911. Section 1 (1), under which this respondent was summoned, contains the words "shall cruelly . . . ill-treat," and it also goes on to say "by wantonly or unreasonably doing . . . any act . . . cause unnecessary suffering." No doubt those offences are described a little differently. It appears to me that when a man is summoned under the first part one has to consider what is cruelty. I do not think it can be better defined than "causing unnecessary suffering." It is necessary in some operations to cause suffering. It seems to me that what the justices have to look at when considering whether a man has cruelly beaten or ill-treated an animal is whether he did something which it was not reasonably necessary to do and which he was not justified in doing. The justices have found that the man was not justified in doing this; therefore he caused unnecessary suffering, and I think it follows that he did cruelly ill-treat this dog. The Case must go back to the justices to convict.

Appeal allowed and case remitted.

Solicitor: *S. G. Polhill.*

[Reported by J. F. WALKER, Esq., Barrister-at-Law.]

A

DEBENHAM'S, LTD. v. PERKINS

[KING'S BENCH DIVISION (Bankes and Scrutton, L.JJ., sitting as additional Judges),
April 3, 1925]

[Reported 133 L.T. 252]

*Husband and Wife—Necessaries—Right of wife to pledge husband's credit—
Action for goods sold—Judgment against wife for goods sold after date of
separation—Action against husband for goods sold before that date—Com-
petency—Agency—Election.*

Where an action for goods sold is brought against a wife on a bill containing a number of items, and judgment is recovered against her on all items purchased after a certain date on the ground that since that date she has been acting as principal by reason of her having separated from her husband on that date, proceedings may subsequently be taken against the husband as principal for the items purchased prior to that date, since there are two distinct causes of action, and there has been no election by suing the wife to judgment on the whole or part of one undivided debt.

French v. Howie (1), [1905] 2 K.B. 580 and [1906] 2 K.B. 675, distinguished.

Notes. As to contracts of wife during coverture see 19 HALSBURY'S LAWS (3rd Edn.) 852 et seq., and for cases see 27 DIGEST (Repl.) 168 et seq.

Cases referred to:

- (1) *French v. Howie*, [1905] 2 K.B. 580; 74 L.J.K.B. 853; 93 L.T. 202, D.C.; reversed [1906] 2 K.B. 674; 75 L.J.K.B. 980; 95 L.T. 274, C.A.; 27 Digest (Repl.) 177, 1303.
- (2) *Morel Bros. & Co., Ltd. v. Earl of Westmoreland*, [1904] A.C. 11; 73 L.J.K.B. 93; 89 L.T. 702; 52 W.R. 353; 20 T.L.R. 38, H.L.; 27 Digest (Repl.) 177, 1302.
- (3) *Williams v. Lord Bagot* (1825), 3 B. & C. 772; 5 Dow. & Ry. K.B. 719; 107 E.R. 920.
- (4) *The Koursk*, [1924] P. 140; 93 L.J.P. 72; 131 L.T. 700; 40 T.L.R. 399; 68 Sol. Jo. 842; 16 Asp. M.L.C. 374, C.A.; 41 Digest 798, 6591.
- (5) *Brunsdon v. Humphrey* (1884), 14 Q.B.D. 141; 53 L.J.Q.B. 476; 51 L.T. 529; 49 J.P. 4; 32 W.R. 944, C.A.; 1 Digest 15, 122.

Appeal from Bloomsbury County Court.

The plaintiffs, Debenham's, Ltd., sued Mrs. Perkins, a married woman, for a sum of £21 18s. 9d., the price of goods sold and delivered. They gave particulars, setting out the items of the alleged claim, which amounted to nine in all, with the respective dates of purchase. Some of the articles were purchased in March, some in April, and some in June and July, 1922. In May, 1922, Mrs. Perkins separated from her husband. The county court judge held that he must draw a distinction between the liability of the wife as to the periods before and after the separation, and ultimately gave judgment against Mrs. Perkins for £3 12s. 3d. He did not enter this judgment in a form reciting facts and grounds, although it was clear that he decided against Mrs. Perkins for the five items purchased after the separation in May, on the ground that after that date she was acting as a principal. The plaintiffs then brought an action against the husband, Mr. Perkins, for three items purchased prior to May, but the county court judge entered judgment for the defendant, on the ground that the plaintiffs had already elected to proceed to judgment against the wife. The plaintiffs appealed.

G. P. Glanfield for the plaintiffs.

W. de B. Herbert for the defendant.

BANKES, L.J.—This appeal raises a nice question upon the law, not of husband and wife, so much as the law of election in a case of principal and agent. The

A matter arises in this way. The plaintiffs first sued the wife for a sum of £21 18s. 9d., of which they gave particulars. Those particulars set out the dates upon which it was said the articles were purchased at one branch of the plaintiffs' business and others at quite a different branch ; some were purchased in March, some in April, and some in June and July, 1922. The matter went to trial. For this purpose it is necessary to consider only the claim between the plaintiffs and the defendant, and it is unnecessary to consider some third-party proceedings that were introduced.

B The learned judge came to the conclusion, on the evidence before him, that he ought to draw a distinction between the liability of the wife in respect of the earlier and later periods, because, on the evidence before him, which he accepted, at some date in May, 1922, the husband and wife had separated ; and, as the result, it might be that in respect of the earlier period the wife was making these purchases

C as agent of her husband, if they were necessities, but in respect of the later period she must have been acting as principal, because she could no longer have any right arising out of the fact that she was a wife living with her husband. The learned judge ultimately gave judgment against the wife for a sum of £3 12s. 3d., which is in fact made up of all the items purchased on or after June 2. I think it is quite plain from the learned judge's decision that he did decide against the wife in respect of those

D items on that ground. It is not a question of quantum, it was not a question that she had ordered only some of the goods and had not ordered others. He decided solely on the ground that as from that date she was acting as principal.

If the judgment had been entered in a form reciting the facts, and reciting the ground of the learned judge's judgment, and indicating particular items upon which he found against the wife, I do not think that any question could seriously have

E been raised. But the judgment is a judgment merely against the wife for £3 12s. 3d., and one has to look outside the judgment as drawn up to ascertain what the real facts were. I think the decision of this case turns upon whether the court is entitled to look behind the judgment and to ascertain what were the grounds of the learned judge's decision. In my opinion, we are. Counsel for the

F defendant, in his argument, put two points, as I understand. He says the law is clear that if a creditor is in doubt whether A. or B. is liable to him for some particular article purchased, and the creditor elects by suing one of them to judgment, he cannot afterwards change his mind and say : "I have made a mistake, and I find that I ought to have sued the other." I entirely accept that. Where a person is sued for the whole amount of the claim, I think that suing to judgment for the whole amount of the claim is a conclusive election. But I think it is also

G established that where the creditor has not sued the agent to judgment, the questions whether he has so elected or not is a question of fact depending on the circumstances of the case.

His second point is this. He says this case falls within *French v. Howie* (1) and that is a decision that in a claim such as this it is an undivided debt, and that if the plaintiff recovers judgment for part of it, that operates as a suing to judgment and a conclusive election. I think one has to look carefully into *French v. Howie* (1) and see what the facts were and what the decision meant. I agree that if it is a decision in a case like this where there is a claim for an amount, naming the amount, made up of a number of items showing purchases of goods at different dates over a considerable period—if *French v. Howie* (1) is a decision

H that such a claim is what is called in this judgment an undivided debt, then we must follow that decision. But the facts in *French v. Howie* (1) must be carefully considered in order to ascertain what the court really did decide. There the action was brought to recover a sum of £26 11s. 6d. for groceries supplied by the plaintiff to the defendants, husband and wife living together, the order being given by the wife; the wife admitted her liability to the amount of £20, claiming that this was all that was due, and she paid £20, leaving a balance of £6 11s. 6d. That latter sum was not identified with any particular item of the bill, it was a balance of a bill. The next step was that proceedings were taken and the master made an

I

order for payment of £4 by the wife, again £4 off the general bill and off the amount then outstanding and unpaid. The statement of facts says that the order for £4 was made, not in respect of any particular items in the plaintiff's bill, but on account of his claim generally. Then both defendants were given leave to defend as to the balance, £2 11s. 6d., and the action was remitted to the county court. Then when the matter came to be tried, judgment was given against the husband for this £2 11s. 6d. In those circumstances it seems to me that there were no materials upon which anybody could treat that bill or any one of those payments as being in respect of any particular item or set of items. It may be, and I have no doubt it was, quite right to speak of that as JELF, J., did, as an undivided debt. This is what he says ([1905] 2 K.B. at p. 582):

"Then if it is an action in which there is no joint liability, a judgment, as it were, on the record that the wife is liable for part of the undivided debt sued for, and a judgment that the respondent is liable for another part of the same undivided debt, would to my mind be perfectly inconsistent judgments."

If one is entitled to look into the facts, and, as I have already said, I think in this case we are, there is no judgment here for part of the same undivided debt. If one is entitled to look at the particulars, one will find what the items were and one knows that the learned judge gave judgment against the wife in respect of certain identified items, and on a ground which, in his opinion, constituted her the debtor, because as from a certain date she was the principal. JELF, J., says again (*ibid.* at p. 583):

"By accepting a judgment against the wife for a part of an undivided debt he elected to say that she was liable for the whole of it."

It is true that KENNEDY, J., and LORD ALVERSTONE, C.J., did not take the same view, because they thought that, even accepting the view for the moment that it was an undivided debt, it did not fall within the principle of *Morel Bros. & Co., Ltd. v. Earl of Westmoreland* (2), because the judgment had not been for the whole of the debt, but only for a part of it; and KENNEDY, J., when he is dealing with the view upon which JELF, J., decided, says ([1905] *ibid.* at p. 583):

"It is quite true that in a sense, the bill was, as JELF, J., has said, an indivisible whole—that is to say, it was not a case of portions of the goods being supplied under different circumstances."

Without any objection from JELF, J., KENNEDY, J., is then explaining what he understands JELF, J., is referring to when he speaks of an undivided debt.

It seems to me, therefore, that if I am right in saying that we are entitled to look at the particulars of the claim for the grounds upon which the learned judge's judgment proceeded, it is not possible to say in this case, as was said in that case, that this was an undivided debt. If that is so, we have got rid of the ground of concluded election upon the basis that there was no suing of the wife to judgment for the whole amount claimed. If we have got rid of the difficulty of the suggestion that this was an undivided claim, or an undivided debt, the position seems to me to be that the plaintiffs have sued the wife to judgment in respect of certain items on the ground that she was the principal and ordered the goods. They attempted to establish that she was liable for the rest of the account, but upon the facts the learned judge held that she was not the principal, and, if there was any liability at all upon an order given by her, it was a liability of the principal of the agent who gave the order.

In those circumstances, it seems to me that the learned judge ought to have allowed this action to proceed, and that the plaintiffs should be entitled to establish, if they can, in respect of the items other than those for which judgment was given, their claim to the amount they are seeking to recover from the husband on the ground that they were ordered with his authority by his wife. I think on those grounds that the appeal ought to succeed, and must be allowed with costs, and

A that the matter must be remitted to the county court for trial, and that the costs of the first trial must abide the result of the second.

SCRUTTON, L.J.—This is one of a class of cases that have given the courts much trouble in the past and probably will in the future—claims or questions whether the husband or wife is liable for goods supplied to a married woman.

B What has happened in this case is that on a claim being brought against the husband, the learned judge has declined to proceed with the case, on the ground that the matter is concluded by a judgment in a previous action against the wife. When an agent acts for a disclosed principal, it may be that the agent makes himself or herself personally liable as well as the principal. But in such a case the person with whom the contract is made may not get judgment against both.

C He may get judgment against the principal or he may get judgment against the agent who is liable as principal, but once he has got judgment against either the principal or the agent who has the liability of the principal, he cannot then proceed against the other party who might be liable on the contract if proceedings had been taken against him or her first. This is sometimes explained by the doctrine of election and sometimes by the doctrine that when one has merged a contract in a judgment, one can have only one judgment, and, having merged the contract in the judgment, one cannot use the contract to get a second judgment. It is unnecessary to consider which is right.

In this case the tradesman first of all sued the married woman for nine dated items, claiming for a lump sum the price of the goods sold and delivered. As far as we can surmise what happened at the trial—and I understand that counsel are agreed as to what did happen at the trial in this case—the judge took the view that as to the first four items in date the wife was the agent of a principal, the husband, and not herself personally liable, and therefore judgment could not be entered against her, but he decided that as to the last five items the wife was then living separately and not with her husband, and she was not acting as his agent, but was personally liable. Then comes a very odd fact, that having held that she was not acting as agent for her husband, so that there was no defence and she was personally liable, in some way, which I do not understand, the learned judge, on a third-party procedure, held that the husband was bound to indemnify the wife. The learned judge is so experienced a judge that one cannot help thinking that there is something one does not know which must have led him to take that view. Anyhow, as far as the case against the wife was concerned, the result of that procedure was that the tradesman failed to recover anything under the first four items and succeeded in getting a judgment for the amount of the last five items, though they were not specifically set out in the judgment. Whereupon the tradesman, desiring to get his money from somebody, sued the husband for the first three items. Thereupon objection was taken, which I understand can be put in this way: the plaintiff sued for one cause of action, and although it is quite true he did not get what he wanted, he got a judgment for part of that cause of action. Having taken judgment against the one person for the cause of action, he cannot use the cause of action to try to get a judgment against another party. The cause of action, the contract, is merged in the judgment.

But it appears to me that there are really two causes of action, not one, in this case. There is a cause of action against the wife who is liable personally, there is a cause of action against another person supposed to be acting by the agency of the wife, for different items, at different times, resulting in claims of different amounts. It seems to me, therefore, that this claim for one sum as a debt is really the result of two causes of action. If that is so, the fact that the plaintiff has got judgment against the wife on one cause of action does not merge the cause of action on which he has failed to get judgment, and which still remains available against the person against whom that cause of action should properly be brought. Another way, perhaps, of putting it, though I think it also involves

treating the matter as two causes of action, is that a plaintiff does not elect to sue one of two people alternatively liable, because he brings a proceeding against the other which fails, and in which he does not get judgment. He terminates the liability of the person alternatively liable only if he brings an action against his or her alternate and gets judgment, so that having got judgment against the one, the person who is alternatively liable is discharged. I think that where the second action is against the same person, it clearly would be a discharge of the cause of action that one does take judgment on the cause of action for a smaller sum than that claimed. I see that in *Williams v. Lord Bagot* (3), BAYLEY, J., puts the case of a man claiming £60, consisting of three sums of £20, which became due to him at different times ; in which case he says he clearly could not bring a second action for the other £20, because he claimed £60 and got a judgment for £40 on the claim and could not then say "£20 has been omitted from the judgment and I can bring a second action for the £20." But that is a case where one is claiming against the same person the £20 that one has already claimed from him included in the £60.

I have not been able to find any case nearer than that to-day, but I have been looking at what seems to me to be a similar question, which was considered in this court last year, in a case of tort and not contract. That was *The Koursk* (4). In that case, two ships ran into a third ship, one on each side. The injured ship first sued ship A., which had run into her on the starboard side, and got judgment against her, and not getting as great damages as she wanted from ship A., she then sued ship B., which had run into her on the port side. Whereupon ship B. contended that the cause of action was merged in the judgment obtained against ship A. That failed, for the court said it may be that the damage is the same, but the cause of action, the two negligencies, are different and the result would be the same, if the negligence was the same, but the two damages were different, which is *Brunsdon v. Humphrey* (5). In that case the court said that the cause of action was not merged, because all the facts which went to make the cause of action were different. It seems to me that the cause of action against a wife as principal is a different thing from a cause of action against a husband sued for goods supplied through the agency of the wife. On the best consideration, therefore, that I can give to the matter, it seems to me that the judgment obtained in the first action was for a cause of action different from the one which is now being sued, and that therefore the tradesman ought not to be estopped from continuing to sue the husband for those items not included in the first account. I quite appreciate that the husband says that he has defences which the county court judge in the first action ought to have appreciated, and which he is going to raise when he is able to put all the facts before the court. We are not, therefore, deciding for the moment who is going to succeed when this action is tried, but only that the judge was premature in stopping the action on the ground either of an election or of *res judicata*.

Appeal allowed.

Solicitors : *Boyce & Evans; Valpy, Peckham & Chaplin.*

[*Reported by T. R. F. BUTLER, ESQ., Barrister-at-Law.*]

A R. v. MINISTER OF HEALTH. Ex parte ALDRIDGE

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Shearman, JJ.), April 22, 23, 1925]

[Reported [1925] 2 K.B. 363; 94 L.J.K.B. 707; 133 L.T. 139; 89 J.P. 114; 41 T.L.R. 465; 23 L.G.R. 449]

Street—Private street works—Expenses—Apportionment—Appeal by memorial to Minister—Competency—Public Health Act, 1875 (38 & 39 Vict., c. 55), s. 268.

The applicant was the owner of land fronting on a road in a borough, and the borough council purchased certain other land fronting on the same road. The council resolved to execute private street works in the road, but they did not resolve under s. 10 of the Private Street Works Act, 1892, that in settling the apportionment regard should be had to any consideration other than the frontage of the respective premises. The works were carried out, and the applicant, deeming himself aggrieved by the final apportionment, addressed a memorial to the Minister of Health under s. 268 of the Public Health Act, 1875, (as amended by s. 3 (1) of the Ministry of Health Act, 1919) on the ground that the greater degree of benefit to be derived from the works by the premises belonging to the council should have been taken into consideration. The Minister refused to entertain the appeal on the ground that the choice between an apportionment on frontage alone and an apportionment taking degree of benefit into account was in the discretion of the local authority and that no appeal lay to the Minister under s. 268. The applicant then obtained a rule nisi for a mandamus directing the Minister to entertain the appeal.

Held: the provisions of s. 268 of the Act of 1875 had not been superseded or rendered nugatory by the provisions as to objections contained in the Act of 1892, and an appeal lay to the Minister under s. 268 asking him to make an order which appeared to him to be equitable taking into account the matters mentioned in s. 10 (a) and (b) of the Act of 1892.

Notes. The functions of the Minister of Health under the Public Health Act, 1875, were transferred to the Minister of Housing and Local Government in 1951.

Referred to: *Stockwell v. Southgate Corpn.*, [1936] 2 All E.R. 1343; *Hornchurch U.D.C. v. Webber*, [1938] 1 All E.R. 309.

As to street works see 19 HALSBURY'S LAWS (3rd Edn.) 437 et seq., and for cases see 26 DIGEST 519 et seq. For Public Health Act, 1875, and Private Street Works Act, 1892, see 19 HALSBURY'S STATUTES 56 and *ibid.*, vol. 11, p. 181.

Cases referred to:

- (1) *Hayles v. Sandown U.D.C.*, [1903] 1 K.B. 169; 72 L.J.K.B. 48; 88 L.T. 61; 67 J.P. 177; 51 W.R. 348; 1 L.G.R. 187, D.C.; 26 Digest 546, 2443.
- (2) *Pearce v. Maidenhead Corpn.*, [1907] 2 K.B. 96; 76 L.J.K.B. 591; 96 L.T. 639; 71 J.P. 230; 5 L.G.R. 622, D.C.; 26 Digest 545, 2432.
- (3) *Bridgwater Corpn. v. Stone* (1908), 99 L.T. 806; 72 J.P. 487; 6 L.G.R. 1171, D.C.; 26 Digest 545, 2428.

Rule Nisi for a writ of mandamus to be directed to the Minister of Health commanding him to consider the matter of a certain memorial of the applicant Aldridge, dated Aug. 11, 1924, addressed to him in accordance with the provisions of s. 268 of the Public Health Act, 1875, and, in pursuance of the Ministry of Health Act, 1919, and to make such order in the said matter as to the Minister should seem equitable.

The applicant was the owner in fee simple of certain land having a frontage of something over 1,300 ft. to and upon one side of Orchard Road in the borough of Chipping Wycombe. In May, 1920, the council of that borough bought land of much the same frontage on the north side of that road. On Sept. 20, 1921, the

council resolved to execute private street works in the road, and, accordingly, approved specifications, plans, sections, and so forth. Statutory notice was given that the works would be executed at the expense and cost of the owners of premises fronting, adjoining, or abutting on the road. On Oct. 27, 1921, the applicant gave notice of objection to the proposals, this notice of objection being based on grounds which were not for the present purpose material. On Feb. 23, 1922, the objections were considered by the justices for the borough, and they did not amend the provisional apportionment, being of opinion that they had no power to take into consideration the greater or the less degree of benefit to be derived by the premises fronting the road through the works. The works were, accordingly, carried out, and a final apportionment was made on Jan. 15, 1924. On July 29, 1924, the applicant received from the council of the borough an application for payment of a sum of £1,964. On Aug. 11, he addressed a memorial to the Minister of Health in which it was stated that the applicant "is aggrieved by the resolution of the council apportioning the expenses according to the frontage of the respective premises and considers that the greater degree of benefit to be derived by the premises belonging to the council from the works should be taken into consideration and the expenses apportioned accordingly." He expressed the view that the council, as joint frontagers, could not justly be permitted to decide finally the apportionment of the expenses especially as the works were executed, he said, entirely for the benefit of the housing scheme of the council and to the detriment of the applicant's land. The Minister of Health refused to entertain the appeal, because he was advised that the choice between an apportionment on frontage alone and an apportionment taking into account degree of benefit was a matter in the absolute discretion of the local authority in respect of which no appeal lay to the Minister under s. 268 of the Public Health Act, 1875. The applicant then obtained the present rule nisi.

The Attorney-General (Sir Douglas Hogg, K.C.), and W. Bowstead showed cause for the Minister of Health.

Montgomery, K.C., and William Allen for the local authority.

Scholefield, K.C., and H. du Parcq in support of the rule.

LORD HEWART, C.J., stated the facts above set out and continued: The only question is whether an appeal upon the points referred to lies to the Minister under s. 268 of the Public Health Act, 1875. By that section it is provided that:

"Where any person deems himself aggrieved by the decision of the local authority in any case in which the local authority are empowered to recover in a summary manner any expenses incurred by them, or to declare such expenses to be private improvement expenses, he may, within twenty-one days after notice of such decision, address a memorial to the [Minister of Housing and Local Government] stating the grounds of his complaint, and shall deliver a copy thereof to the local authority; the [Minister of Housing and Local Government] may make such order in the matter as to [him] may seem equitable, and the order so made shall be binding and conclusive on all parties."

The words "make such order as may seem equitable" are obviously very comprehensive, but it is said that upon the true interpretation of certain sections in the Private Street Works Act, 1892, there cannot be an appeal to the Minister upon this question in this case, nay, more, that so far as matters arising under the Private Street Works Act, 1892, are concerned, although s. 268 of the Act of 1875 is not expressly repealed, it is in effect rendered of no account inasmuch as the whole opportunities of appeal are dealt with and exhausted in the specific provisions of the Private Street Works Act, 1892.

Under that statute a clear distinction is undoubtedly drawn between two different modes of apportionment. Under s. 10 it is provided without qualification that

A unless the urban authority take a particular course expenses are to be apportioned according to the frontage of the respective premises. The words are :

"In a provisional apportionment of expenses of private street works the apportionment of expenses against the premises fronting, adjoining, or abutting on the street or part of a street in respect of which the expenses are to be incurred shall, unless the urban authority otherwise resolve, be apportioned according to the frontage of the respective premises . . ."

B But the words are inserted : "unless the urban authority otherwise resolve," and the urban authority, the section further provides,

"may, if they think just, resolve that in settling the apportionment regard shall be had to the following considerations ; (that is to say) (a) The greater or less degree of benefit to be derived by any premises from such works ; (b) The amount and value of any work already done by the owners or occupiers of any such premises."

C It was, therefore, open to the urban authority to resolve in that sense and to substitute the second basis of apportionment for the first basis of apportionment, and so to take the matter out of the general rule by passing the exceptional resolution. D But the local authority did not take that course. The scheme of the Act of 1892 is, after provision for notice and the like, that objections to proposed works may be taken in a particular way. Section 7 of the Act sets out in great detail, and evidently in the most careful detail, the grounds upon which objections may be taken within the time limited.

E "During the said month any owner of any premises shown in a provisional apportionment as liable to be charged with any part of the expenses of executing the works may, by written notice served on the urban authority, object to the proposals of the urban authority on any of the following grounds,"

and there follow grounds (a), (b), (c), (d), (e) and (f). The words of (f) are important :

F "That the provisional apportionment is incorrect in respect of some matter of fact to be specified in the objection, or (where the provisional apportionment is made with regard to other considerations than frontage as hereinafter provided) in respect of the degree of benefit to be derived by any persons, or the amount or value of any work already done by the owner or occupier of any premises."

G To put the matter the other way round, so far as s. 7 is concerned, there may not be an objection upon the ground that the provisional apportionment is incorrect in respect of the degree of benefit to be derived by any premises or the amount or value of any work already done by the owner or occupier of any premises unless the provisional apportionment has been made with regard to other considerations than frontage as provided by s. 10.

H In those circumstances it is said that a resolution of the urban authority is a condition precedent to the adoption of what I have described as the second method of apportionment ; that that condition precedent has not been fulfilled ; that, therefore, the kind of criticism or objection sought to be made by Mr. Aldridge could not in this case be made ; and that it is not possible for him to make that criticism or objection by way of appeal to the Minister inasmuch as all powers of appeal or objection are to be found in s. 7 of the statute of 1892. I Speaking for myself, I am bound to say that I should be very reluctant to arrive at any conclusion which even seemed to tend in the direction of impairing the autonomous power of a local authority whose resolution is a condition precedent to a certain course. Local authorities are vested with great powers, because in practice they show themselves to be worthy of them, and their discretion is not lightly to be impaired in any degree whatsoever. But it is not said here that it is the function of the Minister to direct the local authority to pass the resolution which they might have passed but have

abstained from passing. What is said is that the Minister, under the provisions of s. 268 of the Act of 1875, may make such order in the matter as may seem to him to be equitable ; in other words he may, if he thinks it equitable, deal with the question of quantum much as it might have been dealt with if the local authority had not refrained from passing the resolution contemplated by s. 10 of the Act of 1892. Is that course open to him? There is, at any rate, one thing quite clear. A

There is no express repeal in the Act of 1892 of anything contained in s. 268 of the Act of 1875, but great stress is laid by the learned Attorney-General and by counsel for the local authority upon the words in s. 8 (2) of the Act of 1892. In order to interpret those words correctly it may be a little important to consider the context in which they occur. It is quite true that by s. 1 of the Act of 1892 it is provided that the Act shall be construed as one with the Public Health Acts. B
But when one comes to the highly detailed provisions of s. 7 it is interesting to observe that the objections referred to therein are described in the opening words of s. 8 as objections made "as in this Act mentioned." To read the whole sentence : C

"The urban authority at any time after the expiration of the said month may apply to a court of summary jurisdiction to appoint a time for determining the matter of all objections made as in this Act mentioned [that must mean in the Private Street Works Act, 1892] and shall publish a notice of the time and place appointed, and copies of such notice shall be served upon the objectors ; and at the time and place so appointed any such court may proceed to hear and determine the matter of all such objections" D

That is to say, objections made "as in this Act of 1892 mentioned," and it is after those phrases and it is in that context that one gets sub-s. (2) : E

"No objection which could be made under this Act shall be otherwise made or allowed in any court proceeding or manner whatsoever."

Looking at these words in the place where they occur and at all that has gone before them, I think it would be a straining of the natural ordinary meaning of the words to say that "no objection which could be made under this Act" should be construed as "no objection which could be made under this Act or under the Public Health Acts with which it is to be construed." If that second and larger meaning had been contemplated by the legislature, it would have been easy, in various ways, to express that meaning beyond doubt. It might have been done by leaving out certain words in sub-s. (2) ; it might have been done by adding a new sub-s. (3). But, in my opinion, and I confess that my view of the matter has undergone modification in the course of the able argument which has been presented, it is significant not only that this sub-section does not contain any provision by way of repeal of s. 268 in the Act of 1875, but does import and repeat in this context the words "no objection which could be made under this Act." F

I think, therefore, that the argument that the provisions of s. 268 of the Act of 1875 have been superseded or rendered nugatory by the provisions as to objections contained in the Act of 1892 fails, and that an appeal does lie to the Minister upon such a matter as that which is contained in the memorial of the applicant. It may be, as has been suggested, that in certain other respects also, in particular with reference to s. 10 and s. 11 of the Act of 1892, such an appeal remains. It is not, however, necessary to decide that point, but in this case I am satisfied that there is an appeal to the Minister. It is an appeal to him to make an order which appears to him to be equitable, notwithstanding that the local authority has refrained from passing the resolution contemplated by s. 10. As for the merits of the case, I express no opinion and I do not even desire to suggest one. The Minister may conceivably say that he sees no reason at all for going behind the decision of the local authority, but he may take another course and say that, although the resolution contemplated by s. 10 has not been adopted, nevertheless it is equitable that the matter should be treated, so far as the applicant is concerned, G
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A much as if it had been adopted. It is not suggested seriously, I think, that the Minister should be invited to request or to direct the local authority to pass that resolution. What is asked is that, looking at all the circumstances and the history of the matter, he should make an equitable order taking into account the matters mentioned in (a) and (b) in s. 10, notwithstanding the absence of the resolution.

B This question whether an appeal in such a case and upon such a matter to the Minister remains is a question which has been long discussed to some extent, or, at any rate, has often appeared to be approached. References to it are to be found in chronological order in *Hayles v. Sandown U.D.C.* (1) ([1903] 1 K.B. at p. 175), *Pearce v. Maidenhead Corpn.* (2) ([1907] 2 K.B. at p. 100), and *Bridgwater Corpn. v. Stone* (3). The development of the observations to be found in these cases is not without interest. In the first case, in the year 1903, certain phrases were used which apparently gave rise to some misunderstanding. In the second case, in the year 1907, that misunderstanding was removed, and in the third case, in the year 1908, a judicial opinion was expressed, freed from any possibility of misunderstanding. In these circumstances and for the reasons I have mentioned I have come to the conclusion, not without hesitation, but clearly after listening to the arguments, that this appeal contended for by the applicant does still remain, and that this rule ought to be made absolute.

D
AVORY, J.—I am of the same opinion. We have nothing to do upon this application with the merits of the question which the applicant desires to raise before the Minister, nor does our judgment in any way indicate what the result of such appeal should be if it lies to the Minister. The sole question here is whether an appeal given by s. 268 of the Public Health Act, 1875, still survives in a case like the present. It is not disputed that there has been here a decision of the local authority in a case in which the local authority are empowered to recover in a summary manner expenses incurred by them or to declare such expenses to be private improvement expenses. That decision appears in the exhibits in this case as a resolution passed at a meeting of the town council, that the private street within the borough known as Orchard Road shall be sewered, levelled, paved, &c., and provided with proper means for lighting. Further, it was resolved that the specification, plans, sections, and estimates and provisional apportionment prepared by the borough surveyor and submitted be approved; and that apportionment, on its face, shows that it is an apportionment based on frontage. That being the decision of the local authority, that this street shall be paved, &c., and that the expense shall be apportioned on frontage, the applicant is a person, it is not disputed, who deems himself aggrieved by that decision. Therefore, the case comes plainly within the words of s. 268, unless that right of appeal has been taken away by the Private Street Works Act, 1892. It is not suggested that it has been taken away for any other reason than for something which appears in that statute, and the only thing which is relied upon in that statute of 1892 which is said to deprive the applicant of his right of appeal is to be found in s. 8 (2) of that statute. The words of sub-s. (2) are these:

"No objection which could be made under this Act shall be otherwise made or allowed in any court proceeding or manner whatsoever."

I There are two ways in which that subsection can be read. It may be read as meaning no objection which can be made under this Act, that is, under the Act of 1892. That would be *primâ facie* the natural meaning of it. When the statute speaks of "this Act" one presumes it means this Act and not some other Act, and, if the subsection be read in that way, it is conceded that this objection by the applicant is not one which could be made under the Act of 1892. In the circumstances of this case it is not one of the objections which can be made under s. 7, and, therefore, it is not one which can be made under this Act of 1892. Read, therefore, in that way, it is obvious that these words cannot exclude the right of appeal under the Act of 1875. But then it is said that because by s. 1 of the Act of 1892 the

Act is to be read as one with the Act of 1875, s. 8 (2) may be read in this way: "No objection which can be made under this Act or the Act of 1875 shall be otherwise made or allowed." But the objection is not one which could have been made under the Act of 1875. Consequently, whichever way you read sub-s. (2), there is, in my opinion, nothing to justify the contention that that subsection by implication takes away the right of appeal conferred by s. 268 upon any person who deems himself aggrieved by a decision, as undoubtedly this was, of the local authority. For those reasons, shortly, I agree that this rule ought to be made absolute.

SHEARMAN, J.—I agree. When a local authority adopts the provisions of the Private Street Works Act, 1892, in my judgment, there are still some decisions of the local authority which are subject to review on equitable grounds by the Minister under s. 268 of the Public Health Act, 1875. They are those decisions which are not covered by the jurisdiction conferred upon the justices by ss. 7 and 8 of the Act of 1892. Where the justices' jurisdiction remains the jurisdiction of the Minister has gone; where the justices have no jurisdiction the jurisdiction of the Minister remains. For those reasons I think this rule ought to be made absolute.

Rule absolute.

Solicitors: *Solicitor to the Ministry of Health; Sharpe, Pritchard, & Co.,* for the Town Clerk, Chipping Wycombe; *Ward & Melliar Smith,* for *Reynolds & Son,* High Wycombe.

[Reported by J. F. WALKER, Esq., Barrister-at-Law.]

WEBER v. BIRKETT

[COURT OF APPEAL (Bankes, Scrutton and Atkin, L.JJ.), April 21, 1925]

[Reported [1925] 2 K.B. 152; 94 L.J.K.B. 767; 133 L.T. 598; 41 T.L.R. 451]

Defamation—Action for libel and slander—Damages—Verdict of lump sum for both causes of action—Duty of jury to apportion damages—Payment into court of one sum.

The plaintiff claimed to recover from the defendant damages (i) for slander, and (ii) for libel arising out of the same matter. The defendant pleaded that he had published an apology and paid into court a sum of £105 in respect of both causes of action. Later, he amended his defence and pleaded that he paid into court £105 in respect of the slander, and £105 in respect of the libel, saying that those two sums were sufficient to satisfy the plaintiff's claim. At the trial the jury returned a verdict in favour of the plaintiff for one sum only, namely £200, and said that they could not assess a separate sum in respect of each cause of action.

Held: (i) the case was one which called for a separate verdict upon each issue, and, therefore, the jury having failed to apportion the damages, there was no verdict at all, the trial was a mistrial, and judgment could not be entered for either party.

(ii) the plea of payment into court of one sum as sufficient to satisfy both claims was a bad plea.

Dictum of DARLING, J., in *Benning v. Ilford Gas. Co., Ltd.* (1), [1907] 2 K.B. 290, doubted.

Notes. Considered: *Tallent v. Coldwell and Tailor and Cutter, Ltd.*, [1938] Ch. 653. Referred to: *Smith v. Schilling*, [1928] 1 K.B. 429; *Encee, Ltd. v. Sunday Pictorial Newspapers (1920), Ltd.*, [1939] 2 All E.R. 384.

A As to reviewing assessments of damages by juries see 11 HALSBURY'S LAWS (3rd Edn.) 310-314, and as to payment into court see *ibid.*, 2nd Edn., vol. 26, pp. 62-64. For cases see 17 DIGEST (Repl.) 177 et seq., 32 DIGEST 176; DIGEST, PLEADING AND PRACTICE, 482-484.

Cases referred to :

- B** (1) *Benning v. Ilford Gas Co., Ltd.*, [1907] 2 K.B. 290; 76 L.J.K.B. 681; 97 L.T. 102; 23 T.L.R. 485; Digest Practice 484, 1626.
- (2) *Ellis v. Desilva* (1881), 6 Q.B.D. 521; 50 L.J.Q.B. 328; 44 L.T. 209; 29 W.R. 493; Digest Practice 919, 4622.
- (3) *Gisborne v. Hart* (1839), 4 M. & W. 50.
- C** (4) *Kilburn v. Kilburn* (1845), 13 M. & W. 671; 2 Dow. & L. 633; 1 New Pract. Cas. 226; 14 L.J.Ex. 160; 4 L.T.O.S. 375; 153 E.R. 281; 2 Digest (Repl.) 638, 1605.
- (5) *Stonehewer v. Farrar* (1845), 6 Q.B. 730; 1 New Pract. Cas. 154; 14 L.J.Q.B. 122; 9 Jur. 203; 115 E.R. 275; 2 Digest (Repl.) 635, 1580.
- D** (6) *Bourke v. Lloyd* (1842), 10 M. & W. 550; 12 L.J.Ex. 4; 152 E.R. 589; 2 Digest (Repl.) 634, 1575.
- (7) *Hunt v. Hunt* (1836), 5 Dowl. 442; Will. Woll. & Dav. 62; 1 Jur. 135; 2 Digest (Repl.) 635, 1581.
- (8) *Duckworth v. Harrison* (1839), 4 M. & W. 432; 7 Dowl. 71; 1 Horn. & H. 349; 8 L.J.Ex. 41; 2 Jur. 1090; 150 E.R. 1498; 2 Digest (Repl.) 639, 1614.
- E** (9) *England v. Davison* (1841), 9 Dowl. 1052; 6 Jur. 261; 2 Digest (Repl.) 635, 1576.
- (10) *Dibben v. Marquis of Anglesea, Marquis of Anglesea v. Dibben, Marquis of Anglesea v. Peyton* (1834), 10 Bing. 568; 2 Cr. & M. 722; 4 Tyr. 926; 4 L.J.Ex. 278; 131 E.R. 1015; 2 Digest (Repl.) 635, 1585.
- (11) *Mackay v. Manchester Press Co.* (1889), 54 J.P. 22; 6 T.L.R. 16, D.C.; 32 Digest 186, 2281.
- F** (12) *James Tucker Steamship Co., Ltd. v. Lamport and Holt* (1906), 23 T.L.R. 10, C.A.; Digest Practice 483, 1625.

Appeal from an order of LORD HEWART, C.J., upon the further consideration of an action tried by him with a special jury.

The facts appear in the headnote.

G LORD HEWART, C.J., in his judgment, referred to *Ellis v. Desilva* (2), *Gisborne v. Hart* (3), *Kilburn v. Kilburn* (4), *Stonehewer v. Farrar* (5), *Bourke v. Lloyd* (6), *Hunt v. Hunt* (7), *Duckworth v. Harrison* (8), *England v. Davison* (9), *Dibben v. Marquis of Anglesea* (10), and said: These cases and their reasoning seem to me to throw light on the difficulty which arises in the present case. Here, there were two separate and distinct issues—first, whether £105 was or was not sufficient to satisfy the claim in respect of the slander, and, secondly, whether £105 was or was not sufficient to satisfy the claim in respect of the libel. A verdict on each of these issues is necessary before the proper judgment can be directed and the liability for costs determined. The jury, I think, in substance, said that they were unable to agree on their verdict on either of those issues and their finding in favour of the plaintiff for £200 in all is not, in my opinion, a valid verdict. It is true, no doubt, that a jury is entitled in a proper case to return what is called a general verdict. But that means a verdict covering the whole extent of the genus; it does not mean mixing up one genus with a different genus. That is what has been done here. It was urged that, at any rate, there ought to be judgment for the plaintiff for an injunction, but, in my opinion, this is not a case in which an injunction should be granted. I should be sorry to fasten on a claim for an injunction as a mode of cutting the Gordian knot which the finding of the jury has created. It follows that the so-called verdict is not a verdict; the jury have, in effect, disagreed, and the

case must, therefore, be re-entered if the plaintiff desires. It is not possible for me, as the matter stands, to give judgment. The defendant appealed.

Sir Henry Maddocks, K.C., and *S. O. Henn Collins* for the defendant.

Charles, K.C., and *F. Hinde*, for the plaintiff, were not called on to argue.

BANKES, L.J.—In my view, the course taken by the learned judge was right. It was really the only course which it was possible to take under the circumstances.

The action was brought for damages for slander and for libel, two distinct causes of action. I think it only confuses the matter to call attention to the particular circumstances attending the publication of the slander and the libel. For the present purpose the case must be treated as one in which the plaintiff had two distinct causes of action, one for slander and one for libel. In the first instance the defendant paid a sum of money into court, 100 guineas, in respect of both causes of action. In my opinion, that was not a good plea, and I think that that is well established by the authorities. There are two cases to which I will shortly refer. The first case is *Mackay v. Manchester Press Co.* (11). There the plaintiff brought an action and set out the libel and the innuendo, and the defendant paid a sum of money into court. The plaintiff claimed that the defendant must give particulars showing in respect of which cause of action, the libel or the innuendo, the money was paid into court. The court, treating the innuendo strictly as a separate cause of action, held that the order which *A. L. SMITH, J.*, had made requiring the defendant to state by his pleading in respect of which cause of action the money was paid into court was a good order. **HUDDESTONE, B.**, said :

"He did not quite agree that there were here substantially two libels, but there was the libel and the innuendo, a part of the latter being accepted by the defendants as the meaning of the words, and a part denied. Under those circumstances it was right that the defendants should state in their defence to which part of the statement of claim the payment into court was intended to apply."

The same rule was laid down in more distinct terms in the *James Tucker Steamship Co., Ltd. v. Lamport and Holt* (12) in the passage from the judgment of **LORD COZENS-HARDY, M.R.**, stating that the defendant could not pay money into court and say that it was in respect of several causes of action. I would also refer to *Benning v. Ilford Gas Co.* (1), but only to say that that decision was given in very special circumstances. Money had been paid into court in respect of several causes of action, apparently without any objection. The case went to the official referee who dealt with the costs on the footing that the payment into court, which had not been objected to, was a good payment into court. There was an appeal from so much of the official referee's decision as dealt with the costs, and that appeal was dismissed. It may well be that it was right to dismiss the appeal, having regard to the fact that no objection seems to have been taken to the payment into court, but **DARLING, J.**'s, statement of law that the plea of payment into court was *prima facie* good, and that it might be corrected if the parties chose by applying for particulars, is, in my opinion, not consistent with the authorities to which I have already referred.

To proceed with the story of the present case, that payment into court of 100 guineas having been made in respect of all the causes of action, a letter was written asking the defendant to appropriate the payment. In reply to that the defendant himself applied to amend his defence by making a separate payment of 100 guineas in respect of the two causes of action and it was upon that amended pleading that the case went to trial. In my opinion, the case demanded a separate verdict from the jury upon each issue. Whether the parties made it sufficiently plain that they claimed that right I do not know. It may be that both parties were rather afraid of what the verdict of the jury might be upon the separate issues. I do not know. It is true that the learned judge told the jury that they were asked to divide the damages into two sums, but he did say later on :

A "You may think that they are so much of a muchness and they are so closely related and dependent upon each other that it is not possible or useful to distinguish between the two."

B As a result the jury returned a verdict for £200, and when they were asked to say how much they gave in respect of the slander and how much they gave in respect of the libel they said they were unable to do so. In my opinion, that was no verdict at all. The learned judge was right in coming to the conclusion that the only course to take was to treat the trial as a mistrial which had no result. It is said that the learned judge should have amended. What amendment he was to make I do not know except to fly in the face of the rules and to say that a defendant was entitled to pay a sum of money into court in respect of both these causes of action. He certainly was not justified in doing that, but, apart from that, it seems to me impossible for the defendant, having elected deliberately, when his attention was called to it, not to pay a sum of money into court in respect of both causes of action but to pay in a separate sum in respect of each, when the difficulty arose owing to the attitude of the jury, to say: "Please allow me to do something that I deliberately elected before not to do, in order to get me out of a difficulty and put the plaintiff in a difficulty." I cannot conceive any learned judge in those circumstances making the amendment asked for. I think that the appeal fails and must be dismissed with costs.

C

D

E **SCRUTTON, L.J.**—I think that the jury failed to find a verdict on the issues on which it was necessary for them to find on the pleadings, and, therefore, there was no verdict, and in the circumstances it was impossible to make the amendment which was asked for.

F **ATKIN, L.J.**—I agree. Once the jury was discharged it seems to me that the learned judge could have done nothing other than what he did on the ground that the jury had been discharged without their coming to a verdict on the issues joined between the parties. I quite agree that the amendment could not possibly have been made. To my mind *Benning v. Ilford Gas. Co., Ltd.* (1) must be considered to be a case of very doubtful authority in view of the rules and of the decisions of this court.

Appeal dismissed.

Solicitors: *Cunliffe, Blake & Mossman*, for *Tolhursts & Cozens*, Southend-on-Sea; *Bentley & Jenkins*, for *R. H. Thurlow Baker*, Southend-on-Sea.

[Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.]

SIMPSON *v.* WEBER

[KING'S BENCH DIVISION (Salter and Fraser, JJ.), February 11, 12, 1925]

[Reported 133 L.T. 46; 41 T.L.R. 302]

Easement—Implied easement—Intention of parties—Creeper growing on, and gatepost attached to, grantor's wall.

Two adjoining houses, originally belonging to one person, became vested in the plaintiff and defendant respectively. For some years before the severance of ownership a creeper had been growing in what was now the defendant's garden with its foliage spreading along the wall of the plaintiff's house. Also before the severance of ownership the post of a gate leading from what was now the defendant's garden had been fastened by plugs and nails into the plaintiff's wall. The growth of the creeper had from time to time reached the plaintiff's gutter and he had been obliged to cut it back. The plaintiff brought an action for trespass in respect of the two acts mentioned, and the county court judge found both acts to be trespasses, made a declaration to that effect, and awarded the plaintiff 40s. damages.

Held: there was no evidence that it was not the intention of the parties to the conveyance when it was entered into that the creeper and the gatepost should remain, and, therefore, an easement in each case was impliedly reserved, but there was a duty on the part of the defendant to use care that the plaintiff's property was not unduly interfered with, and in allowing the creeper to obstruct the plaintiff's gutter the defendant had failed to use necessary care, and as to this part of the case the award as to damages must stand.

Notes. Distinguished: *Re Webb*, [1951] 2 All E.R. 131.

As to the implication of easements on a disposition by a common owner see 12 HALSBURY'S LAWS (3rd Edn.) 538 et seq., and for cases see 19 DIGEST 38 et seq.

Cases referred to:

- (1) *Wheeldon v. Burrows* (1879), 12 Ch.D. 31; 48 L.J.Ch. 853; 41 L.T. 327; 28 W.R. 196, C.A.; 19 Digest 45, 253.
- (2) *Jones v. Pritchard*, [1908] 1 Ch. 630; 77 L.J.Ch. 405; 98 L.T. 386; 24 T.L.R. 309; 19 Digest 43, 229.
- (3) *Pwllbach Colliery Co. v. Woodman*, [1915] A.C. 634, H.L.; 19 Digest 13, 27.
- (4) *Schwann v. Cotton*, [1916] 2 Ch. 459; 85 L.J.Ch. 689; 115 L.T. 168; 60 Sol. Jo. 654, C.A.; 19 Digest 52, 291.

Appeal from Southend County Court.

Before 1918 two adjoining houses in Southend were owned by the same person. In December, 1918, the plaintiff became owner of one house, and in January, 1923, the defendant became owner of the other. The plaintiff brought an action, in which he asked for an injunction and damages for two acts of trespass by the defendant. The first alleged trespass arose from the growth of a Virginia creeper. In 1912 this grew in what was now the defendant's garden, with its foliage spreading along the wall of what was now the plaintiff's house. It had never overhung the plaintiff's property, but had merely adhered to it, but at times its growth had reached the plaintiff's gutter and threatened to choke it, so that the plaintiff had been obliged to cut it back. The county court judge held that the defendant, in allowing the creeper to climb had committed a trespass, but found as a fact that the creeper had not, as alleged, caused dampness to the interior of the plaintiff's house. He refused to grant an injunction, but made a declaration that a trespass had been committed and awarded £2 damages. The second alleged trespass arose from the fastening of a gatepost to the plaintiff's wall. In the days when the two houses had been jointly owned, the post of a gate, leading from a path into what was now the defendant's garden, had been fastened to the plaintiff's wall by

A means of nails and plugs. The county court judge held that this fastening of the gatepost amounted to a trespass. The defendant appealed.

G. B. Hurst, K.C., and Graham Mould for the defendant.

Compston, K.C., and Doughty for the plaintiff.

B **SALTER, J.**—This is a very unneighbourly litigation, but one which, none the less, must be determined. It arose in the following manner. The garden of the defendant's premises abuts on the easterly wall of the plaintiff's premises, and there is in the garden of the defendant a creeper growing against the plaintiff's wall. There is also in the corner of the defendant's garden a gatepost supporting a small wicket, and this post is partly supported by being nailed to the plaintiff's easterly wall. The plaintiff brought an action in the county court claiming in respect of both the above-mentioned matters, which he alleged to be acts of trespass, C an injunction and damages. The county court judge did not think fit to grant an injunction, but considered himself obliged to find as a matter of law that the plaintiff's claim was well-founded. Accordingly, he made a declaration that the plaintiff was entitled to enjoy his property free from interference, and held that the defendant had no legal right to have either the creeper or the gatepost there D at all. He also awarded the plaintiff 40s. damages. Against these decisions the defendant now appeals.

In June, 1918, the land and buildings, which are now partly the freehold of the plaintiff and partly the freehold of the defendants, were the freehold property of a man named Lowry, and at that time his creeper, being of the kind that attaches E itself to whatever supports it, had been planted some years before, and was growing rooted in the garden and spreading itself over what is now the easterly wall of the plaintiff's house. The gatepost also was there. When the plaintiff's house was built, before 1918, wooden plugs were let into its easterly wall, in order that the post of this gate might be so attached and supported. Lowry sold one of the houses, No. 1, Whitefriars Crescent, to a Mr. Gunning, reserving the freehold of the other, F No. 7, Grosvenor Road, to himself. The land of the grantor was in enjoyment of an obvious easement over the land granted, namely the easement of right of support for this creeper and this gate. The house purchased by Mr. Gunning was ultimately sold to the plaintiff.

In its simplest form the question we have to determine is: Could Mr. Gunning immediately after the conveyance to him, have required the former common owner, as of right, to take away the creeper and to detach the gatepost. If not, G neither has the plaintiff any such right against the defendant, for both are successors in title. The creeper continued to grow, and the evidence is that in time its growth spread so as partly to obstruct the gutter of the plaintiff's house at a point where the gutter overhangs the defendant's land. There was a dispute as to the consequences of this, and the plaintiff had the creeper cut back and the gutter freed. H We must assume that the county court judge awarded the 40s. damages to the plaintiff in respect of the cutting back of the creeper, or of some small damage caused to the gutter, or of both. Was the county court judge right in holding that the defendant had no legal right of support against the plaintiff's wall either for the creeper or the gatepost? The case raises the question of the implied reservation of easements in grants of property. I do not think it necessary to refer to more I than four cases. These are *Wheeldon v. Burrows* (1), *Jones v. Pritchard* (2), *Pwllbach Colliery Co. v. Woodman* (3), and *Schwann v. Cotton* (4). All these cases lay down a general rule, which ought to guide me here. I have to ask, what was the intention of the parties in the present case as to whether the creeper was to remain and grow against the plaintiff's wall, and as to whether the gatepost was to remain fastened to it. I doubt whether the finding of the county court judge does not involve some question of fact; but, upon the whole, I have come to the conclusion, in the case of an easement so obvious as this, that there was no evidence that it was not the intention of the parties that the creeper and gatepost

should stay. The basis of easements is always the same, namely, the common intention of the parties, and this is most clearly expressed in the cases of an easement of necessity and continuing easements: see the judgment of Astbury, J., in *Schwann v. Cotton* (4) where the whole of the cases were reviewed. For these reasons I think that the county court judge was wrong in law in holding that the defendant had no right to the support of the plaintiff's wall for the creeper or the gatepost. I think he had a right to support for both. The declaration, therefore, cannot stand. With regard to the damages awarded, I think the decision was right. The implied reservation which the defendant claimed did not mean that he was entitled to let the creeper grow so as to obstruct his neighbour's gutter. He must use proper care or a trespass would be committed. The county court judge was right in finding that a trespass had been committed as to that part of the case. The appeal must be allowed and the judgment varied by striking out the declaration and entering judgment for the plaintiff for £2 damages.

FRASER, J.—I agree, and would add nothing except for the fact that we are varying the judgment of the county court judge. The implied reservation of an easement was raised by the defendant in his defence, but the whole question of easements was only very lightly touched on in the county court. The county court judge had not the advantage of considering the cases that we have had; otherwise he might have come to a different conclusion.

Appeal allowed.

Solicitors: *Bentley & Jenkins*, for *R. H. Thurlow Baker*, Southend; *C. R. Sawyer & Withall*, for *D. G. Verney*, Southend.

[Reported by T. R. FITZWALTER BUTLER, Esq., Barrister-at-Law.]

Re GRAY. TODD v. TAYLOR

[CHANCERY DIVISION (Romer, J.), February 13, 25, 1925]

[Reported [1925] Ch. 362; 94 L.J.Ch. 430; 133 L.T. 630; 41 T.L.R. 335; 69 Sol. Jo. 398]

Charity—Benefit to community—Gift to regiment to form fund for promotion of sport—Efficiency of the Army.

A testator by his will gave "the sum of £300 to form the nucleus of a regimental fund for the Carabiniers for the promotion of sport (including in that term only shooting, fishing, cricket, football, and polo)." He further directed that in certain events a further £2,000 should be given to the fund upon the same terms.

Held: it clearly being the intention of the testator to benefit the officers and men of the regiment by giving them an opportunity of indulging in healthy sport which might reasonably be supposed to encourage physical efficiency, an object which was for the benefit of the public, the gifts were valid charitable bequests.

Re Good (1), [1905] 2 Ch. 60, applied.

Notes. *I.R. Comrs. v. Yorkshire Agricultural Society*, [1927] All E.R. Rep. 536; *Wernber's Charitable Trust (Trustees) v. I.R. Comrs.*, [1937] 2 All E.R. 488; *Polish Combatants' Association, Ltd. v. I.R. Comrs.* (1949), 93 Sol. Jo. 543; *I.R. Comrs. v. City of Glasgow Police Athletic Association*, [1953] 1 All E.R. 747.

- A** Referred to: *Re Meyers, London Life Association v. St. George's Hospital*, [1951] Ch. 534; *Baddeley v. I.R. Comrs.*, [1953] 2 All E.R. 233.

As to charitable public purposes see 4 HALSBURY'S LAWS (3rd Edn.) 226-232, and for cases see 8 DIGEST (Repl.) 342 et seq.

Cases referred to:

- B** (1) *Re Good, Harington v. Watts*, [1905] 2 Ch. 60; 74 L.J.Ch. 512; 92 L.T. 796; 53 W.R. 476; 21 T.L.R. 450; 49 Sol. Jo. 445; 8 Digest 347, 278.
- (2) *Income Tax Special Purposes Comrs. v. Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 7 T.L.R. 657; 3 Tax Cas. 53, H.L.; 8 Digest (Repl.) 312, 1.
- C** (3) *A.-G. v. National Provincial and Union Bank of England*, [1924] A.C. 262; 40 T.L.R. 191; 68 Sol. Jo. 235; sub nom. *Re Tetley, A.-G. v. National Provincial and Union Bank of England*, 93 L.J.Ch. 231; 131 L.T. 34, H.L.; 8 Digest (Repl.) 397, 892.
- (4) *Re Nottage, Jones v. Palmer*, [1895] 2 Ch. 649; 64 L.J.Ch. 695; 73 L.T. 269; 44 W.R. 22; 11 T.L.R. 519; 39 Sol. Jo. 655; 12 R. 571, C.A.; 8 Digest (Repl.) 358, 370.
- D** (5) *Re Macduff, Macduff v. Macduff*, [1896] 2 Ch. 451; 65 L.J.Ch. 700; 74 L.T. 706; 45 W.R. 154; 12 T.L.R. 452; 40 Sol. Jo. 651, C.A.; 8 Digest (Repl.) 395, 879.
- (6) *Blair v. Duncan*, [1902] A.C. 37; 71 L.J.P.C. 22; 86 L.T. 157; 50 W.R. 369; 18 T.L.R. 194, H.L.; 8 Digest (Repl.) 394, 865.
- E** (7) *Houston v. Burns*, [1918] A.C. 337; 87 L.J.P.C. 99; 118 L.T. 462; 34 T.L.R. 219, H.L.; 8 Digest (Repl.) 396, 889.
- (8) *Re Mariette, Mariette v. Aldenham School Governing Body*, [1915] 2 Ch. 284; 84 L.J.Ch. 825; 113 L.T. 920; 31 T.L.R. 536; 59 Sol. Jo. 630; 8 Digest (Repl.) 327, 98.
- (9) *Re Stephens, Giles v. Stephens* (1892), 8 T.L.R. 792; 36 Sol. Jo. 713; 8 Digest (Repl.) 350, 300.
- F** (10) *Re Stratheden and Lord Campbell, Alt v. Stratheden and Lord Campbell*, [1894] 3 Ch. 265; 63 L.J.Ch. 872; 71 L.T. 225; 42 W.R. 647; 10 T.L.R. 574; 38 Sol. Jo. 602; 8 R. 515; 8 Digest (Repl.) 346, 277.

Adjoined Summons to determine whether gifts given by the will of the testator Lonsdale Richard Douglas Gray.

G The testator, by his will, gave the following legacies:

"the sum of £300 to form the nucleus of a regimental fund for the Carabiniers for the promotion of sport (including in that term only shooting, fishing, cricket, football and polo), the said fund to be called 'The Gray Fund,' and to be managed by a committee of two captains and three subalterns of the said regiment to be elected annually by the officers of the said regiment. The said committee shall have full control of the said fund, and the income thereof shall be divided annually as to one-half among the officers of the said regiment and as to the other half among the men thereof, in the promotion of such sport as aforesaid."

H Later in his will the testator said:

I "Whereas upon the death of my mother the Baroness Gray I may under a certain settlement made by my said brother and my mother become entitled to property of which I am not already possessed and I may become entitled to further property under other wills; now I direct that if and when the same or any part thereof shall fall into possession there shall be paid thereout the following legacies, namely: £2,000 further to the aforesaid sporting fund in the Carabiniers to be held upon the same terms as the former legacy thereto. . . ."

It was admitted that the regiment referred to in the will as the Carabiniers was still in existence under another name. The residuary legatees, however, contended that the legacies were not charitable gifts, and were, therefore, void as infringing the rule against perpetuities. This summons was taken out by the trustees of the will. A

B. J. Levenson for the trustees.

H. J. H. Mackay, for one of the residuary legatees, referred to *Income Tax Special Purposes Comrs. v. Pemsel* (2), *A.-G. v. National Provincial Union Bank of England* (3), *Re Nottage, Jones v. Palmer* (4), *Re Macduff, Macduff v. Macduff* (5), *Blair v. Duncan* (6), and *Houston v. Burns* (7). B

Dighton Pollock, for another residuary legatee.

Farwell, K.C., and *C. R. R. Romer*, for the treasurer and secretary of the fund which had been constituted to administer the gifts, referred to *Re Good, Harington v. Watts* (1), *Re Mariette, Mariette v. Aldenham School Governing Body* (8). C

ROMER, J.—I have to decide a question whether two legacies given by the testator are valid, or whether they have failed on the ground that they are given on trusts which are not charitable and will last beyond the limits allowed by the rule against perpetuities. D

The testator who describes himself as "of the 6th Dragoon Guards (the Carabiniers)" gives the first of the two legacies in these words :

"I give the sum of £300 to form the nucleus of a regimental fund for the Carabiniers for the promotion of sport (including in that term only shooting, fishing, cricket, football, and polo) the said fund to be called 'The Gray Fund' and to be managed by a committee of two captains and three subalterns of the said regiment to be elected annually by the officers of the said regiment. The said committee shall have full control of the said fund, and the income thereof shall be divided annually as to one half among the officers of the said regiment and as to the other half among the men thereof in the promotion of such sport as aforesaid." E

The second legacy is given in these words : F

"Whereas upon the death of my mother the said Baroness Gray I may under a certain settlement made by my said brother and my mother become entitled to property of which I am not already possessed and I may become entitled to further property under other wills ; now I direct that if and when the same or any part thereof shall fall into possession there shall be paid thereout the following legacies, namely : £2,000 further to the aforesaid sporting fund in the Carabiniers to be held upon the same terms as the former legacy thereto." G

It is contended on behalf of the persons entitled to the residue that those two legacies were given on trusts which are not charitable. It is said that the object of the testator was merely to encourage sport. If that were so, the gifts would, no doubt, be given on trusts which were not charitable : see *Re Nottage* (4) where a gift for purposes of encouraging yacht racing was held not to be a charitable legacy. But, in my opinion, it was not the object of the testator in the present case to encourage or promote either sport in general or any sport in particular. I think it is reasonably clear that it was his intention to benefit the officers and men of the Carabiniers by giving them an opportunity of indulging in healthy sport. It is to be observed that the particular sports specified were all healthy outdoor sports, indulgence in which might reasonably be supposed to encourage physical efficiency. That, I think, was his object even though he refers to the fund as the "sporting fund." This case, therefore, does not, in my opinion, fall within *Re Nottage* (4). H

I realise the truth of what *Eve, J.*, said in *Re Mariette v. Aldenham School Governing Body* (8) as to the natural inclination of the court, if possible, to give effect to a gift of this sort, and the danger of allowing that natural inclination to I

A induce one to disregard established principles, but I am glad to find that there is an established principle enabling me to give effect to the gifts in the present case. This principle was established by FARWELL, J., in *Re Good* (1) in 1905, a case that so far as I know has never been questioned in any way. In that case the testator gave his residuary personalty upon trust for the officers' mess of his regiment, to be invested and the income to be applied in maintaining a library for the officers' mess for ever, any surplus to be expended in the purchase of plate for the mess. According to the headnote of the report of that case it was held that the gift to maintain the library and to purchase plate for the officers' mess, being for a general public purpose tending to increase the efficiency of the army and aid taxation, was a good charitable bequest. It was also held that the gift might be supported as a "setting out of soldiers" within the meaning of those words in the statute of Elizabeth. But the judgment of FARWELL, J., was based primarily on the ground that the gift on trust for the maintenance of the library was a gift tending to increase the efficiency of the army, and he referred, only as a possible alternative ground, to the fact that the trust tended to aid taxation. In the course of his judgment he said, referring to the argument for the Attorney-General:

D "Now Mr. Parker has put his argument on two grounds. First, he says that anything that improves the efficiency of the army is charitable within the meaning of the Act, because it is for a public purpose—a purpose in which the public are interested. Secondly, he says that it also comes within the last clause of the preamble of the statute of Elizabeth: 'To aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers and other taxes,' because it will relieve the taxation of the public."

E He refers to the difficulties of applying the second part of that argument, because there was not at any time any provision made in the army regulations for payment by the government in aid of the library of the mess, and then he says this:

F "I have come to the conclusion that this is a good charitable gift on the first ground—namely, that it is a direct public benefit to increase the efficiency of the army, in which the public is interested, not only financially, but also for the safety and protection of the country. I desire to avoid any misunderstanding. I am not, of course, suggesting for a moment that the officers are objects of charity. It is the public, not the officers, that are benefited by better means being put at the disposal of the officers to enable them to make themselves efficient servants of the King for the defence of their country."

G After referring to the decision of KEKEWICH, J., in *Re Stephens* (9), and to the decision of ROMER, J., in *Re Lord Stratheden and Campbell* (10), he says:

H "I think it would be difficult to say that money given to be expended in terms in some specific way in order to increase the efficiency of a regiment in a particular mode is not a good charity. This gift, to my mind, does tend to increase the efficiency of the army by giving the officers greater opportunities of providing themselves with literature."

After dealing with the suggestion that the money might conceivably be applied in the purchase of books which were unlikely to increase the efficiency of the army, he says:

I "An officer is all the better equipped if he can speak several languages, and if he knows the history and geography of his own nation as well as many other nations, as well as being instructed in the military art. I should be sorry to have to hold that any gift which tends to educational equipment in that way is not a charitable gift."

It was suggested by counsel for the residuary legatees that FARWELL, J., based his judgment on the ground that the gift fell within one of the classes specified by LORD MACNAGHTEN in *Income Tax Special Purposes Comrs. v. Pemsel* (2), i.e., that it

came within the category of trusts for the advancement of education. It is quite clear, however, that FARWELL, J., was not proceeding on that ground, but that he decided the question on the ground that the gift tended to promote the efficiency of the army. In the case before FARWELL, J., the efficiency was mental efficiency, and the only distinction between that case and the present case is that in the present case the efficiency is physical as opposed to mental efficiency. But it is obviously for the benefit of the public that those entrusted with the defence of the realm should be, not only mentally, but also physically, efficient, and I think I am justified in coming to the conclusion that there is no difference between mental and physical efficiency for the present purpose.

That view is, I think, supported by the observations of EVE, J., in *Re Mariette* (8). In that case the testator bequeathed

“£1,000 to the governing body of Aldenham School for the purposes of building Eton fives courts or squash racket courts, or for some similar purpose that shall be decided by a majority of the house masters at the time of my death”

and

“£100 to the headmaster for the time being of Aldenham School upon trust to use the interest to provide a prize for some event in the school athletic sports every year agreed upon by the committee of the athletic sports.”

In point of fact the school itself was admittedly a charity, but EVE, J., did not decide the case on that ground. He pointed out that a gift to a charity may quite possibly be of such a character as not to be in itself a charitable gift, but he held that the gifts in the case before him were good because they promoted the efficiency of the bodies educated at the school. Referring to the importance of the development of the bodies as well as the minds of the boys, he said :

“The object of this charity is the education, in the widest sense, of boys and young men between the ages of ten and nineteen. No one of sense could be found to suggest that between those ages any boy can be properly educated unless at least as much attention is given to the development of his body as is given to the development of his mind.”

One might equally well say that no person can be trained to be an efficient and useful soldier unless as much attention is given to the development of his body as to the development of his mind. EVE, J., continues :

“It is necessary, therefore, in any satisfactory system of education to provide for both mental and bodily occupation, mental occupation by means of the classics and those other less inviting studies to which a portion of the day is devoted, and bodily occupation by means of regular and organised games. To leave 200 boys at large and to their own devices during their leisure hours would be to court catastrophe ; it would not be educating them, but would probably result in their quickly relapsing into something approaching barbarism.”

It appears to me that those remarks may also be applied to the education of soldiers. For these reasons I hold that the legacies of £300 and of £2,000 are good charitable gifts.

Solicitors : *Campbell, Hooper & Todd ; Fladgate & Co.*

[Reported by J. S. SCRIMGEOUR, Esq., Barrister-at-Law.]

LEMON AND ANOTHER v. AUSTIN FRIARS INVESTMENT TRUST, LTD.

[COURT OF APPEAL (Sir Ernest Pollock, M.R., Warrington and Sargant, L.JJ.), July 14, 1925]

[Reported [1926] Ch. 1; 95 L.J.Ch. 97; 133 L.T. 790; 41 T.L.R. 629; 69 Sol. Jo. 762]

Company—Debenture—"Income stock certificate"—Acknowledgment of company's indebtedness—Payment off of certificates out of net profits—Right to inspect register—Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 102 (1).

A company issued "income stock certificates" which certified that the company was indebted to the holder in a sum certain "payable only out of profits," and provided that three fourth parts of the net profits of the company in each year should be applied in paying off the income stock *pari passu*. In conditions endorsed on each certificate the company undertook to keep a register of the certificates, and provision was made for the transfer of a certificate from one holder to another and the registration of transfers.

Held: in the Companies Acts the word "debenture" was used without any precise or narrow definition; the main characteristic of a debenture was that it acknowledged indebtedness on the part of the company; the certificates in question did acknowledge such indebtedness, and although they contained special provisions, e.g., the funds out of which the company's present indebtedness would be satisfied by payment in the future, those features were irrelevant for the present purpose; and, therefore, the certificates were debentures within s. 102 (1) of the Companies (Consolidation) Act, 1908, and the register of the certificates must be open to the inspection of any registered holder of a certificate.

Notes. The Companies (Consolidation) Act, 1908, was repealed by the Companies Act, 1929. Section 102 of the Act of 1908 has now been replaced by s. 87 of the Companies Act, 1948.

Considered: *R. v. Findlater*, [1939] 1 All E.R. 82. Referred to: *Knightsbridge Estates Trust, Ltd. v. Byrne*, [1940] 2 All E.R. 401.

As to what is a debenture see 6 HALSBURY'S LAWS (3rd Edn.) 466, and for cases see 10 DIGEST (Repl.) 763. For Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Cases referred to:

- (1) *Levy v. Abercorris Slate and Slab Co.* (1887), 37 Ch.D. 260; 57 L.J.Ch. 202; 58 L.T. 218; 36 W.R. 411; 4 T.L.R. 34; 10 Digest (Repl.) 763. 4949.
- (2) *British India Steam Navigation Co. v. I.R. Comrs.* (1881), 7 Q.B.D. 165; 50 L.J.Q.B. 517; 44 L.T. 378; 29 W.R. 610, D.C.; 6 Digest 500, 3172.
- (3) *Edmonds v. Blaina Furnaces Co., Beesley v. Blaina Furnaces Co.* (1887), 36 Ch.D. 215; 56 L.J.Ch. 815; 57 L.T. 139; 35 W.R. 798; 7 Digest 31, 155.

Motion by the plaintiffs, who were solicitors, to restrain the defendant company, Austin Friars Investment Trust, Ltd., from interfering with their statutory right to inspect the register of the holders of income stock certificates kept by the company.

The company was incorporated in January, 1925, as a company limited by shares under the Companies Acts, its objects being (inter alia) to purchase, subscribe for, underwrite, or otherwise acquire, hold, sell, and deal in stocks, bonds, debentures, and other securities. The plaintiffs were the registered holders of a certificate, part of a total issue of £1,400,000 made in January, 1925, of income stock certificates, signed by the secretary of the company by order of the board of directors, by which the company acknowledged its indebtedness to the plaintiffs in the

sum of £2,100 "payable only out of profits." The certificate provided that, within two calendar months after the approval of the accounts of the company for each year in annual general meeting, three fourth parts of the net profits of the company of that year, or a sum equal thereto, should be applied in or towards paying off the income stock *pari passu*. It further provided that, as and when the company became bound to pay to any holder in respect of his certificate, the company should give him notice stating the amount to be paid and the time and place of payment, and stated that it was issued subject to and with the benefit of the conditions endorsed thereon. The conditions provided (*inter alia*) that the income stock was to rank *pari passu*, and that a register of the certificates should be kept at the company's offices, where the names and addresses, and descriptions of the registered holders, and particulars of their certificates would be entered. Condition 9 provided that the holders of three-fourths in value of the certificates for the time being outstanding should be empowered to sanction any modification of the rights of the holders, which should be proposed by the company, and any compromise or arrangement proposed to be made between the company and the certificate holders, and that the same were to be binding on all the holders of that series. The plaintiffs, having requested and been refused leave to inspect the register, issued a writ asking for a declaration that the certificates in question were debentures within the meaning of s. 102 of the Companies (Consolidation) Act, 1908, and for an injunction restraining the company from interfering with the applicants in the exercise of their statutory right to inspect the register, and now moved the court for an order in the terms of the writ.

By s. 102 (1) of the Companies (Consolidation) Act, 1908 :

"Every register of holders of debentures of a company shall, except when closed in accordance with the articles during such period or periods (not exceeding in the whole thirty days in any year) as may be specified in the articles, be open to the inspection of the registered holder of any such debentures, and of any holder of shares in the company, but subject to such reasonable restrictions as the company may in general meeting impose, so that at least two hours in each day are appointed for inspection, and every such holder may require a copy of the register or any part thereof on payment of sixpence for every one hundred words required to be copied."

Sir Patrick Hastings, K.C., Jenkins, K.C., G. Ansley, and A. P. Vanneck, for the plaintiffs, referred to Levy v. Abercorris Slate and Slab Co. (1).

Owen Thompson, K.C. and Arthur Sims, for the company, referred to LORD WRENBURY ON COMPANIES ACTS (10th Edn.), p. 232, s. 93, and PALMER'S COMPANY PRECEDENTS (12th Edn.) pp. 2 and 3.

P. O. LAWRENCE, J., held that these income stock certificates were debentures within the meaning of s. 102 of the Companies (Consolidation) Act, 1908, and that the register, which was kept in pursuance of the conditions endorsed on those certificates was a register of holders of debentures of a company within the meaning of that section. Various objections had been taken on behalf of the company to the suggestion that a certificate of this kind was a debenture. The first was that it did not purport on the face of it to be a debenture. That was wholly immaterial if in fact the income stock certificate was a debenture. The issue was of certificates which fulfilled the conditions of debentures, and the mere fact that the company did not call this a debenture had no bearing on the case if, in fact, it was a debenture. The certificate was not under seal, but that again was not of itself sufficient to cause it not to be a debenture. The main argument that had been addressed to his Lordship was that the certificate did not purport to charge or mortgage the undertaking, or any specific assets, of the company, but only purported to charge profits as and when they arose, and only in the event of their arising, and, therefore, there was no kind of charge unless profits come into existence.

- A Even if there had been no charge at all, it would have been immaterial, because for the reasons stated, his Lordship thought that the certificates would have been debentures even without any charge. To his mind it clearly contained a charge on three-fourths of the profits as and when those profits arose, and those profits were the produce of the trading of the company, and, therefore, an asset of the company. The fact that a charge might or might not be valuable did not seem to help in
- B the contention that these were not debentures. It is further said that there was no acknowledgment of a debt simpliciter so as to bring it within the definition given by CHITTY, J., in *Levy v. Abercorris Slate and Slab Co.* (1). That was true, but there was an acknowledgment of indebtedness to the extent that the indebtedness arose as and when profits were earned and then there was an acknowledgment that the sum contained in the certificate would be paid to the registered holder out of
- C those profits. That was an acknowledgement of indebtedness which was one of the indicia of a debenture.

Counsel agreed to treat this motion as the trial of the action, and the company appealed.

- Upjohn, K.C., Owen Thompson, K.C., and Arthur Sims, for the company.
- D Sir Patrick Hastings, K.C., Arnold Jolly, and G. Ansley, for the plaintiffs.

SIR ERNEST POLLOCK, M.R.—This appeal must be dismissed. The point arising for our decision is whether or not the document to which I will refer in a moment is or is not a debenture within the meaning of the Companies (Consolidation) Act, 1908. That section says :

- E “Every register of holders of debentures of a company shall, except when closed in accordance with the articles during such period or periods (not exceeding in the whole thirty days in any year) as may be specified in the articles, be open to the inspection of the registered holder of any such debentures. . . .”

The action has been brought on the part of two holders of such debentures to have it determined that they are entitled, pursuant to that section, to have an inspection

F of the register of holders of these documents, of which these two persons who are the plaintiffs are some. Counsel for the company pointed out that we have not to come to a conclusion by way of definition as to what a debenture is. What has to be determined is whether or not the document which has been issued to the plaintiffs is to be deemed a debenture within the meaning of s. 102.

- G Our attention has been called to what is a matter of interest, that this word “debenture” is one very old in use in the English language. Some account of it is to be found in the opening words of cl. 1 of Part III of SIR FRANCIS PALMER’S *COMPANY PRECEDENTS* (12th Edn.). Again, CHITTY, J., in *Levy v. Abercorris Slate and Slab Co.* (1) said that he had had his attention called to the old uses of the word “debenture” (37 Ch.D. at p. 264). SIR FRANCIS PALMER in his book has
- H collected a number of characteristics, some of which are to be found in various debentures. It is not essential that all these characteristics should be found, but they are tabled on pp. 3 and 4 of the volume I have already referred to, and some nine characteristics are pointed out as not uncommon in some debentures. But these characteristics are none of them essential, that is to say, it is not essential that they should all be present, and some are almost the antithesis the one of
- I the other. For instance, sometimes a number of debentures is issued as a series with a register of the series ; on the other hand, a debenture is sometimes issued to one person only as a single debenture. That single debenture is, perhaps, less common in the present day than it was earlier. At any rate, there are a number of characteristics which I think are summarised in the passage I have referred to, but whatever the characteristics which you would expect to find or may find in the debentures, the root meaning of the word is “indebtedness.”

The present document relates to an issue of £1,400,000 of income stock, payable out of profits, and it is named an income stock certificate. On its face it shows

that it is one of a series of numbers, because it bears its number, and on the back, among the conditions which are held to be applied to it, the condition is recorded that it is one of a series of like certificates, and that a register of the certificates will be kept at the company's registered office, wherein are to be entered the names, addresses and descriptions of the registered holders and particulars of the certificates held by them respectively. But on the primary point that is essential, it records indebtedness in these words:

"This is to certify that the above named company is indebted to Messrs. Brighten and Lemon or other registered holder for the time being of this certificate in the sum of £2,100 payable only out of profits as hereinafter mentioned."

LINDLEY, L.J., in *British India Steam Navigation Co. v. I.R. Comrs.* (2), says he does not know of any satisfactory legal definition which has been given of a debenture. He says that the fact that a document is called a debenture is something to which possibly some attention should be given, but it is not essential. The actual decision in that case was that a document which was called a debenture, recorded indebtedness, and was one of a series, was to be dealt with as a debenture under the Stamps Acts. But he says this:

"Now, what the correct meaning of 'debenture' is I do not know. I do not find anywhere any precise definition of it. We know that there are various kinds of instruments commonly called debentures. You may have mortgage debentures, which are charges of some kind on property. You may have debentures which are bonds; and, if this instrument were under seal, it would be a debenture of that kind. You may have a debenture which is nothing more than an acknowledgment of indebtedness."

That LINDLEY, L.J., is right in what he says there appears to me to be established by the passages which are to be found in SIR FRANCIS PALMER'S COMPANY PRECEDENTS and in other decisions which have been given in respect of particular documents. I do not refer again to the cases which were cited before CHITTY, J., but in *Edmonds v. Blaina Furnaces Co.* (3) he says:

"In determining what is or is not a debenture within the section I am not bound to hold that an instrument is a debenture because it is called a debenture by the company issuing it, nor to hold it is not a debenture because it is not so called by the company. I must look at the substance of the instrument itself, and, without the assistance of any precise legal definition, form the best opinion I can whether the instrument does or does not fall within the exemption of the section."

Taking those two passages from LINDLEY, L.J., and CHITTY, J., I look at this document of which I have already stated that it is a certificate of indebtedness of the company to these persons, who are described as the registered holders for the time being of the certificate, and I find it also provides for a copy of the register and for transfers which are to be made from one holder to another, and the registration of the transfers when they have been completed. It is true that by cl. 2 of the terms on the face of the certificate it is provided that the source from which the repayment is to be made of this indebtedness is out of the annual profits of the company—three-fourth parts of the net profits as and when those profits have been made and have been certified to exist by the auditors, whose certificate is to be final. Counsel for the company says the fact that there is indebtedness may be an indication that this document is a debenture, but when you have got the mode or source of payment narrowed down to three-fourths of the actual net profits, which never may be made, and no other source indicated, there is no debenture, because in ordinary parlance one would expect to find a charge upon the assets of the company, or some method of payment less narrow than that which is indicated

- A** in this certificate. I do not accept that view, because it appears to me from what I have already said that the primary qualification of a debenture is fulfilled, namely, that it is an acknowledgment of indebtedness, and while the fact that the possibility of repayment is limited to three-fourths of the net profits may make the expectation of repayment less than it would otherwise be, it does not prevent it being the fact that there is a source from which this recorded indebtedness may be resolved.
- B** SIR FRANCIS PALMER, in a catalogue of the characteristics of a debenture, says this (*COMPANY PRECEDENTS*, Part III, Debentures, p. 3): "A debenture is, as a general rule, one of a series." This document is certainly one of a series. The term "debenture" is applied as a general rule to instruments issued by a company. This instrument is issued by a company. It is not issued, it is true, under seal, and a debenture usually provides for the payment of a principal sum or a principal
- C** debt, but that, as he points out, is not essential, for there are millions of debentures which have not got an actual provision for repayment because they are perpetual or permanent debentures. Again, PALMER says (p. 4): "A debenture usually provides for payment of interest." This does not. Further, "a debenture contains generally a charge on the undertaking of the company," but from the cases that are referred to it is quite plain that there are a number of debentures where there is
- D** no such charge, and, indeed, one must be careful not to confuse a debenture with a mortgage debenture. It is also said that the word "debenture" is not used. Coming back again to s. 102 of the Companies Act I think it was intended to give to these persons whose names are recorded in the register of debentures an opportunity of obtaining the information that they need, and that on the whole the word "debenture" is intended to be used without a precise or narrow definition.
- E** In the present case I think that cl. 1 and 2 on the face of this stock certificate clearly indicated an instrument which in its true nature is a debenture. I may leave out cl. 3 and 4, because they only deal with the mode of repayment which is to be made out of the profits, but the last clause is:

F "This certificate is issued subject to and with the benefit of the conditions endorsed upon it which are to be deemed part of it."

- Those conditions, as I have already pointed out, refer to the register, to the transfers, and to a number of other matters which are certainly, not to put it too high, not uncommonly given in the case of registered mortgage debentures of a company. I agree with counsel for the company that what you find in condition 8 does not make what is otherwise not a debenture into a debenture; and I do not
- G** think it is necessary for us to determine whether or not in the case of a liquidation there would be a right on the part of the holders of these stock certificates to repayment as a debt in the liquidation. But it appears to me that the very intention of this instrument is to record indebtedness, to record the source from which that indebtedness is to be liquidated, and to show that the persons who are holders of the certificates are holders in a series and are to be paid *pari passu*, and that
- H** their names are to be recorded in a register. It appears to me, therefore, that this instrument does contain a number of the characteristics of a debenture, and that we ought to hold affirmatively that it is a debenture within the meaning of s. 102. The appeal must be dismissed with costs.

- I** **WARRINGTON, L.J.**—I am of the same opinion. This company has issued certain documents which they call income stock certificates, each one of which purports to be one of a series of like certificates for an amount not exceeding in the aggregate at any one time £1,400,000. The company bind themselves by the conditions on the back of the certificate to keep a register of the certificates at the company's registered office, wherein would be entered the names and addresses and descriptions of the registered holders and the number of certificates held by them respectively. The plaintiffs are the holders of one of these certificates for the sum of £2,100. They have applied to the company for the inspection of the register which the company thus binds itself to keep and that inspection had been

refused on the ground that the document is not a debenture within the meaning of s. 102 of the Companies Act, 1908, and the question is whether the document is or is not such a debenture. The learned judge has decided that it is, and I agree with him. A

It has been said by a wiser man than myself that it is impossible to give an exhaustive definition of the word "debenture," and I certainly do not propose to incur the reproach of venturing where wise men fear to tread, and, therefore, I shall not attempt to give any definition of the word "debenture." But there are certain characteristics which, if they are found in a document, have usually in legal transactions and commercial transactions been held to constitute that document a debenture. One of those is that the document is an acknowledgment of indebtedness, and I look to this document to see whether it does or does not contain at least that characteristic. I find that it does. It certifies that the above-named company "is indebted to the plaintiff or other registered holder of this certificate in the sum of £2,100." That is a clear acknowledgment of the indebtedness of the company in that sum. It is quite true that the document contains special provisions with regard to the funds out of which that indebtedness will be satisfied by payment: but that, in my opinion, is utterly irrelevant to the question that we have to determine. If one finds that a document of this kind contains an acknowledgment of the indebtedness, it satisfies at all events that part which was thought to be sufficient by CHITTY, J., and was said in express terms to be sufficient by LINDLEY, L.J., and I need not express my own opinion. On these authorities it is obviously sufficient to constitute the document a debenture, and on that simple ground, in my opinion, the judgment of LAWRENCE, J., is correct. B C D

It is unnecessary to decide, and I do not propose to express an opinion on the other questions which have been raised in the course of the argument. One of these is whether this is a debt which in the case of a winding-up would have to be paid although there were no profits out of which it was payable. That may provide a difficult and interesting question if and when it arises, but it has not arisen, and I, therefore, express no opinion upon it, nor do I express any opinion on the true construction and effect of cl. 8 of the conditions, which enables the company to give notice of their intention to pay off what remains owing at the expiration of the notice to pay. That, again, gives rise to interesting questions of law. But for the purpose of this decision it is enough, in my opinion, to say, as I do, that this document contains an acknowledgment of indebtedness and, therefore, ranks as a debenture within the meaning of s. 102 of the Companies Act, 1908. I agree that the appeal fails and must be dismissed with costs. E F G

SARGANT, L.J.—I am of the same opinion. The point is a short one, and I will add very little to what has been already stated. It is true that this document is not called on the face of it a debenture. I should like to make the observation that not only is the name not conclusive, but that while I think it would be difficult for a company to put on the face of these documents a statement that it was a debenture and then to say that it was not a debenture, I do not think there is the same difficulty in holding that something which is not called a debenture by the company is a debenture, inasmuch as there are certain obvious reasons, physical and otherwise, which might induce a company not to attach the name "debenture" to it. I should like also to add that the name given to this document by the company of an "income stock certificate" has no meaning in law at all, so far as I can see. This is a limited company. A limited company may have share capital and may have debenture capital or loan capital. Share capital may be converted into stock, and then stock certificates are issued in the place of share certificates, and the capital ranks in the form of shares. But this is certainly not a stock certificate; there are no shares which have been converted into stock, the name given, "income stock certificate" is, on the face of it, absolutely meaningless, and, therefore, it seems to me that no importance is to be attached to the particular H I

A designation adopted by the company inasmuch as that particular designation is one that has no definite meaning at all.

In the present case is there, in the first place, an acknowledgment of indebtedness? I think that is the first and principal characteristic of a debenture. Counsel for the company has strenuously contended that this is not an acknowledgment of indebtedness because, he says, the acknowledgment that is there is coupled with

B the restriction to payment out of profits, which prevents it being an indebtedness. But surely that is altogether to give the go-by to the common doctrine that you may have a debt debitum in praesenti solvendum in futuro, and which may not only be payable in the future, but may be payable on a contingency. Here the language is, to my mind, absolutely clear and specific. The certificate begins by saying:

C "This is to certify that the above-named company is indebted to [a certain person] or to other the holders" and then follow the subsequent words "payable only out of profit as hereinafter mentioned." I should find it difficult to frame clearer words for the purpose of expressing that there is an immediate debt, but that that debt is only to be payable in the future and on a contingency. There are indications to the same effect in the conditions endorsed on the document itself, because in condition 8 there is power in the company at any time

D "to give notice in writing to pay off the moneys thereon or any part thereof and upon the expiration of three calendar months from such notice being given the principal moneys payable hereunder then due or unpaid or any part thereof shall be payable."

E They are, therefore, dealing with these moneys as moneys which are presently due although the payment of them is postponed. Then there is a question which it is not necessary for us to decide, whether the moneys would be payable in a winding-up. Counsel thought it essential for his arguments to contend, as I understood it, that the moneys would not be payable in a winding-up, inasmuch as they were only payable out of profits, and profits necessarily cease when a winding-up begins.

F But, in my judgment, the other construction is at least equally attractive even as a matter of language, namely, that there is a present debt, and while a company is a going concern that debt is only to be paid out of profits. Certainly, for myself, I should find it a very difficult construction to adopt to say that the company immediately after having received £2,100, which I understand was paid for this certificate, could by passing a resolution to wind-up, absolutely and entirely deprive the holders of this document of any right whatever to receive any payment in respect of it. Besides that acknowledgment of indebtedness in those clear terms, it seems to me the principal matter to look at is that there is no doubt that this document does contain conditions which are in the ordinary case indicia of a debenture.

H I do not think that anybody, not looking at what it is called on the face of it and simply paying attention to the real effect of it, could have much doubt that this is a debenture of a limited company. Otherwise what is it? As I have said, it is nothing known to the law, unless it is a debenture. It is certainly not a promissory note, nor a stock certificate. I think the only category into which this can be placed, having regard to the ordinary considerations, is the category of a debenture. I must say for myself I am startled at the contents of the document, because it is such an odd document from the commercial point of view. Here you have the acknowledgment of a debt and an arrangement under which that debt is payable over a great number of years, perhaps without any interest payable in the meantime at all. It was a document which was not known to SIR FRANCIS PALMER in the earlier editions of his work, and seems first to have been given as a precedent in the ninth edition. I suppose, as you find it in the ninth edition, and as that is repeated in subsequent editions, it is a document of some commercial meaning and value, but for my part it seems quite extraordinary in its result. However that may be, here we do find on the face of it that which acknowledges

a debt. I think I should say there is this further indicia of its being a debenture, that it does, in my judgment, contain a charge on property though it is only a charge on the profits of the company to arise while the company is going on. The profits of the company until they have been declared and distributed as dividends are, of course, part of the property of the company, and this is obviously a document which entitled the holder to enforce the charge against the fractional proportion of the profits of the company as and when those profits shall be ascertained. I think the learned judge was quite right, and the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Brighten & Lemon; J. D. Langton & Passmore.*

[Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.]

Re FLEETWOOD'S POLICY

[CHANCERY DIVISION (Tomlin, J.), October 22, 1925]

[Reported [1926] Ch. 48; 95 L.J.Ch. 195; 135 L.T. 374]

Husband and Wife—Assurance policy by husband for benefit of wife—Wife to benefit if surviving husband—Provision for loans to husband on security of policy—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 11.

By a policy of insurance insurers agreed to pay £500 to the wife of the insured on proof of his death. The policy contained certain options which the insured could exercise at the end of twenty years from the date of the policy if he was still living. One option, which the insured in fact sought to exercise, was that he should receive in cash the cash value of the policy, with profits, and discontinue the policy. There was also a provision in the policy under which cash loans might be obtained by the insured on the security of the policy.

Held: the facts that the policy was expressed to be for the benefit of the wife in a certain event only, i.e., the death during her lifetime of the husband, and provided for a right in the insured to have cash loans made to him which he might be entitled to exercise as against the wife did not prevent the policy being effected by the insured "on his own life, and expressed to be for the benefit of his wife" within s. 11 of the Married Women's Property Act, 1882, and, therefore, a trust had been created in favour of the wife who would become entitled to the fund at the death of her husband.

Re Equitable Life Assurance Society of the United States and Mitchell (1) (1911), 27 T.L.R. 213, applied.

Notes. Considered: *Cousins v. Sun Life Assurance Society*, [1932] All E.R. Rep. 404; *Re Gladitz, Guaranty Executor and Trustee Co. v. Gladitz*, [1937] 3 All E.R. 173.

As to insurance by a spouse for the other's benefit see 19 HALSBURY'S LAWS (3rd Edn.) 845-848, and for cases see 27 DIGEST (Repl.) 134 et seq. For Married Women's Property Act, 1882, see 11 HALSBURY'S STATUTES (2nd. Edn.) 799.

Cases referred to:

- (1) *Re Equitable Life Assurance Society of United States and Mitchell* (1911), 27 T.L.R. 213; 27 Digest (Repl.) 136, 988.
- (2) *Re Ioakimidis' Policy Trusts, Ioakimidis v. Hartcup*, ante p. 164; [1925] Ch. 403; 95 L.J.Ch. 24; 133 L.T. 796; 41 T.L.R. 486; 69 Sol. Jo. 662; 27 Digest (Repl.) 137, 995.

- A (3) *Re Engelbach's Estate, Tibbetts v. Engelbach* [1924] 2 Ch. 348; 93 L.J.Ch. 616; 130 L.T. 401; 68 Sol. Jo. 208; 29 Digest 422, 3288.
- (4) *Cleaver v. Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147; 61 L.J.Q.B. 128; 66 L.T. 220; 56 J.P. 180; 40 W.R. 230; 8 T.L.R. 139; 36 Sol. Jo. 106, C.A.; 27 Digest (Repl.) 136, 989.
- B (5) *Re Suse and Sibeth, Ex parte Dever* (1887), 18 Q.B.D. 660; 56 L.J.Q.B. 552; 3 T.L.R. 400, C.A.; 5 Digest 680, 6011.

Adjourned Summons taken out by a husband asking that a sum of money representing the cash value of a policy of life assurance standing in court should be paid out to him.

C On Nov. 19, 1904, the husband, Charles Fleetwood, effected a policy of assurance on his life with the New York Life Insurance Co. for the sum of £500. By the terms of the policy the company "agrees to pay £500 sterling to Louisa Ann Fleetwood . . . the wife of the insured, or in the event of her prior death to the insured's executors, administrators or assigns" upon receipt and approval of proofs of the insured's death. The premium payable under the policy was the annual sum of £14 19s. The policy conferred the following right to participate in the profits of the company :

E "If the insured is living on Nov. 19, 1924, which is the end of the twenty year accumulation period of this policy, and if the premiums have been duly paid to that date and not otherwise, the company will then apportion to this policy its share of the accumulated profits and the insured shall then have the option of one of the following six accumulation benefits: (1) Receive the profits in cash and continue this policy by payment of the original premium ; or (2) receive the profits converted into an annual income for life and continue the policy by payment of the original premium ; or (3) receive the profits converted into additional paid-up insurance, subject to evidence of insurability satisfactory to the company, and continue this policy by payment of the original premium ; or (4) receive the entire cash value, as stated below, converted into an annual income for life, and discontinue this policy ; or (5) receive the entire cash value, as stated below, converted into paid-up insurance payable at death and discontinue this policy."

G The company guaranteed that the entire cash value of the policy at the end of the accumulation period should be £174, and in addition the cash profits apportioned by the company. All premiums were duly paid up to Nov. 19, 1924, and on Sept. 22, 1924, the company sent the insured a notice that the cash profits apportioned to the policy, if withdrawn in cash, would be £113 15s. 7d. Shortly afterwards the insured wrote to the company exercising his option to be paid in cash the guaranteed value of the policy together with the apportioned profits. On H Nov. 19, 1924, the company sent to the insured a cheque for £288 15s. 7d. The cheque was made payable to the insured and his wife jointly. The insured and his wife had some years earlier separated by mutual consent, and the insured returned the cheque to the company asking for payment by a cheque drawn in his favour alone. The company refused to pay the insured the policy money, unless his wife would join in giving a receipt, and ultimately the company paid the I sum of £288 15s. 7d. into court to a ledger account intituled "In the matter of the policy No. 1,133,578 of the New York Life Insurance Co. on the life of Charles Fleetwood."

Greenland, for the husband, referred to *Re Ioakimidis' Policy Trusts* (2), *Re Engelbach's Estate* (3), *Cleaver v. Mutual Reserve Fund Life Association* (4), *Ex parte Dever* (5), *Re Equitable Life Assurance Society of the United States and Mitchell* (1).

J. E. Harman for the wife.

TOMLIN, J.—The question that I have to decide in this case is as to the respective rights of a husband and a wife in a sum in court of £288 15s. 7d. representing the proceeds of a policy taken out in the New York Life Insurance Co. on Nov. 19, 1904, by the husband. A

The policy is in a form used by the insurance company to meet either of two possible cases, namely, the case where there is a beneficiary designated in the policy, or the case where there is no beneficiary designated. I gather that from the statement at the bottom of the second page of the policy under the heading "instalment benefits," where it says : B

"If a beneficiary is designated herein, the insured may change the payment of the proceeds of this policy from payment in one sum, as provided on the first page hereof, to payment by annual instalments," C

so that it clearly contemplates that a policy in this printed form may be used for one or other of the two alternatives. It is quite plain from the terms of the policy that it is a policy on the life of the husband, and that the proceeds will belong to the wife if she survives the husband, but otherwise to the husband. [His LORDSHIP read the clause dealing with participation in the profits of the company set out above and continued:] There follows in the policy a statement that the company at the end of the accumulation period will send a written statement of the results under each of the six accumulative benefit options ; and the company guarantees the entire cash value of the policy at the end of the accumulation period at £174, and in addition thereto the cash profits then apportioned by the company. There is also a provision in the policy under which cash loans may be obtained by the insured on the security of the policy in accordance with the table which is set out. On Nov. 19, 1924, being the date of the expiration of the accumulation period, both husband and wife were still living, and the husband exercised the option conferred on him by the policy in the fifth alternative, that is to say, he elected to "receive the entire cash value, as stated below, in cash, and discontinue this policy." On that footing there was payable by the company some £288. The company, I understand, were prepared to pay that sum to the husband and wife jointly. Unfortunately, differences have arisen between husband and wife. They are living apart, and they have been unable to agree as to the adjustment of their rights under the policy, and are not prepared jointly to accept payment from the company. The company has, therefore, paid the fund into court, and this application is made by the husband in the presence of the wife to have it determined what are their respective rights in the fund. D

On the part of the husband it is said that while it is true that the policy is expressed to be for the benefit of the wife in the event of her surviving the husband, yet there are provisions in the policy which in terms confer upon the husband the absolute right to destroy his wife's interest. His contention is that, if at the end of the accumulation period he and his wife are both still living, he is free to exercise one or other of the several options provided for by the policy ; and that, if by so doing, he puts an end to the policy, his wife's interest under the policy ceases, and he is entitled to put into his own pocket any benefit which results from his exercise of the particular option. The wife, on the other hand, says that as she is, although contingently only, a beneficiary under the policy, the husband must, when he exercises one of the options, be exercising it for her benefit, and that either she is to-day entitled to take the sum received as the result of the exercise of this option, or, alternately, that sum must be held in medio until the happening of the event which determines finally whether the husband or the wife is the person entitled to the fund. E

A number of cases have been cited to me, and my attention has also been called to s. 11 of the Married Women's Property Act, 1882. In my view, that section applies to this policy. The policy is, in the terms of the section, a policy of assurance effected by a man on his own life, and expressed to be for the benefit F

A of his wife. It is true it is expressed to be for the benefit of his wife in a certain event only, but the fact that the benefit is of a limited or contingent character does not prevent it from being a benefit within the meaning of this Act. I think, therefore, that the policy creates a trust in favour of the wife, but only in the terms of the trust. That throws one back upon the policy for the purpose of determining what in fact is the extent of the trust created for the wife's benefit.

B Among the cases which have been cited to me there is one which is relevant to the question which I have to decide: *Re Equitable Life Assurance Society of the United States and Mitchell* (1), which was decided by SWINFEN EADY, J. In that case a policy had been effected by the husband, and it was expressed to be a contract for the payment of the policy money by the society to the wife for her sole use, if she should be living at a time which on construction was held to be the death of the husband. If she was not then living, the policy enured for the benefit of the children of the husband, and, if there were no children, for the benefit of the husband's estate. The policy was framed, as I gather from the report, upon lines very similar to the policy in the present case. Thus there was a provision under which at a certain period the insured had the right to exercise one of a number of options much on the lines of the six accumulation benefits here. In that case it appeared that the husband, being in financial difficulties, assigned to a trustee for creditors all his property in terms which were wide enough to cover his interest in the policy, and the trustee at the given period claimed the right to exercise one of the options under the policy. The wife was then dead, but there was a daughter living who claimed the benefit of the policy. The society proceeded upon the footing that the first option was exercised. This, corresponded more or less with the fifth option here and gave the right to receive the cash value of the policy, and on that footing the society paid a sum into court. SWINFEN EADY, J., held on the construction of the policy that it was within s. 11 of the Married Women's Property Act, and that it was not the less a policy for the benefit of the wife and children because in case of their death in the lifetime of the insured the policy money was to be for the insured's benefit. The report continues:

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"In his Lordship's opinion the contention for the infant, that the options could only be exercised for the benefit of the persons for whom the trust was created, was the true one. So long as any objects of the trust remained unperformed the trusts could not be defeated, and the options must be exercised in the best manner for the benefit of those entitled."

G

In other words, SWINFEN EADY, J., held that, while under the policy certain powers and options were to belong to the insured, yet, as there was a beneficiary under the policy in addition to the insured, all the powers and options of the insured under the policy must be treated as exercised by him either as trustee or as absolute owner, according as he or the beneficiary ultimately became entitled to the benefit of the policy.

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I feel great difficulty in finding anything in this policy which enables me to distinguish it from the policy in the case before SWINFEN EADY, J. Counsel for the husband has pressed upon me that the presence in this policy of provisions for cash loans makes all the difference. I am unable to distinguish the case on that ground. It seems to me that the presence in the policy of powers which the insured may or may not be entitled as against the beneficiary to exercise, does not enable me to construe this policy as one which, in respect of these options, gives the insured the right to destroy the rights of the beneficiary. It may be that if he had done his duty to the full, he would have exercised the option conferred upon him by electing to have the policy converted into a paid-up insurance payable at his death, but he has not done so. In the result, I think that neither of the parties is to-day entitled to the fund. The fund must remain in court and

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be accumulated until either the parties come to some agreement or one or other of them dies. A

Solicitors: *Walter Crimp & Co.*, for *Stanley Richards & Norrington*, Paignton; *Gibson & Weldon*, for *A. C. Howard*, Paignton.

[Reported by L. MORGAN MAY, ESQ., Barrister-at-Law]

FAGAN v. GREEN AND EDWARDS, LTD. C

[KING'S BENCH DIVISION (Horridge, J.), October 28, 29, 30, November 9, 1925]

[Reported [1926] 1 K.B. 102; 95 L.J.K.B. 363; 134 L.T. 191; 70 Sol. Jo. 185]

Carriage of Goods—Special contract—Carrier “not responsible for fire”—Carrier “not under any circumstances responsible for article which shall exceed value of £10”—Goods destroyed by fire—Negligence of carrier's servants—Liability of carrier. D

The defendants, who were furniture removers and warehousemen, contracted to carry the plaintiff's goods from L. to O., the contract being subject to certain conditions, one of which provided that “the company will not be responsible for fire,” and another provided: “The company will not under any circumstances be responsible for any article which shall exceed the value of £10 . . .” The goods, which were loaded on a motor-van, were destroyed while in transit by fire, which was occasioned by the negligence of the defendants' servants. In an action by the plaintiff to recover the value of the lost goods. E

Held: that as the defendants were bailees only and not common carriers, and, therefore, only bound to take reasonable care, the only thing they could be liable for was negligence, and so the condition must be construed as exempting them from liability for fire arising from their own negligence, as otherwise the condition would be of no effect. F

Turner v. Civil Service Supply Association, Ltd. (1), [1926] 1 K.B. 50, applied. G

Re Polemis and Furness, Withy & Co. (2), [1921] 3 K.B. 560, distinguished.

Per HORRIDGE, J.: The words “under any circumstances” would cover the negligence of the defendants' servants, and, therefore, the defendants were also protected by that clause.

Notes. Referred to: *Calico Printers' Association, Ltd. v. Barclays Bank* (1931), 145 L.T. 51; *Aslan v. Imperial Airways, Ltd.*, [1933] All E.R. Rep. 567; *Bontex Knitting Works, Ltd. v. St. John's Garage*, [1943] 2 All E.R. 690; *Alderslade v. Hendon Laundry, Ltd.*, [1945] 1 All E.R. 244. H

As to special contracts of carriage see 4 HALSBURY'S LAWS (3rd Edn.) 154–157, and for cases see 8 DIGEST (Repl.) 41 et seq.

Cases referred to:

- (1) *Turner v. Civil Service Supply Association, Ltd.*, [1926] 1 K.B. 50; 95 L.J.K.B. 111; 134 L.T. 189; 8 Digest (Repl.) 5, 5. I
- (2) *Re Polemis and Turness, Withy & Co.*, [1921] 3 K.B. 560; sub nom. *Polemis v. Furness, Withy & Co.*, 90 L.J.K.B. 1353; 126 L.T. 154; 37 T.L.R. 940; 15 Asp. M.L.C. 398; 27 Com. Cas. 25, C.A.; 36 Digest (Repl.) 38, 185.
- (3) *Price & Co. v. Union Lighterage Co.*, [1904] 1 K.B. 412; 73 L.J.K.B. 222; 89 L.T. 731; 52 W.R. 325; 20 T.L.R. 177; 48 Sol. Jo. 207; 9 Com. Cas. 120, C.A.; 8 Digest (Repl.) 46, 277.

- A** (4) *Taubman v. Pacific Steam Navigation Co.* (1872), 26 L.T. 704; 1 Asp. M.L.C. 336; 8 Digest (Repl.) 188, 894.
- (5) *Thompson v. Royal Mail Steam Packet Co.* (1875), 5 Asp. M.L.C. 190, n.; 8 Digest (Repl.) 138, 892.
- (6) *Haig v. Royal Mail Steam Packet Co., Ltd.* (1883), 52 L.J.Q.B. 641; 49 L.T. 802; 48 J.P. 230; 5 Asp. M.L.C. 189, C.A.; 8 Digest (Repl.) 113, 728.
- B** (7) *Pyman Steamship Co. v. Hull and Barnsley Rail. Co.*, [1915] 2 K.B. 729; 84 L.J.K.B. 1235; 112 L.T. 1103; 31 T.L.R. 243; 13 Asp. M.L.C. 64; 20 Com. Cas. 259, C.A.; 41 Digest 976, 8660.
- (8) *Joseph Travers & Sons, Ltd. v. Cooper*, [1915] 1 K.B. 73; 83 L.J.K.B. 1787; 111 L.T. 1088; 30 T.L.R. 703; 12 Asp. M.L.C. 561; 20 Com. Cas. 44, C.A.; 8 Digest (Repl.) 46, 278.
- C** (9) *Williams v. Midland Rail. Co.*, [1908] 1 K.B. 252; 77 L.J.K.B. 157; 98 L.T. 81; 24 T.L.R. 170; 52 Sol. Jo. 113; 13 Com. Cas. 119, C.A.; 2 Digest (Repl.) 368, 476.
- (10) *Steinman & Co. v. Angier Line*, [1891] 1 Q.B. 619; 60 L.J.Q.B. 425; 64 L.T. 613; 39 W.R. 392; 7 T.L.R. 398; 7 Asp. M.L.C. 46, C.A.; 41 Digest 421, 2639.

D **Further Consideration** of action tried before HORRIDGE, J., and a special jury.

The defendants, who were furniture removers and warehousemen, agreed in April, 1924, to carry certain of the plaintiff's goods from London to Oxford in accordance, as the jury found, with their printed conditions and regulations. The material clauses of these were as follows :

- E** "3. The company will not be responsible for fire, but will insure goods without delay upon the receipt of written instructions to do so, and the charges will be placed to the account of the depositor. Goods remain at the owner's risk until the receipt for the insurance is delivered. 4. The company will not hold themselves liable for any loss or damage which may arise from lightning, civil commotion, or any act of God ; neither will they be responsible for moth, rust or mildew ; nor for leakage or ullage of wines or other liquors, or for deterioration or deficiency happening to articles of a perishable nature. 5. The company will not under any circumstances be responsible for any article which shall exceed the value of £10, and the company will not under any circumstances be responsible for the contents of any chest, chest of drawers, articles of furniture, box, or package, unless the same be properly secured to the satisfaction of the company's manager or foreman, nor will they even then be responsible for such contents beyond the sum of £10. On April 25, 1924, the plaintiff's goods were loaded on the defendant's motor-van, and while in transit from London to Oxford both van and goods were destroyed by fire. The plaintiff brought an action against the defendants for damages for the loss of his goods, alleging that the fire had been occasioned by the negligence of the defendants or their servants. The jury found that the defendants took reasonable care to provide a fit and proper van, and that the van was reasonably fit for the carriage of the goods contracted for, but that the defendants' servants were guilty of negligence, and that such negligence caused the fire.
- F**
- G**
- H**

Cyril Atkinson, K.C., and *Blanco White*, for the defendants, referred to *Turner v. Civil Service Supply Association, Ltd.* (1), *Price & Co. v. Union Lighterage Co.* (3), *Taubman v. Pacific Steam Navigation Co.* (4), *Thompson v. Royal Mail Steam Packet Co.* (5), *Haigh v. Royal Mail Steam Packet Co., Ltd.* (6), *Pyman Steamship Co. v. Hull and Barnsley Rail. Co.* (7), *Joseph Travers & Sons, Ltd. v. Cooper* (8), *Williams v. Midland Rail. Co.* (9).

Charles, K.C., and *James Wylie*, for the plaintiff, cited *Re Polemis and Furness, Withy & Co.* (2).

Cur. adv. vult.

Nov. 9. **HORRIDGE, J.**, read the following judgment.—In this case the plaintiff claims for the loss which he has sustained through damage to his goods occasioned

by a fire which broke out on the lorry on which they were being conveyed from London to Oxford. At the trial before myself and a special jury the special jury found in answer to a question by me that the cause of the fire was the negligence of the defendants' servants. In those circumstances the defendants would be liable if it were not for the terms of the special contract under which they are found by the jury to have carried the plaintiff's goods. The first exception relied upon is No. 3:

"The company will not be responsible for fire, but will insure goods without delay upon the receipt of written instructions to do so, and the charges will be placed to the account of the depositor. Goods remain at the owner's risk until the receipt for the insurance is delivered."

It is said on behalf of the defendants that the only thing to which that clause can refer is the negligence of the defendants' servants. It is not contended here that the defendants were common carriers, and, therefore, they are in the position of bailees and are only bound to take reasonable care of the goods committed to their charge. It is said, therefore, on behalf of the defendants that, as the only thing they could be liable for in this case was negligence, in order to give a meaning to this exception, it is necessary to hold that it covers negligence.

I need not go through all the cases, but in every case where the defendants have been held liable—with the exception, perhaps, of the case in the Court of Appeal to which I am going to refer—the defendants were in the position of common carriers, and, therefore, would have been liable for loss of the goods apart from negligence unless they could prove they were lost either by the act of God or the King's enemies. I am not referring now to the class of case where special words are added to the exception clause; that class of case I shall have to refer to when I come to deal with another clause, which is numbered 5. There are no special words such as "howsoever caused" or "in any circumstances whatever," qualifying in any way the third clause. The case in the Court of Appeal to which I referred is *Joseph Travers & Sons, Ltd. v. Cooper* (8). In the judgments of two of the learned lords justices, BUCKLEY and PHILLIMORE, L.JJ., the distinction is clearly drawn between the liability of the common carrier and the liability of the bailee as affecting the question of the construction to be put upon an exception clause which has no reference to negligence. KENNEDY, L.J.'s judgment is a little more ambiguous, because he says ([1915] 1 K.B. at p. 93):

"In the present case, whether he had the larger liability of a common carrier or not, there can be no doubt that the defendant had at least the duty not to be negligent in regard to the carriage of the goods in his lighter, and he was negligent. Is he protected by the terms of the special contract from the consequences of that negligence to the owner of the goods? But for the words however caused I am of opinion that he would not be, and that the decision of this court in *Price & Co. v. Union Lighterage Co.* (3) affirming the judgment of WALTON, J., which is referred to by PICKFORD, J., in his judgment in the present case, would bind us so to hold."

I do not think the learned lord justice is there saying that it is immaterial to consider whether he was a common carrier or not, but I think he is saying that having regard to the words "however caused," which would apply even to the case of a common carrier, he does not think it is necessary to consider accurately whether the defendant in that case was a common carrier or not.

The case which is most directly in point is, no doubt, *Turner v. Civil Service Supply Association, Ltd.* (1), before SANKEY, J., and I can see nothing which enables me to distinguish that case from the present case. In that case the clause was: "The contractors are not responsible for loss or damage caused by fire." The facts of the case were strangely like the facts in this case. SANKEY, J., there held that as there was no alternative construction to give to that clause than to hold that it applied to fire occasioned by negligence, he was bound to give that

A meaning to it. That decision is directly in point and would in the ordinary course be followed by any judge of the King's Bench Division, even if it did not exactly appeal to him, but in this case it does appeal to me. I think the judgment is right, and I propose to follow it.

B The only decision which has given me any trouble was the decision of the Court of Appeal in *Re Polemis and Furness, Withy & Co.* (2). In that case the charterers of a vessel were guilty of negligence, through their servants, by which the vessel got on fire, and it was there held that they were not protected by an exception of the act of God, the King's enemies, loss or damage from fire. Now in that case the charterers would be under no liability except for negligence, and, therefore, at first it struck me as being a case which presented a real difficulty in deciding in favour of the defendants in this case, because there the Court of
C Appeal held that although the defendants could only be liable for fire caused by negligence an exception from fire did not protect them against loss by fire caused by the negligence of their servants. I think the ground of that decision was due to the words at the head of the exception clause in most charterparties, and also contained in the exception clauses in this charterparty, namely: "Always mutually excepted," which means that the clause containing the exceptions operates equally
D for the benefit of the shipowner and the charterer mutually, and that because in the case of the shipowner the Court of Appeal would have been obliged by the decisions to put upon the exception the construction that it did not protect the shipowner who was a common carrier, that, therefore, the mutual interpretation of that clause was that it operated in the same way in the case of the charterers, and that because under that exception, which had to cover both the shipowner
E and the charterers, if the shipowner would not have been liable, the charterers would also not be liable, so as in the particular circumstances the shipowner would have been liable the charterers were, therefore, equally liable. I refer to the language of BANKES, L.J., where he says ([1921] 3 K.B. at p. 572):

F "I see no reason why a different rule of construction of this exception contained in the charterparty should be adopted in the case of the charterer than would undoubtedly be adopted in the case of the shipowner. In the case of the latter clear words would be required excluding negligence. No such words are found in this clause. Neither shipowner nor charterer can, in my opinion, under this clause claim to be protected against the consequences of his own negligence."

G WARRINGTON, L.J., says (*ibid.* at p. 573):

H "It appears to be well settled that in such a contract as the present the exceptions would not be construed so as to excuse a shipowner for loss of the nature described if caused by the negligence of himself or his servants, unless expressly so framed: CARVER ON CARRIAGE BY SEA, ss. 14 and 22, and, as to bills of lading, per BOWEN, L.J., in *Steinman v. Angier Line* (10), and in my opinion the same construction must be given to the clause when it is the liability of charterers which is in question."

I, therefore, think the ground of that decision was that one construction must be put on the exception applicable to both charterer and shipowner; that the shipowner would not be protected; and, therefore, the charterer would not be protected. I do not think it affects the decision of SANKEY, J., in *Turner v. Civil Service Supply Association, Ltd.* (1), that where the only interpretation that can be given to such a clause is to make it applicable to negligence, then the carrier is excepted from liability. In this case I think the carriers were excepted from liability because the fire, though caused by negligence, was the only fire which could have been intended by the exception, and that, therefore, the exception covers and protects them. As regards the second exception, that does not arise if I am right on the first point; but I think it is quite clear, on the authority of *Haigh v. Royal Mail Steam Packet Co., Ltd.* (6) that the words "under any

circumstances" cover the negligence of the defendants' servants, and that, therefore, they are protected by that clause, although the loss was occasioned by the negligence of their servants.

The result is that the plaintiff will not, under the first portion of cl. 5, be able to recover for the loss of any article exceeding the value of £10, and under the latter portion of the clause, if the contents of any chest of drawers or packages are worth more than £10, the plaintiff will not be able to recover in respect of that package more than £10.

Judgment for defendants.

Solicitors : *Martineau & Reid ; Macdonald & Stacey.*

[*Reported by T. R. FITZWALTER BUTLER, Esq., Barrister-at-Law.*]

COMMONWEALTH TRUST, LTD. v. AKOTey

[PRIVY COUNCIL (Lord Atkinson, Lord Shaw and Lord Parmoor), May 1, 4, July 21, 1925]

[Reported [1926] A.C. 72; 94 L.J.P.C. 167; 134 L.T. 33; 41 T.L.R. 641]

Sale of Goods—Estoppel—Title to goods—Seller not owner—Right of owner to recover value from bona fide buyer for value—Ostensible authority given by owner to seller.

The respondent consigned goods to L., consignment notes being forwarded, and L. sold the goods to the appellants who in good faith took delivery and paid L. for them. At the date of the re-sale to the appellants the contract between the respondent and L. had not been completed owing to a difference between the parties as to the price of which the appellants were not aware. In an action by the respondent against the appellants for damages for the conversion of the goods,

Held: although the property in the goods had not passed from the respondent, he had so acted as to estop him from setting up his title against the appellants, and, therefore, he was not entitled to succeed.

Per LORD SHAW : To permit goods to go into the full possession of another, with all the insignia of possession thereof and of apparent title, and to leave it open to go behind that permission so given and accompanied and upset a purchase of the goods made for full value and in good faith, would bring confusion into mercantile transactions and would be inconsistent with law and with the principles so frequently affirmed, following *Lickbarrow v. Mason* (1), (1787), 2 Term Rep. 63.

Notes. Not followed : *Jerome v. Bentley & Co.*, [1952] 2 All E.R. 114; *Mercantile Bank of India v. Central Bank of India*, [1938] A.C. 287. Referred to : *Central Newbury Car Auctions, Ltd. v. Unity Finance, Ltd.*, [1956] 3 All E.R. 905.

As to estoppel through conferring ostensible authority on another see 15 HALSBURY'S LAWS (3rd Edn.) 239, 240, and as to the sale of goods by a person other than the owner see 29 HALSBURY'S LAWS (2nd Edn.) 103. For cases see 21 DIGEST 359 et seq., and 39 DIGEST 606 et seq.

Cases referred to :

- (1) *Lickbarrow v. Mason* (1787), 2 Term Rep. 63; 100 E.R. 35; on appeal sub nom. *Mason v. Lickbarrow* (1790), 1 Hy. Bl. 357; Ex. Ch.; sub nom. *Lickbarrow v. Mason* (1793), 4 Bro. Parl. Cas. 57; 6 East, 22n., H.L.; 39 Digest 614, 2115.

A (2) *Farquharson Bros. & Co. v. King & Co.*, [1902] A.C. 325; 71 L.J.K.B. 667; 86 L.T. 810; 51 W.R. 94; 18 T.L.R. 665; 46 Sol. Jo. 584, H.L.; 21 Digest 289, 1021.

B Appeal from an order of the full court of the Gold Coast Colony (LOGAN, acting C.J., HALL and MICHELIN, JJ.), reversing the judgment of BEATTY, J., who had entered judgment for the defendants in an action brought against them and one Laing by the respondent for damages for the conversion of 1,050 bags of cocoa. The full court set aside the judgment and entered judgment for the plaintiff for £6,375 and costs. The defendants appealed.

Clauson, K.C., and *J. Forster* for the appellants.

Geoffrey Lawrence, K.C., for the respondent.

C July 21. **LORD SHAW.**—This is an appeal from a judgment of the full court of the Gold Coast Colony, reversing the judgment of the judge of first instance. The action was brought by the respondent against the appellants and a co-defendant named Laing for damages for the conversion of 1,050 bags of cocoa. This cocoa was consigned by the respondent to Laing; the consignment notes were duly forwarded; Laing transferred these to the appellants, who, in entire good faith, took delivery of and paid Laing for the cocoa. The full court entered judgment for the respondent for the sum of £6,375 and costs. If the respondent is entitled to recover, this figure is not disputed. This means that the appellants are to pay a second time for the same cocoa on the ground that the respondent cannot be charged with any responsibility for the sale by Laing, his consignee, and the receipt of payment by Laing.

E The respondent is a grower of cocoa, and the appellants are a limited company carrying on business at Accra, including a business of general export and import. The co-defendant Laing is dead, but it is in evidence that he had on previous occasions in the year 1920 purchased cocoa on credit from the respondent or the respondent's factor. A question raised in the appeal is whether the cocoa about which the dispute has arisen had become the property of Laing, so as to place F him in a position to transfer it with a good title to the appellants. The judge of first instance held that the property in the cocoa had passed from the respondent to Laing, and if it had so passed the appellants would be entitled to judgment. The full court held that the sale of the cocoa had not been completed between Laing and the respondent. A material question in the case is whether a certain letter G of April 30, 1920, is genuine. The judge of first instance was not satisfied as to the genuineness of this letter, but the full court held that the case could be decided without deciding whether it was genuine or not. The Board is of opinion that the alleged letter cannot be relied upon as a genuine letter. The other correspondence is as follows. The first letter of April 28 states that the respondent has that day "consigned 492 bags, viz.: 242 in wagon No. 1274, and 250 bags in wagon No. 1213," and the letter adds this important sentence: "And consignment note of it I H have attached to this letter and I am sure you will get it safely." This letter covers part of the cocoa in question in this case. The letter ends: "Expect me on the coming Monday, and I will come and see you." A second letter was written on April 29 stating that a further consignment had been made, and adding: "Consignment note of it enclosed with my best compliments." The cocoa referred to I in these two letters covers 756 bags out of the 1,050 bags included in the writ of summons. A further letter was written on April 29 stating that the respondent had shipped 250 bags of cocoa, but these bags are not part of the cocoa in question. It includes, however, the sentence: "Find more money (cash) and I will come on Monday, May 3, 1920, to receive it."

Laing sold the cocoa to Lawson, the transport manager of the appellants, and handed him the consignment note. Lawson took delivery by re-consigning the bags in which the cocoa was packed to the railway sidings of the appellants. It is not disputed that the actings of the appellants were in good faith, nor that the purchase

was made in ordinary course of business and for full value. It turns out that although Laing had the goods consigned to him, he and the respondent had a difference as to price, the respondent wishing Laing to increase the figure of 50s. a ton which Laing had named. On May 1 the respondent came down to Accra and saw Laing, who stated that he was prepared to pay the respondent 50s. a load, but this the respondent refused to accept. Their Lordships incline to agree with the decision of the full court that the price of 50s. had not been accepted by the respondent when he forwarded the consignment note to Laing, and that consequently no contract of sale had been completed at the material date.

It was further argued before their Lordships that, although the property in the cocoa had not passed from the respondent, yet that the respondent had so acted as to estop him from setting up his title in answer to the claim of the appellants. Reliance was placed on the well-known statement of ASHURST, J., in *Lickbarrow v. Mason* (1):

"whenever one of two innocent persons must suffer by the act of a third, he who has enabled such third person to occasion the loss must sustain it."

Their Lordships are clearly of opinion that the present is a plain case for the application of that principle. There is no kind of specialty in this case such as occurred in *Farquharson Bros. & Co. v. King & Co.* (2), the parallel to which would be that the goods were delivered to Laing by the fraudulent act of respondent's agent. The goods were in fact delivered over to Laing by the direct act of the respondent himself. To permit goods to go into the full possession of another, with all the insignia of possession thereof and of apparent title, and to leave it open to go behind that permission so given and accompanied, and upset a purchase of the goods made for full value and in good faith, would bring confusion into mercantile transactions and would be inconsistent with law and with the principles so frequently affirmed, following *Lickbarrow v. Mason* (1). Their Lordships will humbly advise His Majesty that the appeal should be allowed, the judgment of the full court set aside with costs, and the judgment of BEATTY, J., restored. The respondent will pay the costs of the appeal.

Appeal allowed.

Solicitors: *Linklaters & Paines; Denton, Hall & Burgin.*

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

A

DEXTERS, LTD. AND HILLCREST OIL CO. (BRADFORD), LTD.

[COURT OF APPEAL (Banks, Warrington and Scrutton, L.JJ.), December 8, 9, 1925]

[Reported [1926] 1 K.B. 348; 95 L.J.K.B. 386; 134 L.T. 494;
42 T.L.R. 212; 31 Com. Cas. 161]

B

*Arbitration—Estoppel—Appeal from order of High Court on Special Case
Acceptance of award before appeal—Approbation and reprobation.*

C

By a contract in writing, dated Aug. 13, 1923, sellers sold to buyers 250 tons of "dark cotton seed grease as per sample." The buyers sold the goods to N. & Co., who in turn re-sold to D. C. & Co. The latter sold the goods to buyers in New York and Genoa, and shipments were made direct to those sub-buyers by the original buyers. The sub-buyers rejected the goods as not being in accordance with sample, and the matter went to arbitration by which the buyers agreed to be bound. The umpire awarded to D. C. & Co. £3,745 damages for breach of contract and ordered N. & Co. to pay the costs, and the buyers paid that amount awarded to D. C. & Co. In an arbitration between the original buyers and the original sellers the umpire made an award in the form of a Special Case in which he stated that the goods delivered by the sellers did not comply with the contract description, and that the buyers were entitled to recover from the sellers £2,000 damages. On July 27, 1925, the Special Case came before ROCHE, J., who confirmed the award. On July 29 the buyers applied to the sellers for payment of the £2,000 "pursuant to the award of the arbitrator as upheld by the judge." This was paid by the sellers. The buyers then appealed against the order of ROCHE, J., and asked that the order be reversed in so far as it was adjudged that the umpire had assessed the damages rightly and on the right basis, and that it might be ordered that a higher, alternative, basis of damages should be adopted. On a preliminary point,

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Held: the buyers having obtained payment of the £2,000 under the award and decision of ROCHE, J., could not approbate and reprobate, and so were not entitled to appeal against the order of the learned judge.

Notes. Referred to: *Baxter v. Eckersley*, [1950] 1 All E.R. 139.

As to approbation and reprobation see 15 HALSBURY'S LAWS (3rd Edn.) 171-174, and as to appeals against decisions on award see *ibid.*, vol. 2, p. 61. For cases see 21 DIGEST 321 et seq., and 2 DIGEST (Repl.) 586, 587.

G

Case referred to:

- (1) *Verschures Creameries v. Hull and Netherlands Steamship Co.*, [1921] 2 K.B. 608; 91 L.J.K.B. 39; 125 L.T. 165, C.A.; 21 Digest, 226, 593.

Case Stated by an arbitrator.

H

By a contract in writing, dated Aug. 13, 1923, and made between the Hillcrest Oil Co. (Bradford), Ltd., of the city of Manchester (hereinafter called the sellers) and Dexters, Ltd., of the city of London (hereinafter called the buyers), the sellers agreed to sell and the buyers agreed to buy a parcel of 250 tons dark cotton seed grease, as per sample. It was provided that any dispute in reference to the contract should be settled by arbitration in Manchester, in the usual manner. A dispute having arisen between the parties in which the buyers claimed to recover from the sellers damages for breach of the contract, the parties agreed to submit the dispute to arbitration in London, the buyers appointing as their arbitrator Mr. E. J. Parry, of 59, Great Dover Street, London, S.E., and the sellers appointing as their arbitrator Mr. H. Kunzer, of 17, Jewry Street, London, E.C. The arbitrators, having failed to agree, duly appointed Mr. J. W. Pearson, of 29, Great St. Helens, in the city of London, as umpire. The umpire, having heard and considered the arguments and evidence adduced on behalf of the parties and having been requested by the buyers to state his award in the form of a Special Case under s. 7 of the

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Arbitration Act, 1889, [see now Arbitration Act, 1950, s. 21 (1)] made his award in the form of a Special Case accordingly. A

By the contract of Aug. 13, 1923, the sellers sold to the buyers the goods already mentioned at the price of £9 per ton, on a basis of 95 per cent. fatty matter soluble in carbon bisulphide, f.a.s. Liverpool, delivery about the middle of August, packed in sound iron-bound barrels, package included ; payment, net cash fourteen days from delivery, or cash against delivery if required, less interest at 5 per cent. per annum. Of the 250 tons of grease, the following shipments were made: 450 barrels—75 tons to New York per steamship *Germania* on Aug. 23 ; 450 barrels—75 tons to New York, per steamship *Siam City*, on Sept. 7 ; 600 barrels—100 tons to Genoa per steamship *Brescia* on Sept. 4. The actual shipments were made on behalf of an ultimate buyer, Donald Campbell & Co., who had sold to their buyers in New York and Genoa respectively. Donald Campbell & Co. had made their purchases from Napier & Co., who in turn had bought from Dexters, Ltd. The firms in New York and Genoa, to whom the ultimate buyers had sold the goods under the description of black cotton seed grease, good merchantable quality, rejected them on the ground that they consisted not of grease but mostly of pitch, and were totally useless for their purpose. An arbitration was held between Donald Campbell & Co. and Napier & Co., in which, on the ground that the delivery conform to the description, damages for breach of contract were awarded against Napier & Co., amounting to £3,745 2s. 5d. Dexters, Ltd., had agreed to treat any award made in that arbitration as binding upon themselves, and they, accordingly, paid the amount awarded. Dexters, Ltd., then invited their sellers, the Hillcrest Oil Co., to participate in the arbitration between Donald Campbell & Co. and Napier & Co. to protect their interests. The sellers declined, but agreed to give the buyers all assistance necessary to contest the claim. The sellers were notified by the buyers from time to time of appointments for the hearing of the arbitration, and were invited to attend to give evidence, but did not do so. In the present arbitration the buyers claimed to recover from the sellers the full amount of the damages they had been compelled to pay as the result of that arbitration, together with the whole of the costs incurred by them in defending the claim, on the ground that the sale contracts were identical in essential terms, and that the damages paid by them, together with their own costs incurred in defending the claim, were the damages which they were entitled to recover from the sellers by whom, they contended, the real breach had been committed. B C D E F

The umpire held that the article delivered by the sellers did not comply with the description in the contract, and that they were liable in damages for breach of contract. He further held that such damages should not be assessed on the basis of the amount which the buyers had to pay to their sub-purchasers under the award in the arbitration between Donald Campbell & Co., and Napier & Co., but should be assessed on the basis of the difference between the value of the goods actually delivered and the goods called for by the contract. Subject to the opinion of the court on any question of law arising, he awarded that the buyers were entitled to recover from the sellers the sum of £2,000, and no more, as damages. He assessed the costs of the award and Special Case at the sum of £158, of which amount he directed that the sellers should pay the sum of £32, and that the buyers should pay the balance of £126, and he further directed that each party should bear their own costs of the arbitration. If the court was of opinion that the damages should be assessed on the basis of the amount which the buyers had had to pay to their sub-purchasers, he awarded that the buyers were entitled to recover from the sellers the sum of £3,745 2s. 5d., together with the sum of £227 10s. 9d., the costs (including arbitrator's fees) incurred by them in defending the claim in the previous arbitration, and that the costs of the present award and Special Case should be borne and paid as to £32 by the sellers and as to £126 by the buyers, and that each party should pay their own costs of the arbitration. Should the court be of opinion that the sellers had committed no breach of contract, G H I

A or that the buyers were not entitled to damages, he awarded that the buyers were not entitled to recover anything from the sellers, and he directed that they pay the whole of the costs of the award and Special Case amounting to £158, and that each party should pay their own costs of the arbitration. Before the hearing of the Special Case, the sellers entered a notice of motion to set aside the award on the ground of misconduct of the arbitrator. The Special Case and the motion to set
B aside were both heard on July 27, 1925, when ROCHE, J., gave judgment dismissing the motion and holding, on consideration of the Special Case, that the umpire had correctly awarded the buyers £2,000 damages and ordered the sellers to pay £32 costs.

On July 29, 1925, the buyers' solicitors applied to the sellers' solicitors for payment of £2,032 "pursuant to the award of the arbitrator as upheld by the
C judge." This was paid on Aug. 24. The buyers then appealed against the order of ROCHE, J., so far as it related to the Special Case, and asked that the order be reversed so far as it adjudged that the umpire had assessed the damages rightly and on the right basis, and that it might be ordered that the higher basis of damages as set out in the Special Case (viz., £3,745 with costs) was the correct basis. The sellers entered a cross-appeal asking that ROCHE, J.'s order be reversed,
D and further asking that an order be made that the sellers had not committed any breach of contract, and that the buyers were, accordingly, not entitled to any damages, and that the alternative award of the umpire as set out in the Special Case be confirmed.

Campion, K.C., and R. E. L. Parry, for the buyers.

E *Le Quesne, K.C., and J. Dickinson, for the sellers.*

BANKES, L.J.—This is an appeal from a judgment of ROCHE, J., on a Special Case which raised three questions: first, whether the buyers were entitled to any damages at all; secondly, whether they were entitled to a sum of £2,000 as damages upon the ground that that was the proper measure to apply in this
F particular case; or whether £2,000 was not the proper sum, but a sum of £3,745 was the proper sum, upon the ground that quite a different measure should be applied in ascertaining the proper amount of damages to which the claimants were entitled. The matter came before ROCHE, J., and he decided two things. He decided against the sellers that they had committed a breach of contract, and he decided in favour of the buyers that the amount of damages to which they were entitled was £2,000 and not £3,745. Supposing that the sellers had refused to
G accede to the request for the payment of the £2,000 odd which was made to them on July 29 after ROCHE, J.'s judgment; and supposing they had refused to make the payment, the course which the buyers would have been bound to take would have been to get an order to enforce the award; and supposing the order had been made enforcing the award for £2,000, it is inconceivable, in my opinion, that they
H could afterwards, having taken that course, whip round and appeal and say in substance—because that is what they are saying: "The measure of damages which the arbitrator took in order to arrive at the £2,000 is altogether wrong, he ought to have awarded £3,745 on the other basis altogether, and the learned judge ought so to have found." In my opinion, it is plain that the person who took that step and got the order of the court to enforce an award for £2,000 could not after-
I wards say: "That award is altogether wrong; it ought to be something else, and now I will ask the Court of Appeal to say that it should be something else." I do not think there is any difference between a party who takes that course because the opposing party will not pay what is demanded without an order, and the case, as here, where the application is made and the payment is made, because in substance an application of this kind seems to me to mean this: "The judge has held that the amount of damages should be £2,000. Will you please pay that amount in order to save us and yourselves the expense of applying for an order?"

That is what, in substance, this application comes to, and the answer is: "Yes, A we will pay it."

It seems to me quite impossible for a person who has taken up that attitude to turn round and, having got the money, to say: "The award is all wrong." He is obliged to say that in order to found his case for the claim to the larger amount. It seems to me that whatever else his rights may be, it is quite clear that, having taken the money, he cannot say that the award under which that particular sum was paid to him was not the right view of his legal position. I think, therefore, that the appeal fails on this preliminary point, but it may be some satisfaction to counsel for buyers to know that if the matter had proceeded it seems to me quite plain on the materials we have got that the arbitrator was right in saying that in the circumstances he could not accept the amount awarded in the other arbitration as the proper measure of damages, because it appears to be so uncertain as to how that amount was arrived at and on what basis, and the fact manifestly appears directly you are told that the claimant in that arbitration, Donald Campbell & Co., had sold these goods under an altogether different contract which represented them as something very superior to what everybody agreed they were. They claimed for £6,000, and the damages were agreed at £3,700, but on what grounds nobody knows. In those circumstances it seems to me impossible to apply the rule that the amount recovered by the sub-buyer is the proper measure of damages as against the original seller. It is not a necessary part of the decision that we should deal with that point, and I only say that because it is not very satisfactory that the case should be disposed of under the preliminary point. I do not like doing it. I would rather decide cases on their merits, but it seems to me that the merits and the preliminary objection in the present case both point in the same direction. B C D E

WARRINGTON, L.J.—I am of the same opinion. I think that this is a clear case in which the buyers are seeking to approbate and reprobate at the same time, which it is impossible for them to do. It is important that the arbitrator has made an award in the form of a Special Case. It is not merely a Special Case stated for the opinion of the court, but an award made in that form. The result, I think, is that the award is an alternative award. The arbitrator has, in fact, made three alternative awards, and the fact that a third was made may become important in the result of this preliminary objection to the appeal, for reasons which I will point out directly. F

The three alternative awards are made in this form: "Subject to the opinion of the court on any question of law arising, I award and direct that the buyers are entitled to recover from the sellers the sum of £2,000, and no more, as damages." Then there are directions as to costs. The second alternative is: "If the court is of opinion on the facts above stated that the damages should be assessed on the basis of the amount which the buyers had to pay to their sub-purchasers, then I award that the buyers are entitled to recover from the sellers the sum of £3,745 2s. 5d., together with £227 10s. 9d., the costs incurred by them in defending the claim in the previous arbitration," and then there is a direction as to the costs of the present arbitration. There is a third award which is to be made in the event of the court being of opinion that the sellers have committed no breach of contract, and that the buyers are not entitled to damages; then the arbitrator awards that the buyers are not entitled to recover anything from the sellers, and different directions are given as to the costs. The decision of the court was that the first of the three alternative awards was the correct award. The learned judge's order takes the form, owing to the way in which the matter was brought before him, of an order that the motion to set aside the award be dismissed, with costs to be taxed by the taxing master, and that the award should be in the form of the first of the alternative awards. The object of the appeal is to induce this court to say that the second of the three alternative awards is the one which ought to be the award of the G H I

A umpire, and if the appeal had succeeded that would be the result, that the second of the three alternative awards would be substituted for the first. The learned judge having decided that the first of the three alternative awards was the right award to make, the buyers write to the sellers this letter: "We shall be glad if your clients will now let us have remittance for £2,032 pursuant to the award of the arbitrator as upheld by the judge yesterday." That was to say that the first of the three alternative awards being the award of the umpire, they now asked the sellers to make the payment pursuant to that award. On Aug. 21 the sellers answer that letter in these terms: "We now have received and send you herewith our clients' cheque for the sum of £2,032, payable pursuant to the umpire's award." The effect of that letter seems to me to be two-fold. It acts on the assumption that the first of the three alternative awards and is the right award, and, acting on that assumption, debars the person who paid the money from saying that the third alternative award is the award which should be adopted. The receipt which was given by the buyers on receiving that cheque was given in this form: "Received, the sum of £2,032 in payment of the amount payable under the umpire's award in the arbitration between us." That was on Aug. 24, and within five days the buyers give notice of appeal.

D It seems to me perfectly hopeless to contend that they were entitled to give that notice of appeal after they had deliberately accepted the first alternative award as being the award of the umpire, and had put their opponents in the position of having debarred themselves from proceeding and saying that the third award was the right one? It seems to me, therefore, that the preliminary objection ought to succeed and the appeal be dismissed on that ground. But, like my brother, E BANKES, L.J., I think it may be satisfactory to the parties if I say that I think the appeal would have failed on the other ground. When one comes to look into the matter and see what happened in the previous arbitration, the particulars of which are annexed to the Special Case in this case, one finds that the buyers in that case, that is to say Donald Campbell & Co., then stated as a fact that they sold all the goods to persons resident abroad, partly in New York, and partly in Genoa, under the description of black cotton seed grease—that is to say, under a trade description, F a recognised trade description, and not the description contained in the contract here in question—namely, dark cotton-seed grease, which is not a trade description. Damages were then claimed, it is very uncertain on what footing, but it was stated in the course of the case that £6,000 was claimed by the buyers in that case against their sellers. In those circumstances it is entirely at large and uncertain as to how the amount of damages in the previous award, now sought to be recovered in the present case, were ascertained, but, having regard to the fact that they G claimed the amount which I have stated, it is at least possible to say that the award in the previous case was not on a footing on which alone a claim for damages could have been made in the present case, and if so, then that amount of damages H could not flow from the breach of the contract with which we are now concerned. It seems to me, therefore, that even if it had not been for the preliminary objection the result must have been that the appeal would be dismissed.

I SCRUTTON, L.J.—This is an appeal as to the measure of damages on the sale of goods under a contract of sale, but a preliminary point is taken of considerable general importance, on which I am rather surprised to find there is no clear authority. It may be, as LORD MACNAGHTEN said in one of his judgments, that the more obvious a position is the less likely you are to find an authority for it. The objection taken is that this is an award where the arbitrator awarded as damages £2,000 and no more, and added that if he was wrong in that measure of damages and another measure of damages was the right measure then he awarded £3,745. The matter having been before ROCHE, J., and he having approved of the award of £2,000, the buyers then seek to reap the fruits of that decision, and they ask the sellers to pay them the £2,000 under the award." Involved in that state-

ment is, I think, this statement: "The award is right." The buyers could hardly be saying: "This award is wrong, but pay us under it." They ask for £2,000 under that award; they get the £2,000, and they give a receipt for it as satisfying the award. Then they turn round and say: "The award under which we got the £2,000 is wrong, and we are going to appeal against it and say that the other part of the award ought to have been enforced and be the correct decision, and so we ought to have £3,700." It seems to me, as I have said, that that involves saying first of all: "I approbate this award and claim the benefits of it. Pay me £2,000. Now I have got it I reprobate this award and say it was wrong, and I ask you to substitute another award on which £3,700 is the right amount to be paid."

In various applications it has been cited as the law of England that one cannot approbate and reprobate—that is, one cannot take the advantage of a document or legal right and at the same time say that it is not a document which binds one or is not a legal right of which one is entitled to have the advantage. For instance, one cannot take a benefit under a will and at the same time say that it is a bad will. One cannot take a benefit under a document and repudiate the condition of the document and say that the condition is bad. Both of those matters are in decided cases. In the same way we find in *Verschures Creameries, Ltd. v. Hull and Netherlands Steamship Co.* (1) that one cannot both take the delivery of the goods and then say that it was a wrongful delivery. Having first got the benefit of treating it as a good delivery you cannot turn round and say it was a bad delivery. It seems to me to be an application of the principle that one cannot approbate and reprobate that one cannot claim under a judgment as being good and then appeal against it, having got the benefit under it, and say it is bad. Counsel for the buyers has attempted what seems to me to be, with great respect, a perversion of the rules. He says that an appeal is no stay of execution, consequently I can execute and appeal at the same time. I have always understood that rule to be directed to the case of a man who is appealing against a judgment, and the fact that he is appealing against the judgment does not stop the judgment being executed against him, but it strikes me as a startling proposition to say that one can both say that a judgment is wrong and at the same time take advantage of it being right. It appears to me that the person who framed the rule did not think it necessary to say that in framing the rule, perhaps, because he left it to the ingenuity of counsel for buyers to say that it was necessary. It seems to me to be a wrong construction to put on the rule, and for that reason I think that the parties who have acted on this award by taking the money under it cannot turn round and say that now they will appeal against it and say it was wrong.

While I am not expressing a final opinion, it would seem that the buyers were not entitled to damages based on the amount which they had had to pay to their sub-buyers. I have always considered it as essential to running damages along a chain of contracts that the contracts should be the same. Where, as in this case, the first contract contains one description—a description difficult to interpret because it is not an ordinary trade description—and at some stage in the chain the contract shifts and becomes a contract under a well-known trade description, different from the one in any previous contract, I find it difficult to hold that one can base any claim for damages on sums which are paid under contracts, or in respect of contracts which are different from the one being investigated, and on which the damages are claimed. I am not, as I say, expressing a final opinion on this point because I have not heard all the arguments, but it may possibly be some satisfaction, though a small one, to those who are losing under a preliminary point or objection, to think that they would probably have lost on the main one.

Appeal dismissed.

Solicitors: *Sweptone, Stone, Barber & Ellis; Hyman, Isaacs, Lewis & Mills.*

[Reported by T. W. MORGAN, Esq., Barrister-at-Law.]

CLAYTON v. SALE URBAN DISTRICT COUNCIL

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Sankey, JJ.), November 12, 13, 1925]

[Reported [1926] 1 K.B. 415; 95 L.J.K.B. 178; 134 L.T. 147; 90 J.P. 5; 42 T.L.R. 72; 24 L.G.R. 34]

Nuisance—Flooding of land adjoining river—Collapse of artificial bank—Liability of riparian owner to abate nuisance—No legal obligation to repair—Nuisance arising from “act default or sufferance of owner”—Public Health Act, 1875 (38 & 39 Vict., c. 55), s. 94.

The appellants were the owners of land which had a frontage on a river and was protected from floods by an artificial bank constructed so long ago that there was no record of its construction. Quantities of sewage and of industrial effluents passed into the river before it reached the appellants' land, and during a heavy rainfall the artificial bank gave way, and both the land of the appellants and the adjoining land became flooded, with the result that the deposit of deleterious matter amounted to a nuisance. The Public Health Act, 1875, s. 94, provided: “On the receipt of any information respecting the existence of a nuisance the local authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act, default, or sufferance the nuisance arises or continues, or, if such person cannot be found, on the owner or occupier of the premises on which the nuisance arises, requiring him to abate the same within a time to be specified in the notice, and to execute such works and do such things as may be necessary for that purpose: provided . . . that where the person causing the nuisance cannot be found and it is clear that the nuisance does not arise or continue by the act, default, or sufferance of the owner or occupier of the premises, the local authority may themselves abate the same without further order.” The local authority served a notice on the appellants to abate the nuisance, and on their failing to comply with the notice made a complaint against them under the Act.

Held: under s. 94 of the Public Health Act, 1875, the riparian owner of land was liable to abate a nuisance which had arisen by flooding caused by a breach in the flood bank if that nuisance arose or continued through his “act, default or sufferance,” even though he was under no obligation to repair the flood bank, and, therefore, under s. 94 the appellants could be required to abate the nuisance.

A.-G. v. Tod Heatley (1), [1897] 1 Ch. 560, applied.

Notes. The Public Health Act, 1875, was repealed by s. 346 of the Public Health Act, 1936, to the extent specified in Sched. 3 to that Act. Section 93 of the 1936 Act substantially reproduces s. 94 of the 1875 Act.

Considered: *Neath R.D.C. v. Williams*, [1950] 2 All E.R. 625.

As to notice to abate nuisance and persons liable to be proceeded against see 24 HALSBURY'S LAWS (2nd Edn.) 97 et seq., and for cases see 36 DIGEST (Repl.) 332 et seq. For the Public Health Act, 1936, s. 93, see 19 HALSBURY'S STATUTES (2nd Edn.) 380.

Cases referred to:

- (1) *A.-G. v. Tod Heatley*, [1897] 1 Ch. 560; 66 L.J.Ch. 275; 76 L.T. 174; 45 W.R. 394; 13 T.L.R. 220; 41 Sol. Jo. 311; 61 J.P. Jo. 164, C.A.; 36 Digest (Repl.) 271, 236.
- (2) *Nathan v. Rouse*, [1905] 1 K.B. 527; 74 L.J.K.B. 285; 92 L.T. 321; 69 J.P. 135; 21 T.L.R. 222; 3 L.G.R. 354, D.C.; 36 Digest (Repl.) 338, 803.
- (3) *Hudson v. Tabor* (1877), 2 Q.B.D. 290; 46 L.J.Q.B. 463; 36 L.T. 492; 42 J.P. 20; 25 W.R. 740, C.A.; 7 Digest 290, 172.

- (4) *Margate Pier and Harbour (Co. of Proprietors) v. Margate Town Council* (1869), 20 L.T. 564, 33 J.P. 437; 36 Digest (Repl.) 273, 258.
- (5) *Thames Conservators v. Port of London Sanitary Authority*, [1894] 1 Q.B. 647; 63 L.J.M.C. 121; 69 L.T. 803; 58 J.P. 335; 10 T.L.R. 160; 38 Sol. Jo. 153, D.C.; 36 Digest (Repl.) 333, 765.
- (6) *Scarborough Corpn. v. Scarborough Sanitary Authority* (1876), 1 Ex.D. 344; 34 L.T. 768; 40 J.P. 726, D.C.; 36 Digest (Repl.) 339, 812.
- (7) *Letterkenny Town Comrs. v. Collins* (1891), 28 L.R. Ir. 235; 36 Digest (Repl.) 340, *248.
- (8) *Arlidge v. Islington Corpn.*, [1909] 2 K.B. 127; 78 L.J.K.B. 553; 100 L.T. 903; 73 J.P. 301; 25 T.L.R. 470; 7 L.G.R. 649, D.C.; 38 Digest 164, 101.
- (9) *Whalley v. Lancashire and Yorkshire Rail. Co.* (1884), 13 Q.B.D. 131; 53 L.J.Q.B. 285; 50 L.T. 472; 48 J.P. 500; 32 W.R. 711, C.A.; 36 Digest (Repl.) 289, 366.
- (10) *Bishop Auckland Local Board v. Bishop Auckland Iron Co.* (1882), 10 Q.B.D. 138; 52 L.J.M.C. 38; 48 L.T. 223; 47 J.P. 389; 31 W.R. 288, D.C.; 36 Digest (Repl.) 272, 245.
- (11) *Banbury Urban Sanitary Authority v. Page* (1881), 2 Q.B. 97; 51 L.J.M.C. 21; 45 L.T. 759; 46 J.P. 184; 30 W.R. 415, D.C.; 36 Digest (Repl.) 248, 5.
- (12) *A.-G. v. Keymer Brick and Tile Co., Ltd.* (1903), 67 J.P. 434; 1 L.G.R. 654; 36 Digest (Repl.) 248, 3.
- (13) *R. v. Trafford* (1831), 1 B. & Ad. 874; 9 L.J.O.S.M.C. 66; 109 E.R. 1011; on appeal sub nom. *Trafford v. R.* (1832), 8 Bing. 204; 2 Cr. & J. 265; 1 Moo. & S. 401; 2 Tyr. 201; 1 L.J.Ex. 90; 131 E.R. 379, Ex. Ch.; 38 Digest 408, 985.
- (14) *St. Helens Chemical Co. v. St. Helens Corpn.* (1876), 1 Ex.D. 196; 45 L.J.M.C. 150; 34 L.T. 397; 40 J.P. 471, D.C.; 36 Digest (Repl.) 334, 775.

Case Stated by justices for Cheshire.

A complaint was made on March 9, 1925, by the clerk to the Sale Urban District Council, the respondents, against the appellants (who were trustees), under the Public Health Act, 1875, for failing to comply with a notice to abate a nuisance on land adjoining the River Mersey. The nuisance arose from constant flooding of the land by water admitted from the river through a breach in the flood bank on the portion of the land belonging to the appellants, and the deposit of deleterious material thereon. The justices ordered the appellants within nine months to repair the breach by reconstructing the flood bank.

Upon the hearing of the complaint the following facts were proved or admitted. (a) A notice dated Jan. 7, 1925, to abate the nuisance complained of within forty-two days from the service thereof was duly served upon the appellants by the respondents. (b) The appellants had not abated the nuisance in accordance with the notice or at all. (c) The appellants were the owners of land and premises, comprising an area of 16 acres 3 roods 14 perches. (d) The appellants' said land and premises had a frontage on the River Mersey. (e) Before reaching the appellants' land and premises large quantities of sewage effluents and industrial effluents and some untreated sewage had been passed into the River Mersey. (f) The appellants' land and premises, and adjoining land and premises on each side of the appellants' land and premises, and land and premises on the opposite bank of the River Mersey, were protected from the River Mersey by artificial flood banks, which were constructed of earth, clay, gravel, stone, and the like materials, and which were of a height approximately 12ft. above the normal level of the water in the river. (g) The flood banks were constructed so long ago that no record could be found of their construction. (h) Other riparian owners of the lands and premises adjacent to the River Mersey had carried out repairs to the floods banks on their respective lands and premises. (i) The said flood bank on the appellants' land was not in a state of proper repair at the date when photographs of the breach in

A the river bank were taken. (j) In or about the month of February, 1920, during a heavy rainfall the flood bank on the appellants' land gave way causing a breach in the said flood bank on the appellants' lands, and through this breach water of the River Mersey was admitted on to and flooded the appellants' land and adjoining land and premises. The flooded land and premises within the Urban District of Sale were of an area of approximately 349 acres. (k) The breach in the flood bank B had not been repaired and/or made good, with the result that the said area of approximately 349 acres had become subject to floods from the River Mersey and had been more frequently flooded. (l) The flooding of the said land and premises whereby the said land and premises were submerged and deleterious matter was deposited thereon constituted a nuisance. (m) The breach had gradually increased in size since the date when the flood bank gave way, and at the date of the hearing of the complaint the breach was coterminous with the boundary of the appellants' C land. (n) The breach could be repaired by reconstructing the flood bank on the appellants' land and premises, and the nuisance could be thereby abated.

The justices' attention were called to the following cases: *Nathan v. Rouse* (2), *Hudson v. Tabor* (3), *A.-G. v. Tod Heatley* (1), *Margate Pier and Harbour (Co. of Proprietors) v. Margate Town Council* (4), *Thames Conservators v. Port of London Sanitary Authority* (5), *Scarborough Corpn. v. Scarborough Rural Sanitary Authority* (6), *Letterkenny Town Comrs. v. Collins* (7), *Arlidge v. Islington Corpn.* (8), *Whalley v. Lancashire and Yorkshire Rail. Co.* (9), *Bishop Auckland Local Board v. Bishop Auckland Iron and Steel Co.* (10), *Banbury Sanitary Authority v. Page* (11), *A.-G. v. Keymer Brick and Tile Co.* (12), *R. v. Trafford* (13), *St. Helens Chemical Co. v. St. Helens Corpn.* (14). D

E The justices were of opinion that a nuisance did exist upon the said area of approximately 349 acres, and that the nuisance was caused by the act, default and sufferance of the appellants in failing to make good the breach in the flood bank of the River Mersey, and in suffering the breach to be and to remain and in suffering water and deleterious matter to flow more frequently on to the appellants' F land and thence on to the rest of the said 349 acres.

Wingate-Saul, K.C., and *Harold Rhodes* for the appellants.
Cyril Atkinson, K.C., and *W. Gorman* for the council.

LORD HEWART, C.J.—The question raised by this case is whether the justices came to a correct determination in point of law. It was urged before the justices, as it has been urged before us, that the appellants were under no obligation at all G to repair the bank or any part of it. The question turns upon the true construction of s. 94 of the Public Health Act, 1875, and especially of certain phrases contained in that section. The scheme of the section is sufficiently clear. The local authority, being informed of the existence of a nuisance, begins by trying to find the person by whose act, default or sufferance the nuisance arises or continues—it is important H to observe that in that part of the section the two verbs are used—"arises or continues." The section goes on to deal with the case where the person by whose act, default or sufferance the nuisance arises or continues cannot be found

"or, if such person cannot be found, on the owner or occupier of the premises on which the nuisance arises, requiring him to abate the same, . . ."

I but that is qualified by two provisos of which only the second is material here :

"provided . . . that where the person causing the nuisance cannot be found, and it is clear that the nuisance does not arise or continue by the act, default or sufferance of the owner or occupier of the premises, the local authority may themselves abate the same without further order."

The question before the justices was whether it was true to say that the nuisance arose or continued by the act, default or sufferance of the owners of the land. The argument on behalf of the appellants has proceeded throughout on the basis that there cannot be a default unless there has been a breach of an obligation arising

from agreement. It has been said that there was no agreement to erect or repair the flood banks, and as there was no obligation there could be no default. Stress has been laid on a particular part of a judgment of LORD COLERIDGE, C.J., in *Thames Conservators v. Port of London Sanitary Authority* (5). It is important to observe that in that case the appellants were owners of the foreshore for specified purposes only, and not for the purpose of s. 4 of the Public Health (London) Act, 1891 (which corresponds in the metropolis to s. 94 of the Public Health Act, 1875). They were, moreover, a public body whose powers were regulated by statute, and no statute gave them power to scavenge or abate nuisances except in so far as obstruction was caused thereby to navigation. The judgment is to be read in the light of those facts. That is clear, when one compares the judgment of LORD COLERIDGE with that of MATHEW, J. There are passages in the former, but not in the latter, which seem, indeed, to support the appellants' contention, but it is fair, with respect, to say with reference to the judgment of LORD COLERIDGE (i) that the learned judge was impressed with the fact that the appellants had not the power to do the acts which the respondents sought to make them do ; (ii) that, if the passage referred to does indeed bear the meaning attributed to it, it was not necessary for the decision of the case and is obiter.

The act, default, or sufferance referred to, is an act, default, or sufferance in reference to the particular nuisance, and default no less than sufferance can arise independently of agreement. As was said by LINDLEY, L.J., in *A.-G. v. Tod Heatley* (1) :

"The defendant is the owner and occupier, or possessor, of a vacant piece of land, and we are not embarrassed in this case by any of the questions which arise when the dispute is whether it is the duty of a reversioner, or of a tenant, to keep the premises in proper order. We have only got the owner of the vacant piece of land to deal with. Now is it, or is it not, a common law duty of the owner of a vacant piece of land to prevent that land from being a public nuisance? It appears to me that it is. Turning to the books on criminal law to which we are accustomed to go for information about such matters as this, and taking HAWKINS' PLEAS OF THE CROWN, which is one of the best, I find that in his chapter on nuisances he says (8th Edn., vol. 1, p. 692, s. 1), it seems that a common nuisance may be defined to be an offence against the public, either by doing a thing which tends to the annoyance of the King's subjects, or by neglecting to do a thing which the common good requires. If the owner of a piece of land does permit it to be in such a state, e.g., smothered or covered with filth, that it is a public nuisance, he commits an indictable offence. He has no defence whatever to an indictment for such a public nuisance. It is no defence to say, 'I did not put the filth on, but somebody else did.' He must provide against this if he can. His business is to prevent his land from being a public nuisance."

Again LINDLEY, L.J., adds :

"I cannot for a moment entertain the slightest doubt that it is the common law duty of this gentleman to prevent that piece of land from continuing as a public nuisance. That it is a public nuisance is beyond all controversy. There is no question at all about that."

Those passages seem to me to be, even in a peculiar degree, applicable to the present case. Counsel for the appellant has reposed throughout upon the view that it is only by the breach of an agreement which the owner is compellable to perform that he can be guilty of a default. That seems to be altogether too narrow a view, especially when one has regard to the juxta-position of the word "sufferance." The true principle is that laid down by LINDLEY, L.J., in the passages I have cited from *A.-G. v. Tod Heatley* (1). For these reasons I think that this appeal should be dismissed.

A **AVORY, J.**—I am of the same opinion. The foundation of the appellants' argument was that they were under no legal obligation. But *A.-G. v. Tod Heatley* (1) makes it clear that they are under a legal obligation to abate a nuisance upon their own land, and in this case it is clear that the nuisance arose from the default of the appellants, and that distinguishes this case from *Thames Conservators v. Port of London Sanitary Authority* (5). When that decision of LORD COLERIDGE, **B** C.J., is looked at carefully, it contains nothing inconsistent with the decision which we are giving, though at first sight the passage referred to does appear to be inconsistent with *A.-G. v. Tod Heatley* (1). When looked at closely it appears that the whole argument proceeded on the question whether the conservators were owners for the purposes of the Public Health Acts. Sir Henry James, who appeared for the conservators, said in argument ([1894] 1 Q.B. at p. 651):

C "The Thames Conservancy Act, 1857, which created the conservators and vested in them the rights of the Crown and the corporation in the bed and foreshore of the river, did not make them owners for all purposes of the foreshore. That Act contains restrictive clauses as to the power of the appellants to raise money which are inconsistent with the idea of ownership, together with a specific direction as to the application of their funds, of which one-third **D** is to be paid to the Crown and two-thirds are to be applied to the general purposes of the Act. Those purposes do not include scavenging or sanitary matters, as to which nothing is said in the Act, and the power of removal of nuisances is confined to such as may injure the river or obstruct the navigation; this particular nuisance complies with neither of those requirements, though it **E** may be injurious to the neighbourhood. The appellants have under that Act no funds legally and properly applicable to the removal of nuisances such as the present."

Sir Harry Poland, for the respondents in that case, said:

F "The question in the present case is, therefore, whether, within the meaning of that section, the appellants are the owners of the land on which the nuisance in fact exists."

The whole judgment really proceeds on the basis that they were not owners. LORD COLERIDGE, C.J., says, referring to the proviso:

G "The plain meaning of that proviso is that before the liability of the owner or occupier arises, it must be impossible to find the maker of the nuisance, and the nuisance must continue by the act, default or sufferance of the owner or occupier. Neither of those requisites is satisfied in the present case."

That is, he comes to the conclusion that there was no act, default or sufferance on the part of the conservators of the river. In the present case there clearly was default or sufferance, and consequently I find no difficulty in reconciling the judgment of LORD COLERIDGE, C.J., in *Thames Conservators v. Port of London Sanitary Authority* (5) with our present decision: if there is any difficulty in so reconciling **H** it, then I prefer the decision in *A.-G. v. Tod Heatley* (1), which was three years after the decision in the *Thames Conservancy Case* (5) which the Court of Appeal had before them in *A.-G. v. Tod Heatley* (1). I agree that the appeal should be dismissed.

I **SANKEY, J.**—I agree, and only desire to add a few words on *Thames Conservators v. Port of London Sanitary Authority* (5). Careful examination shows that the real and only point in that case was whether the conservators were owners. That clearly appears from the contentions of the respondents. There were only two of them ([1894] 1 Q.B. at p. 649): (a) That under s. 50 (1) of the Thames Conservancy Act, 1857, the bed and soil of the foreshore of the creek had vested in the appellants, and (b) that under that section and other sections of the same statute the respondents were "owners" of the premises on which the nuisance existed, within the meaning of s. 141 of the Public Health (London) Act, 1891,

and as such liable to abate the nuisance under s. 4 of that Act. Those were the only contentions of the respondents ; the appellants raised a series of contentions to show that they were not "owners" ; it was only when they got as far as (g) that they contended that the nuisance did not arise by their act, default or sufferance. The whole contention of the respondents and the main contention of the appellants were on the question of ownership. It was the only question argued by Sir Henry James and the main question argued by Sir Harry Poland. LORD COLERIDGE, C.J., at the end of his judgment, says :

"I come, therefore, to the conclusion in this case that although the appellants may have been, and no doubt are, for certain purposes, occupiers and owners of the soil and foreshore of the Thames, they are not occupiers and owners of the soil and foreshore for the purposes of s. 4 of the Public Health (London) Act, 1891."

MATHEW, J., as he then was, very briefly dismissed the contrary view :

"I cannot suppose that the legislature had in view owners of this peculiar kind as distinguished from ordinary owners of property, nor can I believe that, if any such obligation was intended to be imposed by the statute on the conservators, there would not be elaborate provisions to enable them to find the means to carry out what it is suggested they ought to do."

If LORD COLERIDGE, C.J., in that case purported to decide any other point than ownership, I think it was obiter, and, if so, as AVORY, J., has pointed out, I prefer the statement of the law in *A.-G. v. Tod Heatley* (1). For these reasons I agree that this appeal should be dismissed.

LORD HEWART, C.J.—I desire to add that these judgments must not be construed as meaning that the appellants are liable in all circumstances to maintain flood banks which will keep out all floods.

Appeal dismissed.

Solicitors : *Rider, Heaton, Meredith & Mills*, for *Ticehurst, McIlquham, & Wyatt*, Cheltenham ; *Church, Adams & Co.*, for *Cobbett, Wheeler & Cobbett*, Manchester.

[*Reported by J. F. WALKER, Esq., Barrister-at-Law.*]

A

YORK GLASS CO., LTD. v. JUBB

[COURT OF APPEAL (Sir Ernest Pollock, M.R., Warrington and Sargant, L.JJ.),
October 14, 15, 1925]

B

[Reported 134 L.T. 36; 42 T.L.R. 1]

*Person of Unsound Mind—Contract—Knowledge of other contracting party—
Repudiation of contract by receiver—Validity of contract.*

C

The defendant entered into a contract by correspondence, after inspection of the property, to purchase the plaintiff company's glassworks and business as a going concern for £54,600, a lower price than that originally asked by the vendors. At that date the defendant was suffering from general paralysis of the insane, and was shortly afterwards removed to a lunatic asylum. The purchase was not completed, and some months later the receiver of the defendant's estate, appointed under the Lunacy Acts, repudiated the contract. The company then brought an action for damages for breach of contract.

D

Held: a contract made by a person of unsound mind with another was valid unless the person of unsound mind could prove that the other contracting party knew him to be so insane at the relevant time as not to be capable of understanding what he was about; in the present case the defendant had failed to prove that the plaintiff company or their representatives knew, or had any reason to suppose, that he was insane at the date of entering into the contract, and, there being no equitable ground, such as that of unfairness, to relieve the defendant and his estate of liability under the contract, the contract was valid and the defendant was liable under it.

E

Imperial Loan Co., Ltd. v. Stone (1), [1892] 1 Q.B. 559, applied.

Decision of LAWRENCE, J., (1924), 131 L.T. 559, affirmed.

F

Notes. By the Mental Treatment Act, 1930 (17 HALSBURY'S STATUTES (2nd Edn.) 1230, the use of the word "lunatic" (except criminal lunatic and lunatic outside England) was replaced by the words "person of unsound mind." See now, the Mental Health Act, 1959.

For contracts made by persons of unsound mind see 21 HALSBURY'S LAWS (2nd Edn.) 279 et seq., and for cases see 33 DIGEST 128 et seq.

Cases referred to:

G

(1) *Imperial Loan Co. v. Stone*, [1892] 1 Q.B. 599; 61 L.J.Q.B. 449; 66 L.T. 556; 56 J.P. 436; 8 T.L.R. 408, C.A.; 33 Digest 130, 57.

(2) *Molton v. Camroux* (1849), 4 Exch. 17; 18 L.J.Ex. 356; 13 L.T.O.S. 305; 154 E.R. 1107, Ex. Ch.; 33 Digest 129, 50.

(3) *Elliott v. Ince* (1857), 7 De G.M. & G. 475; 26 L.J.Ch. 821; 30 L.T.O.S. 92; 3 Jur. N.S. 597; 5 W.R. 482; 44 E.R. 186, L.C.; 33 Digest 135, 126.

H

(4) *Price v. Berrington* (1851), 3 Mac & G. 486; 18 L.T.O.S. 56; 15 Jur. 999; 42 E.R. 348, L.C.; 33 Digest 128, 47.

(5) *Niell v. Morley* (1804), 9 Ves. 478; 32 E.R. 687; 33 Digest 128, 49.

(6) *Sergeson v. Sealey* (1742), 2 Atk. 412; 9 Mod. Rep. 370; 26 E.R. 648, L.C.; 33 Digest 160, 436.

I

(7) *Robinson v. Harman* (1848), 1 Exch. 850; 18 L.J.Ex. 202; 13 L.T.O.S. 141; 154 E.R. 363; 17 Digest (Repl.) 81, 33.

(8) *Baxter v. Earl of Portsmouth* (1826), 5 B. & C. 170; 2 C. & P. 178; 108 E.R. 63; sub nom. *Bagster v. Earl of Portsmouth*, 7 Dow. & Ry. K.B. 614; 33 Digest 129, 54.

(9) *Dane v. Viscountess Kirkwall* (1838), 8 C. & P. 679, N.P.; 33 Digest 130, 60.

(10) *Campbell v. Hooper* (1855), 3 Sm. & G. 153; 3 Eq. Rep. 727; 24 L.J.Ch. 644; 25 L.T.O.S. 220; 1 Jur. N.S. 670; 3 W.R. 528; 65 E.R. 603; 33 Digest 130, 62.

Appeal from a decision of LAWRENCE, J., reported 131 L.T. 559. The facts are fully stated in the judgment of the Master of the Rolls below. The action was one for damages for breach of a contract, contained in correspondence to purchase the plaintiff company's glassworks at York. The defence was that the defendant was of unsound mind when he entered into the contract. The learned judge held upon the evidence (i) that the defendant was insane at the time he entered into the contract, (ii) that the representatives of the plaintiff company who were negotiating with him for the sale did not at any time prior to or at the date of the agreement know that the defendant was insane, or that his state of mind was in any way abnormal, (iii) that the medical evidence given to show that anyone transacting business with the defendant in October, 1922, must have realised he was insane had been proved to be wrong, (iv) that the plaintiff company did not know that the defendant was infirm of mind and body and incapable of managing his affairs reasonably and properly, (v) that the price agreed to be paid was not excessive, (vi) that the plaintiff company's representatives, dealing with one whom they believed to be an ordinary business man were under no obligation to see that he had independent legal or other advice, (vii) that there was no inequality between the contracting parties, and therefore (viii) that there was no want of fairness in the terms of the contract itself or in the circumstances in which it was made. He therefore gave judgment for the plaintiffs, with a declaration that the agreement constituted a valid and binding contract between the parties, and directed an inquiry as to the amount of damages sustained by the defendant company owing to the plaintiff's breach. The defendant appealed, but the appeal, upon his application, was stayed until after the inquiry into damages had been heard. The learned judge found upon the inquiry that the amount of the damages suffered by the plaintiff company was £21,000, and he made an order for payment of that amount. The defendant entered a second appeal from this order, on the ground that the damages awarded were excessive.

F. K. Archer, K.C., A. F. Clements, and Leslie Whitaker for the defendant.

H. S. Preston, K.C., and Cleveland-Stevens, for the plaintiffs, were not called upon to argue.

SIR ERNEST POLLOCK, M.R.—This is an appeal from a judgment given by LAWRENCE, J., in an action on May 6, 1924. The action was brought by the York Glass Co., Ltd., against Thomas Jubb, to enforce a contract which had been made between Mr. Jubb and the receiver of the company, Mr. Barron, for the sale of the buildings and machinery and the premises and land on which the business of the York Glass Co., at the time the contract was entered into, was carried on. It appears that the York Glass Co. had enlarged their business, and during the war had been carrying on for some years a more or less profitable business; but before the year in question, 1922, the prosperity of the company had been decreasing, and, indeed, at the time when the contract was made in October, 1922, a receiver had been appointed, because there had been a failure to pay a sum due upon the debentures, £45,000 in money, which were held by the bank, to a company which had provided new machinery. Those who were interested in the company had come to the conclusion that the best course—and the receiver was also of that opinion—was to try and realise the assets of the company in order to pay the debentures, namely, £45,000, and if possible to get something over which might enure to the benefit of the company. In October, 1922, a contract was made between Mr. Jubb and the company by which Mr. Jubb agreed to buy the land, buildings, machinery and premises of the company at a sum of £54,600. The statement of claim by the prayer asked for a declaration that there was a good and binding agreement between the plaintiff company and the defendant for specific performance of the agreement, and for consequential relief. The defence which was put in was that even if there was a contract made, which was not admitted, Mr. Jubb was a person of unsound mind and incapable of understanding

A the contract as the plaintiffs well knew at the date of the contract. That was the plea which counsel for the defendant has explained to us was his plea in law. There was also permission given at the trial by the learned judge that a new plea should be inserted, a plea which counsel for the defendant says was one really to apply principles of equity to the contract, and that plea was: The alleged contract is not binding upon the defendant in that he was, as the plaintiffs well knew, or ought to have known, infirm of mind and body, and incapable of managing his affairs reasonably and properly, and in that the alleged sale was made at a price greatly in excess of the value of the property, and in that the defendant had no independent or proper legal or other advice, and in that there was no reasonable degree of equality between the contracting parties. That really in effect is a claim which could have been put forward better perhaps by way of counterclaim: that the contract on equitable principles ought not to be held to be binding upon the defendant; but the learned judge has dealt with both the plea which was set forward in law, and the grounds which were set up in equity for resisting the claim of the plaintiffs on the basis that they are to be treated as defences to the action. At the trial counsel for the plaintiffs agreed that he could not ask for, or he would not ask for specific performance of the contract, and the action, therefore, becomes a simple action asking for a declaration that there was a valid contract made in October between the parties to it, and damages for breach of contract, because unhappily it appears Mr. Jubb was suffering both earlier and later than the time of the contract from general paralysis, and was insane, which led to an order being made on Oct. 26, to receive him into a lunatic asylum.

E The case raises a number of interesting points. We have had the advantage of a careful and lucid argument by counsel for the defendant upon the points raised. We have also had the very considerable advantage of a most careful judgment by LAWRENCE, J., who has dealt with the whole of the points of law, and most carefully gone through the questions of fact, and presented his conclusions, and the grounds for them, in a manner which has been extremely helpful to the court. F The first question which arises is: Was there a contract made? The contract is contained in three letters. The letters were, first, a letter signed by Mr. Jubb, of Oct. 11, 1922, addressed to the receivers, Messrs. Barron and Barron.

"Having been round the York Glass Co. works, I beg to offer you for the whole concern, including stock, plant and working material, the sum of £50,000."

G After that offer had been made the receiver expressed his decision not to accept it. He would not accept it because before he had met Mr. Jubb, or received an offer, he had come to the conclusion that not less than £60,000 would be the right price to ask for, and if possible obtain, for the premises which were to be sold, and when this offer was put forward he did not accept it. Afterwards there was a meeting which took place at the Queen's Hotel, at Leeds, and in consequence of what passed, Mr. Jubb amended his offer, and on Oct. 13, the date of the meeting at Leeds, he amended the offer, and wrote as follows: "I hereby amend my offer above to the sum of £54,600." Perhaps it is convenient to mention how the increased sum was arrived at. It appears that a valuation had been made, and was in the possession of the receiver, half of which was the sum of £59,200. That £59,200 was the figure which Mr. Barron was insisting upon getting. By a system of bargaining, Mr. Jubb was prepared to split the difference between £59,200 and his offer of £50,000; that would bring the figure of his offer up to £54,600. On the other hand, Mr. Barron was minded to adhere to his figure of £60,000, but to split the difference between that figure and the £50,000 offer which would have made £55,000. The mean between the valuation and the offer, and the mean between £55,000, the sum that Mr. Barron desired to get, and the £50,000 offer, was £55,000, a difference of only £400 from the £54,600. It appears that in order to settle that question they did what has been done before, and what will be done again by business men in settling figures; they tossed a coin and Mr.

Jubb won, with the result that his offer stood of £54,600, and he amended the form of his letter on Oct. 13. There was the offer put before Mr. Barron. Mr. Barron had to consider what were the views of Mr. Pratt, Mr. Pratt being the person chiefly interested in the York Glass Co. But after communication with Mr. Pratt on Oct. 16, he wrote a letter to Mr. Jubb, which is clear in its terms :

"I beg to accept your offer of £54,600 for the freehold land and buildings, furnaces fixed and loose plant, fixtures, fittings, and stock of material and glassware, the property of the above-named company."

It appears, therefore, *ex facie*, that there is a perfectly clear and clean offer, and a perfectly clear and clean acceptance. It was argued before LAWRENCE, J., and has been argued again here by Mr. Clements, that there was not in fact a contract, because there was on both sides, known to both parties, a condition which prevented Mr. Jubb's offer being the simple offer which it appears on the letters to be, and that there was that term outstanding which had not been dealt with, which is not referred to in the letters, and that the fact that there is that term or condition outstanding preventing there being a consensus animorum of the parties when they wrote those letters. LAWRENCE, J., has dealt with the matter very fully in his judgment, and I do not desire to go over the ground again ; it is sufficient for me to say that I do not think the point a good one. It appears that a suggestion had been made that if £55,000 was the price given by Mr. Jubb, Mr. Pratt would so far back his opinion that the sum was a fair and, indeed, a conservative price to pay for the premises, that if and when a company was formed by Mr. Jubb to carry on the business of glass-making he, Mr. Pratt, would take an interest in some form or another up to £10,000 in that company. The learned judge points out that if that was a condition it was a condition subsequent, and I agree with him. But I also think that there was no such condition attached to or in the minds of the parties who were contracting. The offer was an offer by Mr. Pratt, who was not a party to the contract, and Mr. Pratt, if there was any term which Mr. Pratt was to adhere to, that is to say, if it was to be a contract made by A. with B. if and when C. agreed to do something, or did something, then it appears to me upon the evidence quite clear that Mr. Pratt did agree, and did adhere to the term which he had offered of putting £10,000 in if the price was £55,000. He adhered to that although the price was £54,600. When the letters which passed, and which have been referred to by Mr. Clements, are examined, it appears to be quite clear that there was no reservation or intended reservation, on the question of the contract, and that all parties perfectly understood what was the term of the contract ; that it was to be an out-and-out sale by Mr. Barron as receiver acting on behalf of the debenture-holders to Mr. Jubb, and that any negotiations or term as to Mr. Pratt providing any money were outside that contract. But if it was even a condition, then that condition was fulfilled by Mr. Pratt agreeing with whatever his offer was, it stood good, although the price obtained was not in fact the full £55,000. I come, therefore, to the same conclusion as the learned judge did, that there was a firm and binding contract made between the two parties.

Unhappily it was discovered afterwards that Mr. Jubb was suffering from general paralysis and was insane, and had to be put either in an asylum or in some home for lunatics, with the result that the contract was not carried out. By February, 1923, there was a repudiation of the contract made by the lunatic's receiver. Now, it is quite plain and clear law that the contract of a lunatic is avoidable and not void. It is avoidable and can be avoided if it is proved that at the time when it was made the fact that one party to the contract was a lunatic was known to the other party contracting. LAWRENCE, J., after carefully going into the matter, has come to the conclusion, upon the evidence, and we have gone into some of the evidence, and I agree with his conclusion, that those who were acting on behalf of the York Glass Co. and Mr. Barron did not know at the time, and had no reason

A to know, that Mr. Jubb was a lunatic. Therefore, the contract is one which cannot be avoided. It would imperil contracts if a party was afterwards entitled to say that he was a lunatic, and the reasoning on which the contracts are held to be voidable and not void is traced by the learned Chief Baron in *Molton v. Camroux* (2). That case was affirmed in the Exchequer Chamber, and the decision of the Exchequer Chamber was given by PATTESON, J. The learned Chief Baron

B puts it in this way :

"We think, however, that we may safely conclude, that when a person, apparently of sound mind, and not known to be otherwise, enters into a contract for the purchase of property which is fair and bonâ fide, and which is executed and completed,"

C the contract stands good. In that case it had been argued that there was a difference between contracts executory and contracts executed, but no such distinction was upheld in that case. The law as laid down in *Molton v. Camroux* (2) was not only affirmed in the Exchequer Chamber, but it was accepted and followed in *Elliott v. Ince* (3), where LORD CRANWORTH accepts the doctrine. He says (26 L.J.Ch. at p. 824) :

D "The decision in *Molton v. Camroux* (2) which was referred to, was not founded upon the doctrine here contended for. The principle of that case was that executed contracts, where the parties had been dealing fairly and in ignorance of the lunacy, should not afterwards be set aside. This was a decision which might be described as a decision of necessity ; a contrary doctrine would

E render all dealings unsafe. How was a shopkeeper who sold his goods to know whether the customer was of unsound mind? Perhaps the same principle might apply to sales or mortgages of lands. LORD TRURO, from his observations in *Price v. Berrington* (4) appeared to have thought that it would. But it was obvious that no such question could arise where there was no contract with a third person, but merely a dealing by the lunatic with his own property

F without any consideration from other parties. Still less was the principle on which SIR W. GRANT acted in *Niell v. Morley* (5) applicable. Upon a similar principle to that LORD HARDWICKE acted in *Sergeson v. Sealey* (6). The result of the authorities appeared to be that dealings by way of sale and purchase by a person apparently sane, but afterwards found to be insane, would not be set aside as against those who had dealt with him on the faith of his being a person of competent understanding."

G Still more recently in *Imperial Loan Co. v. Stone* (1) this principle was affirmed. LORD ESHER, M.R., said definitely :

"When a person enters into a contract, and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding on him in every respect, whether it is

H executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about."

FRY, L.J., then says :

"It appears that there has been grafted on the old rule the exception that the contracts of a person who is non compos mentis may be avoided when his condition can be shown to have been known to the plaintiff."

I

Now as I have said, for reasons good and sufficient LAWRENCE, J., has come to the conclusion that there was a contract, and that the lunacy of Mr. Jubb was not known to those who represented the York Glass Co. He has held, therefore, that the contract was binding upon Mr. Jubb. He has further dealt with the plea which he allowed to be put upon the record, which I have read, and which deals with the question of whether or not the contract ought to be set aside on the ground broadly speaking that it was not fair, that Mr. Jubb had no advice, that

there was no equality between the parties, and that it was made at a price greatly in excess of the value. All those matters are most carefully dealt with by LAWRENCE, J., in his judgment, and he finds upon good reasoning that the price was not excessive. There was evidence dealing with that point given at the trial showing a great divergence of opinion among the valuers with regard to the premises which were bought under this contract. It is perhaps as true in the difficult matters of valuation that *quot homines tot sententiae* is an observation which must not be overlooked. No doubt quite honestly different conclusions can be formed by different valuers as to the true price which should have been paid for this business in October, 1922. Quite apart, however, from the evidence of valuers you have these simple and strong facts which are recounted, that Mr. Barron, acting on behalf of the debenture holders, was determined so far as he could to get £60,000 for the premises ; That Mr. Jubb, who was accompanied on his visit to the premises and at the Queen's Hotel at Leeds by others who had long been associated with him, refused to give at first more than £50,000 ; ultimately he increased it to £54,600, but stoutly refused to get up to as much as £55,000. It is obvious, therefore, that considerable bargaining took place between the parties, and on the evidence before him it appears to me that the learned judge was quite right in coming to the conclusion that the price agreed to be paid by the defendant was not excessive. He also decides the other points which are raised by the plea in favour of the plaintiff. He finds the defendant did have advice ; he finds that there was no reasonable degree of inequality, and that the parties were at that time dealing as business men between business men without any knowledge or consciousness of the fact that Mr. Jubb was suffering from this fell disease. He also finds that there is no ground for holding that those acting on behalf of the plaintiff company overreached or exercised any undue influence over the defendant. In those circumstances it appears quite clear that the terms which are constituted in the passage which I have read from the learned Chief Baron's judgment in *Molton v. Camroux* (2) are fulfilled. The contract was entered into for the purchase of property at a price which was fair and *bonâ fide*, or as PATTESON, J., puts it (4 Exch. at p. 19) :

"The modern cases show, that when that state of mind was unknown to the other contracting party, and no advantage was taken of the lunatic, the defence cannot prevail, especially where the contract is not merely executory, but executed in the whole or in part, and the parties cannot be restored altogether to their original position."

Again it was said by LOPES, J., in the *Imperial Loan Co. v. Stone* (1), where he summarises the cases, that in order to avoid a fair contract on the ground of insanity the mental incapacity of the one must be known to the other of the contracting parties. It appears to me, therefore, that LAWRENCE, J., has excluded on both grounds the possibility of Mr. Jubb's representatives avoiding this contract entered into by him on terms which were fair. The result, therefore, is that LAWRENCE, J.'s, judgment on the main question must be supported.

The second question which the learned judge had to determine was : What damages were the York Glass Co. entitled to upon a breach of contract by Mr. Jubb? The learned judge has found upon a subsequent enquiry held a little later than the actual trial of the case on the main question that the sum to be awarded is £21,000. At first sight it seems a large sum because he takes the date at which that sum is to be ascertained as the date of the repudiation to which I have already referred, namely, Feb. 9, 1923. No doubt counsel for the defence had grounds for saying that it appeared somewhat startling that a contract fair and good for £54,600 made on Oct. 16, 1922, should result in a loss quantified at £21,000 some five months later. But a little further examination shows, to my mind, that LAWRENCE, J., was right. It must be remembered that at the time the contract was entered into in October both parties entered into it, in the belief and for the purpose of the business being carried on.

A Mr. Jubb was anxious to get possession at once. Although the furnaces had at the time been damped down, it was possible to re-start them at no very great expense. Orders were still coming in and Mr. Jubb was anxious to put the furnaces at full blast and continue the orders and carry on the business, as it had been, with some new machinery, and to earn profits which at that time he thought could be earned. In February the position was totally different. By that time it was realised by
B Mr. Barron that there would be no chance of a purchaser coming to buy the premises as a whole or as what I may call a going concern. The glass trade had gone back very rapidly. It was realised that it would be impossible to meet foreign competition from America and possibly again from Austria and that the best way of realising the assets in his hands was by selling them at a break-up value. It is really the different way in which the assets were treated that is responsible for the large
C divergence of price obtained. If it had been possible first to sell the business as a going concern, it may well have been that in February, 1923, a sum much closer to the £54,600 would have been obtained. But there was evidence before LAWRENCE, J., which he accepted, that the right course to adopt was that which was adopted by Mr. Barron, namely, to sell at a break-up value. The total loss which has actually been suffered is put by the valuers who were called on behalf of the plaintiffs at no less a sum than £30,000. Counsel for the defendant, for reasons which he explained, after having called evidence of value before the learned judge at the trial on the main question, did not call any evidence on the question of damages, but he cross-examined the fresh evidence given and he was, of course, able to make criticisms upon it. The learned judge had come to the conclusion rightly that he was entitled to apply his own mind to the evidence given before him and not to accept at its
E full value the loss as estimated for him by the valuers called on behalf of the plaintiffs. He has reduced the sum which he gives as damages from £30,000 to £21,000. This is really a simple case in which we have to apply the old rule of common law as to damages, which is :

F "Where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."

There is abundant authority for that statement of the law. I am reading a passage from PARKE B., in *Robinson v. Harman* (7). Those damages are not confined to the actual margin between the sum realised and the contract price ; there may be incidental expenses which have necessarily flowed from the breach of contract, and if those are to be taken into account the damages may be enhanced by an
G amount which will recompense the party who has suffered for the expenses which the breach of contract has entailed upon him. All these considerations have been before LAWRENCE, J. He has applied his mind to the evidence before him, and he has come to the conclusion that a sum of £21,000 is the right amount. I am not disposed at all to differ from him. As I have explained, the divergence arises from the different method of valuation which was necessitated by the conditions of the
H glass trade between October and February. It appears that this court has no right to set aside an amount which has been ascertained with care by the learned judge upon true principles of law which cannot be impeached. The result, therefore, will be that both appeals must be dismissed with costs.

I **WARRINGTON, L.J.**—I am of the same opinion. These are two appeals from LAWRENCE, J. The first is from his judgment at the trial, whereby he declared that certain letters of Oct. 11, 13, and 16, 1922, passing between Mr. Barron, as agent for and on behalf of the plaintiffs, and the defendant, constitute a binding agreement between the plaintiffs and the defendant for the sale by the plaintiffs to the defendant for a sum of £54,600 of the freehold hereditaments and buildings, situate at Fishergate, in the City of York, forming the plaintiffs' works, together with the plant, fixtures, and stock of materials and glassware thereof, and by which he also directed an inquiry as to damages. The second appeal is from an order

on the inquiry which was held in court before the learned judge himself with witnesses, by which he assessed the damages at £21,000. On the letters of Oct. 11, 13 and 16 there was a clear contract in writing for the purchase of the property mentioned in the judgment by the defendant at the sum of £54,600. That contract was duly made on behalf of the plaintiff company by Mr. Barron, acting as their agent, he being, in fact the receiver appointed for the protection of certain debenture holders. The action was brought originally for specific performance of the contract, or, in the alternative, for damages at the trial, it being quite plain that specific performance was quite impossible; the plaintiffs elected to treat the action as one for damages only for breach of contract, and, accordingly, it was so treated in the judgment by which the inquiry as to damages was directed. The defence raised by the defendant was that at the time the contract was made he was a person of unsound mind, and that fact was known to the persons with whom he was contracting. By an amendment made at the trial the defendant added a further paragraph to the defence in these terms:

"The alleged contract is not binding upon the defendant in that he was, as the plaintiffs well knew or ought to have known, infirm of mind and body and incapable of managing his affairs reasonably and properly, and that the alleged sale was made at a price greatly in excess of the value of the property, and in that the defendant had no independent or proper legal or other advice and there was no reasonable degree of equality between the contracting parties."

Counsel for the defendant quite properly stated before us that that amended defence was relied upon as raising a case in equity for the rescission of the contract upon the grounds alleged in that paragraph which I have read; for rescission of the contract, that is to say, on the assumption that at law there was a valid and binding contract, but that it was one which a Court of Equity under the old practice when the two courts were separate would have rescinded and set aside and would have granted an injunction and restrained the plaintiff from enforcing his right at law. I will deal first of all with the legal questions raised by the defence. There is now no question at all, I think, that the law with regard to contracts made by persons of unsound mind is that the person himself who alleges he is of unsound mind has no right to avoid the contract on that ground unless he proves not only that he was of unsound mind at the time he made the bargain, but that the other party knew that he was of unsound mind or knew such facts and circumstances that knowledge must be imputed to him—that they must be taken to have known. I do not propose to go into the earlier cases because it seems to me quite unnecessary, but the law is summed up in these terms by LORD ESHER in this court in *Imperial Loan Co. v. Stone* (1). The passage in his judgment which I propose to read is ([1892] 1 Q.B. at p. 601):

"I shall not try to go through the cases bearing on the subject, but what I am about to state appears to me to be the result of all the cases. When a person enters into a contract, and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding on him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about."

I think there need be added to that nothing but the slight corollary that if circumstances are proved which are such that any reasonable man would have inferred from these circumstances that the man was insane, then the man who contracts with him, although he may, without swearing by the card, say he did not know, would be taken to know that the man was of unsound mind. In the present case this legal position was accepted by the defendant's counsel. The defendant set himself to prove that two facts necessary to his success, namely,

A the fact of his insanity and of the knowledge, or imputed knowledge, of the other contracting party. He proved the fact of his insanity, but he failed to prove the second fact essential to his success, the learned judge having found that those who represented the company acted with honesty and in good faith, with no knowledge that he was of unsound mind, and even with no suspicion as to the defendant's condition in that respect. That finding has not been attacked, and if the court

B concluded the question, so far as the position at law was concerned, namely, that a good and binding contract had been made by the defendant, binding in every respect as if he had been a sane person, there then comes the question raised by the amended defence to which I have referred, whether, assuming the contract to be valid and binding at law, a Court of Equity would interfere to set it aside on proof of the allegations contained in the paragraph of the defence which I have read.

C Whether, if those facts had been proved, that would have been sufficient to justify a court in setting aside the contract, I do not stay to consider, because the learned judge had found that none of the facts so alleged were proved. That finding was attacked on one point, namely, the question of the amount of the purchase money. It was said that the learned judge was wrong in coming to the conclusion that the defendant had not proved that the price was a grossly excessive price. But, in my

D opinion, no reasons have been shown sufficient to justify us in disagreeing with the findings of the learned judge, and these findings must stand. That, therefore, disposes not only of the defence raised in point of law, but of the defence which is really a counterclaim raised for the setting aside of the agreement on the ground to which I have referred. So far, therefore, the agreement clearly stands. But

E a further point was raised by the junior counsel for the defendant, the effect of which was this, that the written contract did not express the entire contract between the parties because it omitted to mention a condition *sine qua non*, that is to say, a condition without the fulfilment of which the contract was not to be binding. Now it is a little difficult too discover what the condition alleged is. Learned

F counsel for the defendants at the trial did not insist that there was any condition at all. But I will pass that by for the moment, and I will try if I can to see what the condition relied upon by the defendant as the condition *sine qua non* is said to be. I think it is this, that the contract was not to be binding or enforceable unless and until a third person gave a promise to a certain effect, and the effect of that promise which it was said to be given was that that person, a third person, should, if and when the contract was completed, and if and when the defendant

G formed a company for the purpose of carrying on the works, he, the third person in question, would subscribe for £10,000 in shares in that company. I will take that as a condition which it is said was an essential condition of this contract being binding upon the defendant. The answer to it is that there is no evidence that any such condition was ever made by the defendant at all. The real fact is that a third person, who was interested as a large shareholder and director of a company

H which hold a considerable sum of debentures in the plaintiff company had expressed his willingness, if the defendant completed the contract for the purchase of the factory and formed a company upon reasonable terms as to capitalisation that he would subscribe for £10,000 in shares. I am perfectly satisfied that neither he nor the receiver nor the defendant regarded this as a condition *sine qua non* preventing the contract from being binding unless that condition was fulfilled. It was an

I expectation ; it was one of the motives with which the defendant entered into the contract, but it was not intended to be and never was a term of the contract itself. I have no doubt at all from the correspondence which we have seen that, if the defendant had not refused to carry out the bargain, the third person would have come in and assisted him in the way he had said he would with regard to the formation of a company. The circumstances never arose in which that assistance was required. The result is that, so far as the judgment in the action is concerned, the appeal fails on all grounds which have been raised and must be dismissed with costs.

The second appeal raised a question as to damages. The law as regards to that, I think, is quite sufficiently stated in WILLIAMS ON VENDORS AND PURCHASERS (3rd Edn.) at p. 1022 and 1023. He states the general rule of the common law as to damages in these terms :

"Where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same position with respect to damages as if the contract had been performed."

Then, dealing with a particular contract for the sale and purchase of land, he says this :

"If the purchaser break the contract as, amongst other things, by failure to pay the price before the vendor has parted with his estate in the land, the vendor cannot recover the whole price as damages, but is limited to the loss which he has actually sustained, that is to say, the difference, if any, between the price agreed to be paid and the value of the land as remaining on his hands at the date of the breach."

I can only add to that what is clearly the law, that he would be entitled to recover any further incidental expenses to which he had been put by being compelled to retain the land in his own possession instead of conveying it to the purchaser. Some attempt was made before us to modify that rule in this case by substituting as the first element of comparisons, not the price which the purchaser had agreed to pay, but some sum which might properly be regarded as the true value of the property at the time the contract was made. In my opinion that contention is perfectly hopeless. If the contract is binding upon the defendant in every respect as if he had been a sane man as by law it is binding, then the contract price is the sum, the payment only of which can fulfil the terms of that contract ; no other sum can be, and it must therefore be the proper element of comparison with the view of ascertaining what has been the vendor's loss by reason of the breach. The breach is the non-payment of the purchase price, in this case £54,600, and no other sum can be a proper standard of comparison. That being so, the further question remains : What is the date as at which that comparison is to be made? I think the learned judge was quite right in taking as the proper date Feb. 9, 1923, the day on which the receiver, acting in the matter of the defendant's estate, finally repudiated his contract. An attempt was made to take as the proper date a date very shortly after the conclusion of the contract, namely, the date at which it was ascertained that the defendant was a person of unsound mind. In my judgment, that date cannot possibly be the proper date for this reason : Not only the defendant, but the plaintiffs were bound by this contract, and no time having been fixed for completion, until the plaintiffs were finally assured that the defendant did not insist upon the performance of the contract they could not have disposed of the property either by selling it in detail or in any other way. They were bound to keep that property so as to be in a position to hand it over to the purchaser in case those who represented him, or he himself, if he should recover, should insist on its performance. They realised the difficulty in which they were placed, and throughout the latter part of 1922 and the early part of 1923 they were constantly pressing the receiver to be informed whether he repudiated the contract or whether he proposed to carry it out. They received no information until Feb. 9, the day on which he finally repudiated the contract. On that day there was clearly a breach, and as from that date the vendors were in a position to deal with the property as if the contract had not been made, but until that date they were not in that position. I think, therefore, that the learned judge was perfectly right in taking that date as the date on which the necessary comparison was to be made. As to the comparison itself we have had our attention drawn to the evidence which was given before the learned judge, and I see no reason for differing from the conclusion at which he has arrived. The value placed upon the property by the principal witness on behalf of the defendant was to the effect the property was then worth only

- A** £30,000, which left a gross deficiency of £24,600. The learned judge did not accept that statement to the full ; on the other hand, he did add something in respect of incidental expenses necessarily incurred, with the result that he arrived at a sum after adding those expenses and making a very considerable allowance in the estimate of value. He arrived ultimately at the sum of £21,000 at which he assessed the damages. No sufficient reason has been shown to us in my opinion for
- B** interfering with that assessment, and I also think the appeal must be dismissed with costs.

SARGANT, L.J.—I am of the same opinion, and on both points I will compress my remarks as much as possible. It seems to me, on the main appeal, with regard to the question whether any damages are payable that there are three points to be

C considered: First, was there a concluded contract between the parties, apart from all questions of lunacy? Secondly, was there a contract in view of the lunacy which was liable to be avoided at law, not enforceable at law? And, thirdly, if it was enforceable at law, was there any case for saying that equity would restrain the enforcement of the contract, that is to say, is the case one in which, prior to the Judicature Act, a Bill would have lain for an injunction to prevent the plaintiff

D enforcing his remedies at Law? Now, on the first point, I need say very little. In my view, there was a perfectly clear and definite contract constituted by the letters. There was no condition, in my judgment, such as junior counsel for the defendants has contended, for there was merely an expectation that, if the contract was concluded, there would be in the subsequent working out of the payment for the property by the formation of a company and so on, a subscription by one of the

E parties of £10,000 towards the capital of the company. With regard to the second point the matter seems to me really to be concluded by the very careful findings of fact by the learned judge. The learned judge has said this:

“I hold it to be a fact that the plaintiff company did not at any time [that means the receiver on behalf of the plaintiff company] prior to or at the date of the agreement in question know that the defendant was insane or that his

F state of mind was in any way abnormal.”

In my view that finding of the learned judge is absolutely and entirely right. Then the learned judge goes on to say: “The only other issue of fact to be decided is whether there was any want of fairness in the agreement,” and he finds that there was no want of fairness in the agreement, that the price was a fair and reasonable

G one, having regard to the purpose for which the property was being bought. I mention that because WARRINGTON, L.J., in his judgment, cited a passage from the judgment of LORD ESHER in *Imperial Loan Co. v. Stone* (1), in which he says nothing at all about fairness. On the other hand LOPES, L.J., deals with it in this way:

“In order to avoid a fair contract on the ground of insanity, the mental incapacity of the one must be known to the other of the contracting parties.”

H

It is possible a question may arise in some future case, with which we have not to deal at present, whether, in the case of a contract which is not a reasonable one and which is made by an insane person that contract can be enforced, the other person not knowing of the insanity. I have looked through a number of cases and I have not found a single case in which a contract has in fact been binding

I except where the contract was an ordinary reasonable contract. I do not in any way want to attempt to express my own view on that point because the point has not been argued before us. It has not been argued before us because the finding of the learned judge is such as to render the point unnecessary for argument and because he has found, and I agree with his finding, that the contract here was a fair one for a fair and reasonable price. I only want to guard myself by saying that my mind is entirely open on the question whether the fairness of the bargain is an essential element to the enforceability of the bargain against a person who was in fact a lunatic although not known to be such by the other contracting party. As

it is, the findings of the learned judge completely satisfy the most rigid tests as laid down in *Molton v. Camroux* (2), and in the judgment of LOPES, L.J., in *Imperial Loan Co. v. Stone* (1), or in such other cases as *Baxter v. Earl of Portsmouth* (8) or in the charge to the jury by PATTESON, J., in *Dane v. Viscountess Kirkwall* (9) (8 C. & P. at p. 685), that being perhaps the more important because PATTESON, J., was the judge who delivered the judgment of the Court of Exchequer Chamber in *Melton v. Camroux* (2). That being so, it seems to me that the contract was one not avoidable in law, but perfectly enforceable at law. The consequence is that the defendant is liable for damages for the breach of the contract unless he can show under the third question which I mentioned that equity would have restrained the enforcement by the plaintiff of his legal rights. With regard to that there is only one case which I need refer to. That is *Campbell v. Hooper* (10). That was a case where a mortgagee was coming to enforce against the estate of the mortgagor what was due on the mortgage security. There was the defence that the mortgagor was a lunatic at the time of the making of the mortgage. In such a case a Bill would have lain to restrain an action at law; a fortiori the Court of Chancery would not have given effect to a Bill for the foreclosure of the mortgage, I find there that the Vice-Chancellor in his judgment adopts the same tests exactly as had been adopted at law. He refers to the case of *Baxter v. Earl of Portsmouth* (8), and he refers to the summing-up of PATTESON, J., in *Dane v. Viscountess Kirkwall* (9). Generally he accepts the view of the law as laid down in the courts of common law. I think, therefore, in that state of things there cannot be any sustainable right on the part of the defendant by way of equitable plea seeking to have the contract rescinded and the legal remedy barred.

The only other point which I have to deal with is on the second appeal on the question of damages. The date at which the value of the property is to be ascertained seems to be of importance. It was urged by counsel for the defendant that very shortly after Oct. 16, 1922, the date of the making of the contract, the plaintiff ought to have known that the contract could not possibly be carried through, and in consequence to have set to work at once to realise the property, and that if he had done so within a month or so it might very well be that the price would have approximated to the price agreed to be paid, and there would not have been anything like the very startling deficiency of £21,000 which the learned judge has awarded by way of damages. But it seems to me that in urging that plea counsel for the defendant was desiring that the plaintiff company should take the initiative in a matter where the initiative clearly lay upon the purchaser and those representing him. As WARRINGTON, L.J., has stated, no date had been fixed for the conclusion of the bargain, and it might very well have been that although the defendant had turned out to be a lunatic a company might have been formed, and it might have been possible to deal with that contract to advantage had trade taken a turn other than which it in fact took. I cannot see that any obligation lay on the vendor of the property to write to the persons representing the purchaser, and call on them to elect as to what they were going to do, when it was quite competent all the time for the persons representing the purchaser to repudiate if they thought fit to do so. In that state of things it seems to me that there is no reason for accelerating the date at which the damages had to be ascertained to a date prior to Feb. 9, 1923, when there was a formal repudiation of the contract by the receiver of the lunatic. In that state of things still the deficiency of £21,000 appears to be startling until it is realised that by that date it had been recognised that the property could no longer be sold as a whole or developed as a whole for any useful purpose. The representatives of the lunatic at that time, and ever since, as I understand, have been taking the view very strongly that the only way to diminish the damages and realise the property to the best advantage was to pursue the course which was, in fact, adopted by the vendors, and to sell the real estate piecemeal, and to sell the machinery, and so on, at break-up prices. That being so, there is nothing startling in a deficiency of £21,000.

A It may very well be that the works as a whole, with the possibility of being developed as a going concern, were moderately priced at £55,000, or thereabouts, but would not at a break-up price realise that amount. In my judgment, therefore, I see no reason at all for quarrelling with the view the learned judge has taken of the damages. It seems to me that he has allowed a liberal discount from the figures that were put forward on behalf of the plaintiffs, and I think on this point also his careful judgment ought to be affirmed.

Appeal dismissed.

Solicitors: *Arthur E. Burton*, for *William* and *E. H. Middlebrook*, Leeds;
Stevenson & Couldwell, for *Ware & Wilberforce*, York.

[*Reported by H. LANGFORD LEWIS, Esq., Barrister-at-Law.*]

C

D

JARVIS v. SURREY COUNTY COUNCIL

[KING'S BENCH DIVISION (Finlay, J.), January 14, 1925]

[Reported [1925] 1 K.B. 554; 94 L.J.K.B. 609; 132 L.T. 745;
89 J.P. 51; 41 T.L.R. 228; 69 Sol. Jo. 327; 23 L.G.R. 195]

E *Limitation of Action—Recovery of sum recoverable by virtue of enactment—*
Riot—Damage to property—Refusal of police authority to pay compensation
—Date of accrual of cause of action—Civil Procedure Act, 1833 (3 & 4, Will.
4, c. 42), s. 3—Riot (Damages) Act, 1886 (49 & 50 Vict., c. 27), ss. 2, 3, 4.
The plaintiff claimed, under s. 2 of the Riot (Damages) Act, 1886, compensation which he alleged was due to him for damage to his property caused by a riot of soldiers on June 14–15, 1919. By s. 4 of the Act a claimant was given a right of action against the police authorities in the event of their refusal or failure to fix the amount of compensation. In January, 1920, the plaintiff sent letters to the defendants, the police authority, asking them to settle the claim, but no reply was then received and on Jan. 29, 1924, the defendants refused to fix compensation. On Feb. 1, 1924, the plaintiff issued the writ in his action. The main point at issue was the date of the accrual of the cause of action so as to determine whether the action had been commenced within the period fixed by the Civil Procedure Act, 1833, namely, two years in the case of an action to recover "penalties, damages, or sums of money given to the party grieved by any statute."

H **Held:** (i) the cause of action arose and the period of limitation began to run from the date when the plaintiff was aggrieved by the refusal or failure of the defendants to fix compensation, which was not until January, 1924; (ii) but, in any case, the words "actions for sums of money given to the party grieved by any statute" referred to penal actions only and did not apply to the present action, which was for compensation; (iii) the present action was not affected by any statute of limitation, and the plaintiff was entitled to recover.

I **Notes.** The Civil Procedure Act, 1833, s. 3, has been replaced by s. 2 (1) of the Limitation Act, 1939. The periods of limitation are in general the same. Actions to recover sums recoverable by virtue of any enactment, other than a penalty or forfeiture or sums by way of penalty or forfeiture, are now covered by s. 2 (1) (d) of the 1939 Act.

For periods from which time begins to run see 24 HALSBURY'S LAWS (3rd Edn.) 193 et seq., and for cases see 32 DIGEST 396 et seq. As to compensation for damage by riot see 28 HALSBURY'S LAWS (3rd Edn.) 86 et seq. For the Riot (Damage) Act,

1886, and the Limitation Act, 1939, see 18 and 13 HALSBURY'S STATUTES (2nd Edn.) A pp. 96 and 1159 respectively.

Cases referred to :

- (1) *Pitchers v. Surrey County Council*, [1923] 2 K.B. 57; 92 L.J.K.B. 415; 128 L.T. 746; 87 J.P. 113; 39 T.L.R. 233; 67 Sol. Jo. 402; 21 L.G.R. 264, C.A.; 37 Digest 191, 114.
- (2) *Cohen v. Hall*, [1922] 2 K.B. 37; 91 L.J.K.B. 497; 127 L.T. 130; 38 T.L.R. 429; 66 Sol. Jo. 349, C.A.; 42 Digest 758, 1848.
- (3) *Cork and Bandon Rail. Co. v. Goode* (1853), 13 C.B. 826; 1 C.L.R. 345; 22 L.J.C.P. 198; 21 L.T.O.S. 141; 17 Jur. 555; 1 W.R. 410; 138 E.R. 1427; 32 Digest 394, 753.
- (4) *Shepherd v. Hills* (1855), 11 Exch. 55; 25 L.J.Ex. 6; 4 L.T. 742; 156 E.R. 743; 32 Digest 395, 755.
- (5) *Thomson v. Lord Clanmorris*, [1899] 2 Ch. 523; 68 L.J.Ch. 727; 81 L.T. 286; 48 W.R. 39; 15 T.L.R. 502; affirmed, [1900] 1 Ch. 718; 69 L.J.Ch. 337; 82 L.T. 277; 48 W.R. 488; 16 T.L.R. 296; 44 Sol. Jo. 346; 8 Mans. 51, C.A.; 32 Digest 320, 57.
- (6) *Shinman v. Lyons* (1922), 38 T.L.R. 560; 66 Sol. Jo. 558; 25 Digest 417, 208.
- (7) *Kaufmann Bros. v. Liverpool Corpn.*, [1916] 1 K.B. 860; 85 L.J.K.B. 1127; 114 L.T. 699; 80 J.P. 223; 32 T.L.R. 402; 60 Sol. Jo. 446; 14 L.G.R. 642, D.C.; 38 Digest 122, 899.
- (8) *Derry v. Peek* (1889), 14 App. Cas. 337; 58 L.J.Ch. 864; 61 L.T. 265; 54 J.P. 148; 38 W.R. 33; 5 T.L.R. 625; 1 Meg. 292, H.L.; 9 Digest (Repl.) 127, 685.
- (9) *Saunders v. Wiel*, [1892] 2 Q.B. 321; 62 L.J.Q.B. 37; 67 L.T. 207; 40 W.R. 594; 8 T.L.R. 650; 36 Sol. Jo. 591, 4 R. 1, C.A.; 43 Digest 263, 1009.
- (10) *Adams v. Batley*, *Cole v. Francis* (1887), 18 Q.B.D. 625; 56 L.J.Q.B. 393; 56 L.T. 770; 35 W.R. 437; 3 T.L.R. 511, C.A.; 13 Digest (Repl.) 135, 767.

Action tried by FINLAY, J.

The plaintiff, Charles Arthur Jarvis, claimed to recover from the defendants, the Surrey County Council, as the police authority for the county of Surrey, the balance of compensation alleged to be due to him in respect of damage to his property caused during a riot of Canadian soldiers, in camp at Witley, Surrey, in February, 1919. The plaintiff was the owner and occupier of premises known as "Sports and Pastimes" and of a garage and petrol store situate in the camp and the action was brought in respect of damage to those premises. The plaintiff suffered a loss of £2,000 during the riot, of which he had received £750 from the Canadian authorities in respect, and now, under s. 2 (1) of the Riot (Damages) Act, 1886, claimed a further sum of £1,250 from the defendant council. The plaintiff made his claim against the defendants on June 24, 1919, and on Jan. 7 and 27, 1920, letters were written to the defendants asking what was being done with regard to the claim, which the defendants did not answer. The defendants definitely refused to fix compensation on Jan. 29, 1924, and the writ was issued on Feb. 1, 1924.

By s. 3 of the Riot (Damages) Act, 1886 :

"Claims for compensation under this Act shall be made to the police authority of the district in which the injury . . . took place, and such police authority shall . . . fix such compensation as appears to them just."

By s. 4 (1) :

"Where a claim to compensation has been made . . . and the claimant is aggrieved by the refusal or failure of the police authority to fix compensation upon such claim, or by the amount of compensation fixed, he may bring an action against the police authority to recover compensation. . . ."

J. G. Hurst, K.C. and *J. B. Melville*, for the plaintiff.—They referred to the following authorities: *Pitchers v. Surrey County Council* (1), *Cohen v. Hall* (2),

A *Cork and Bandon Rail. Co. v. Goode* (3), *Shepherd v. Hills* (4), *Thomson v. Lord Clanmorris* (5), *Shinman v. Lyons* (6), *Kaufmann Bros. v. Liverpool Corpn.* (7).

Sir Leslie Scott, K.C., and L. F. C. Darby, for the defendants.

B **FINLAY, J.**—This case involves a point of some difficulty and interest. The action was brought by the plaintiff claiming an agreed sum by way of compensation for damage to his property at Witley caused by a riot on June 14 and 15, 1919. I need say nothing further as to the facts which are fully set out in the report of *Pitchers v. Surrey County Council* (1). There is no doubt that in the course of this unfortunate riot the plaintiff sustained the damage alleged. In respect of that loss he has already recovered £750 from the Canadian military authorities, which was paid without any admission of liability. It has been agreed between the parties, subject to the legal points, that a further sum of £1,250 should be fixed as damages. After listening to an argument of the greatest force on behalf of the defendants, I have come to the conclusion that I ought to decide in favour of the plaintiff. It is well to look quite shortly at the statute upon which the action was based, the Riot (Damages) Act, 1886. Section 2 grants compensation to persons suffering damage by riot, and s. 3 deals with the mode of compensation and gives power to a Secretary of State to make regulations for the making of claims. Section 4 enacts:

E "Where a claim to compensation has been made . . . and the claimant is aggrieved by the refusal or failure of the police authority to fix compensation . . . he may bring an action against the police authority to recover compensation. . . ."

F The plaintiff duly presented his claim for compensation. Senior counsel for the defendants contends that the cause of action arose at the date of the riot, and that that must be treated as the date from which any period of limitation begins to run. That point was decided by SWIFT, J., in delivering judgment on an application by the defendant in *Pitchers v. Surrey County Council* (1) to amend his defence by adding a plea under s. 1 of the Public Authorities Protection Act, 1893. That learned judge said:

G "I shall not allow this amendment. In my view the cause of action here really only arose after the council had failed to grant compensation. The Act of Parliament which gives a right of compensation prescribes the method in which it shall be obtained, and then goes on to provide, in s. 4 (1) that where a claim for compensation has been made in accordance with the regulations and a claimant is aggrieved by the refusal or failure of the police authority to fix compensation on such a claim, he may bring an action. It seems to me that he cannot bring an action until he is aggrieved by the refusal or failure of the police authority to fix compensation upon such claims."

H No doubt senior counsel for the defendants is right in saying that, strictly speaking, I am not bound by that judgment, and I should not follow it if, after full argument I found myself unable to agree with it. But, after full argument, I am of the same opinion as SWIFT, J., and the awkward results which would follow from the adoption of any other view are obvious. The scheme of the Act is that a plaintiff is not to have a right of action until he has been through the procedure indicated, and this procedure involves a certain amount of time and negotiation. It would be awkward if, while he was still negotiating, time should be running against a plaintiff. Senior counsel for the defendants then contended that, assuming that time begins to run only from the date that the plaintiff is aggrieved by refusal or failure to fix compensation, the failure was within a reasonable time after the receipt of two letters dated Jan. 7 and Jan 27, 1920, from the plaintiff's then solicitors to the defendants, asking what was being done with regard to the claim, which the defendants did not answer. I do not think there was at that time a

failure or refusal. What was the cause of the delay I do not know, but it may be that it was caused by the desire of both parties to see what would happen in *Pitchers v. Surrey County Council* (1). In my opinion, the plaintiff was not aggrieved by any refusal or failure within the meaning of s. 4 (1) of the Act of 1886 until Jan. 29, 1924, when the defendants finally refused to fix compensation. If I am right, that is the end of the case, because in any view of the other points raised the plaintiff's action is in time.

But I think it right to give my view upon the very interesting question raised by senior counsel for the defendants on s. 3 of the Civil Procedure Act, 1833. By that section a limit of two years after the cause of action has arisen is fixed in the case of "actions for penalties, damages, or sums of money given to the party grieved, by any statute." This case seems to fall precisely within the words "sums of money given to the party grieved by any statute." Here we have a sum of money given by a statute to a plaintiff who has suffered loss. But, in my opinion, I ought not to give effect to the argument that those words cover a case like the present case, because it seems to me that a contrary view has been taken in a case which I think I ought to follow, namely, *Thomson v. Lord Clanmorris* (5). The question there arose under the Directors' Liability Act, 1890, an Act passed in consequence of the decision of the House of Lords in *Derry v. Peek* (8). In the former case *KEKEWICH, J.*, seems to have laid down what he conceived should be the principle to be applied in considering the very words which I have to consider in s. 3 of the Act of Will. 4. He says ([1899] 2 Ch. at p. 528):

"In the first place, although the words 'damages or sums of money given to the party grieved' occur in the statute, yet they are connected with a reference to actions for 'penalties,' and I think that this part of the section is aimed at actions for penalties, and means damages or sums of money in the nature of penalties, and not sums of money such as we are dealing with here, representing compensation for loss suffered by persons who have subscribed for shares on the faith of untrue statements in a prospectus."

The payments in that and in the present case are clearly compensation payable in respect of actual injury suffered by claimants, and bear no resemblance to a penalty. The Court of Appeal affirmed the judgment of *KEKEWICH, J.*, and *LINDLEY, M.R.*, said ([1900] 1 Ch. at p. 725):

"In construing s. 3 of the Act of 1833, as indeed in construing any other statutory enactment, regard must be had not only to the words used, but to the history of the Act, and the reasons which led to its being passed. You must look at the mischief which had to be cured as well as at the cure provided. And when we look at the state of the law before the Act of 1833 we can see pretty plainly what was the mischief at which it was aimed. There were certain causes of action as to which there was no defined time of limitation. Some of them are enumerated in the earlier part of s. 3; for instance, 'actions of debt upon any bond or other specialty,' and others which are there mentioned. They were not provided for by the then existing statutes of limitations, and they are brought in. That was the first defect. There was another class of actions as to which there was no definite limitation of time, namely, 'actions for penalties, damages or sums of money given to the party grieved' by various Acts of Parliament, by way of penalty or punishment; not by way of compensation to the person injured, but where, as was pointed out by *LORD ESHER, M.R.*, when commenting, in *Saunders v. Wiel* (9) ([1892] 2 Q.B. at p. 323), upon *Adams v. Batley* (10), punishment was the object; and where the money to be paid, whether it was called penalty, or damage or sum of money, was not assessed with the view of compensating the plaintiff, although he might put some of it in his pocket. That is the class of action which was contemplated by the latter part of s. 3. In other words, they were what are popularly called 'penal actions.' We arrive at

A this from the history of the Act, and from a knowledge of the then state of the law and the defect which was to be cured."

B It is quite true that VAUGHAN WILLIAMS, L.J., puts the matter on a different footing, but we have the decision of KEKEWICH, J., and LINDLEY, M.R., that the latter part of s. 3 of the Act of 1833 refers to penal actions. I should be failing in my duty, in view of these judgments, if I decided in favour of the argument of counsel for the defendant.

C I may add, that apart from authority there would be considerable force in the contention that where a statute speaks of actions for sums of money given to a party grieved, the words are apt to cover a case like the present one. But I am bound by authority, although, as I have said, in the view I take of the earlier part of this case, it is not necessary to decide this point. I do not propose to decide anything more, although other interesting points have been argued before me, but I will say that I am not, as at present advised, convinced that this is an action of debt upon a specialty and I should have desired further time to consider it if it had been necessary to decide that question. If it is not an action of debt upon a specialty and if also, as I hold, it does not, upon the authorities, fall within the latter words of the section, its only effect, of course, is that there is no statute of limitations applicable. Therefore, on the whole matter, I am of opinion, that D the points taken on behalf of the defendants fail, and I must, therefore, give judgment for the plaintiff for the agreed sum.

Judgment for the plaintiff.

E Solicitors: W. Ewart Craigen; Wyatt & Co. for T. W. Weeding, Kingston-on-Thames.

[Reported by T. W. MORGAN, Esq., Barrister-at-Law.]

F

ATTORNEY-GENERAL v. LAIRD

G [COURT OF APPEAL (Sir Ernest Pollock, M.R., Sargant, L.J., and Astbury, J.), January 29, 30, 1925]

[Reported [1925] 1 Ch. 318; 94 L.J.Ch. 243; 132 L.T. 777; 89 J.P. 95; 69 Sol. Jo. 379; 23 L.G.R. 273]

H *Public Health—Buildings in streets—Plans disapproved by borough council—Alleged infringement of building line—"Street"—"House or building on either side thereof"—Public Health (Buildings in Streets) Act, 1888 (51 & 52 Vict., c. 52), s. 3.*

I The owners of a plot of land abutting on the highway on the outskirts of a borough were in the process of building a house and a shop within 2 ft. of a main road which was 60 ft. wide, without first obtaining the consent of the building committee of the borough council. On the eastern side of the plot of land and 700 ft. away was a steam laundry the front main wall of which was set back from the road a distance of 12 ft. The land between was not built on. An action was commenced by the Attorney-General at the relation of the local authority for an injunction to restrain the erection of the house and shop and a mandatory order to pull down the house on the ground that it was a breach of s. 3 of the Public Health (Buildings in Streets) Act, 1888. By s. 3: ". . . it shall not be lawful in any urban district, without the written consent of the urban authority, to erect or bring forward any house or building in any street,

or any part of such house or building, beyond the front main wall of the house or building on either side thereof in the same street, nor to build any addition to any house or building beyond the front main wall of the house or building on either side of the same."

Held: (i) whether a highway was a "street" within s. 3 was a question of fact in each case, consideration being taken of the number of houses on the highway and their degree of continuity and proximity to each other; buildings on one side of a proposed erection would be sufficient, but in the present case the laundry and the defendants' buildings were not in the same street within the section.

R. v. Fullford (1) (1864), Le & Ca. 403, and *Robinson v. Barton-Eccles Local Board* (2) (1883), 8 App. Cas. 798, considered.

(ii) the expression "house or building on either side thereof" in s. 3 means a house within some near distance, within some degree of proximity, and not one standing a considerable distance away, and, therefore, the laundry, being situated 700 ft. away from the defendants' buildings, could not properly be described as a "house or building on either side" of it within s. 3.

Decision of MacKINNON, J., reversed.

Re Ellis and Ruislip-Northwood U.D.C. (3), [1920] 1 K.B. 343, applied.

Dicta of FRY, L.J. in *Ravensthorpe Local Board v. Hinchcliffe* (4) (1883), 24 Q.B.D. at p. 171, approved.

Notes. As to what constitutes a street see 19 HALSBURY'S LAWS (3rd Edn.) 399 et seq. and for cases see 26 DIGEST 268 et seq. and 559 et seq. For the Public Health (Buildings in Streets) Act, 1888 see 19 HALSBURY'S STATUTES (2nd Edn.) 125.

Cases referred to :

- (1) *R. v. Fullford* (1864), Le. & Ca. 403; 33 L.J.M.C. 122; 10 L.T. 346; 28 J.P. 357; 10 Jur. N.S. 522; 12 W.R. 715; 9 Cox, C.C. 453, C.C.R.; 26 Digest 275, 130.
- (2) *Robinson v. Barton-Eccles Local Board* (1883), 8 App. Cas. 798; 53 L.J.Ch. 226; 50 L.T. 57; 48 J.P. 276; 32 W.R. 249, H.L.; 26 Digest 553, 2493.
- (3) *Re Ellis and Ruislip-Northwood U.D.C.*, [1920] 1 K.B. 343; 88 L.J.K.B. 1258; 122 L.T. 98; 83 J.P. 273; sub nom. *Ellis v. Ruislip-Northwood U.D.C.*, 35 T.L.R. 673; 17 L.G.R. 607, C.A.; 38 Digest 218, 524.
- (4) *Ravensthorpe Local Board v. Hinchcliffe* (1889), 24 Q.B.D. 168; 59 L.J.M.C. 19; 61 L.T. 780; 54 J.P. 421, D.C.; 26 Digest 561, 2550.
- (5) *R. v. Ormesby Local Board of Health* (1894), 43 W.R. 96, D.C.; 26 Digest 561, 2557.
- (6) *Warren v. Mustard* (1891), 61 L.J.M.C. 18; 66 L.T. 26; 56 J.P. 502; 8 T.L.R. 65; 36 Sol. Jo. 61, D.C.; 26 Digest 561, 2555.
- (7) *A.-G. v. Edwards*, [1891] 1 Ch. 194; 63 L.T. 639; 26 Digest 560, 2549.
- (8) *Williams v. Wallasey Local Board* (1886), 16 Q.B.D. 718; 55 L.J.M.C. 133; 55 L.T. 27; 50 J.P. 582; 34 W.R. 517, D.C.; 26 Digest 560, 2545.
- (9) *A.-G. v. Siddall* (1898) Times, June 24, C.A.; 26 Digest 562; 2564.
- (10) *R. v. Middlesbrough Corpn.* (1890), Times, July 7, D.C.; 26 Digest 272, 111.

Appeal from a decision of MacKINNON, J., in an action brought in the Chancery Division.

An interim injunction was granted on the application of the plaintiff during the Long Vacation, and an order made for trial without a jury at the Michaelmas Sittings of Liverpool Assizes. The facts are fully stated in the judgments below. MacKINNON, J., gave judgment for the plaintiffs, and the defendants appealed.

A. F. C. Luxmoore, K.C., and *Hugh Gamon*, for the defendants. They referred to: *R. v. Fullford* (1), *Ravensthorpe Local Board v. Hinchcliffe* (4), *R. v. Ormesby*

A *Local Board* (5), *Robinson v. Barton Eccles Local Board* (2), *Warren v. Mustard* (6),
Re Ellis and Ruislip-Northwood U.D.C. (3).

A. T. Miller, K.C., and H. P. Glover, for the plaintiffs.

SIR ERNEST POLLOCK, M.R.—This is an appeal from a judgment of
MACKINNON, J., which was given by him on Nov. 5, 1924, sitting at the assizes
held in St. George's Hall at Liverpool, whereby he granted a mandatory injunction
ordering the defendants to pull down a house, which in the course of the proceedings
had been completed, upon a site which belonged to one or two of the defendants.
The action was brought by His Majesty's Attorney-General upon the relation of
the mayor, aldermen, and burgesses of the borough of Birkenhead, against the
five defendants, for an injunction to restrain these defendants from erecting or
causing to be erected upon a certain plot of land at the corner of Hoylake Road
within an area which is under the control of the relators and beyond a line which
they indicated as the line which must not be transgressed in building the premises
upon the land belonging to some of the defendants ; and the action also asked for
a mandatory order upon the defendants to pull down so much of the building as
had been erected. The action was commenced by writ on July 7, 1924. The
defendants claimed that they were not acting outside or contrary to any powers
that were vested in the plaintiffs, and MACKINNON, J., held that the plaintiffs had
the power to stop the defendants from building on the site in the manner in which
by that time they had done, and that they ought to be ordered to pull down the
building which they had erected. Just to complete this section of the facts, it
appears that the defendants or some of them were the owners of a certain plot of
land upon Hoylake Road, as to which I will say more in a moment, and on April 7
the representatives of the defendants, who were minded to build a shop and a
house on this plot of land fronting the Hoylake Road and at the corner of Hoylake
Road and Challis Street within the borough of Birkenhead, deposited plans with the
corporation for the purposes of getting its approval. On April 10, the relators
disapproved the plans so submitted and gave notice of their disapproval to the
defendants on April 11, 1924. Notwithstanding that disapproval the defendants
indicated that they were determined to go on with their plans, and disputed the
right of the corporation to prevent their doing so. It is in those circumstances
that the defendants went on and built their house and in those circumstances that
on July 7, a writ was issued by the Attorney-General on the relation of the mayor,
aldermen, and burgesses of the borough of Birkenhead to restrain the defendants
from building and to pull down the erection which by the time of the trial had
been completed.

It is important to say a few words as to where this site is. The corporation
of Birkenhead are the building authority upon the area which belongs to the borough
and at some distance to the west of the main body of the borough there is a church
called St. James' Church built in a circle where a large number of roads converge,
and one of the roads which passes from that circle is Hoylake Road which is a
thoroughfare carrying traffic from Birkenhead, through Bidston towards Wirral,
and there is a boundary, the western point, some distance along the Hoylake Road
at which two authorities become contiguous and the duties of the corporation of
Birkenhead cease. The Hoylake Road, although not situate actually in the most
populous part of Birkenhead, is no doubt an important thoroughfare and situate
in an area which appears to be developing rapidly. There is a small town or
village of Bidston, which is distant from St. James' Church something like a mile,
and there is in the land north and south of Hoylake Road an area which can be
used both for building and for recreation purposes ; but I do not wish to indicate
anything more than that Hoylake Road is an important thoroughfare carrying
a large amount of traffic westerly from Birkenhead and in an area which is rapidly
developing. Now as it stands at present there is in the portion of the road which
lies west of St. James' Church and which is within the borough of Birkenhead a

portion of this Hoylake Road which on the north has a certain number of buildings. Not far from St. James' Church there is a steam laundry which is built so as to leave a space of 12 ft. between the unflagged footpath on the north of Hoylake Road and that is the building which along Hoylake Road is nearest to St. James' Church. Still continuing on the north side of Hoylake Road, at a distance of rather more than 700 ft., in fact nearly 250 yds. from the laundry, there is the Bidston Hill Hotel. That hotel has been built for some time and it abuts upon the footpath, which in front of the hotel is flagged. It is not flagged further west. To the west of Bidston Hill Hotel there are some houses which have been put up and which are set back some 20 ft. from the footpath. On the south there are a number of houses which have been built, and apparently during recent years the mayor and corporation have built a number of houses along or on sites not abutting on the south side of Hoylake Road, but those houses are set back from the unflagged footpath a certain distance. Now the site of the defendants on which the peccant house has been built is a site at the corner of Challis Street and Hoylake Road. The house has been built abutting upon the unflagged footpath and in that respect it follows the same line of the Bidston Hill Hotel. It is built at the corner of these two streets and it now has been completed. The corporation claimed first that they were entitled to restrain the building on this site, and are now entitled to a mandatory injunction requiring the defendants to pull down the house and shop which have been completed because they say that house and shop have been built contiguous to the footpath whereas it ought to have been set back 12 ft. from the footpath. The reason they say that is that they take the steam laundry, which is a distance from the house and shop of 696 ft. 11 in. and they say that regarding the steam laundry as a building on one side of the house, they are entitled, under the powers of the statute and the section which I will refer to in a moment, to require that that house shall be set back as the laundry is set back, distant as it is, something like 230 odd yards away.

For the purpose of seeing whether or not the corporation have that power, it is necessary to refer to the legislation which has been passed and which they claim gives them the right to do what they have done. Section 3 of the Public Health (Buildings in Streets) Act, 1888, provides as follows:

"Section 156 of the Public Health Act, 1875, is, save as hereinafter mentioned, hereby repealed, and in lieu thereof it is hereby enacted that it shall not be lawful in any urban district, without the written consent of the urban authority, to erect or bring forward any house or building in any street, or any part of such house or building, beyond the front main wall of the house or building on either side thereof in the same street, nor to build any addition to any house or building beyond the front main wall of the house or building on either side of the same."

The corporation say that having regard to the situation of the laundry, by virtue of that s. 3 they are entitled to insist upon having the defendants' house set back 12 ft. from the unflagged footway. Counsel for the defendants has called our attention to previous Acts and to the sequence of sections, and perhaps it is useful to refer to them. First of all s. 3 starts by repealing s. 156 of the Public Health Act, 1875, which section differs in this way, that the new section contains the words "to erect," whereas s. 156 only provided that it should not be lawful in any urban district without the written consent of the urban authority, to bring forward any house or building forming part of any street, or any part thereof, beyond the front wall of the house or building on either side thereof." In other words, s. 156 was found to be faulty in this, that it did not deal with a house being erected in the first instance, but dealt only with a house which was being re-erected or which was built to replace some other building which had already taken its place in the street, and s. 3 of the Act of 1888 therefore marks a considerable advance in the powers which it gives to the urban authority. The word "street" which is used

A in that section is defined by s. 2, because that section provides that in the Act of 1888, unless the context otherwise requires, the words and expressions to which meanings are assigned by the Public Health Act, 1875, have in this Act the same respective meanings, and turning back to the definition section of the Act of 1875, we find in s. 4 that "street" includes

B "any highway and any public bridge (not being a county bridge), and any road, lane, footway, square, court, alley or passage whether a thoroughfare or not."

It is plain, therefore, that we are to read "street" in s. 3 as including a highway, and Hoylake Road is a highway. But it does not say that all highways are streets; one still has to find what is the meaning of "street" by considering the circumstances of the case and a number of decisions which have already been given.

C Before I pass to those decisions I should like to refer first to what I may call the preceding powers which s. 3 of the Act of 1888 replaced. There was in the Act of 1861 a s. 28, which provided:

D "It shall not be lawful at any time or times hereafter within the district of any local board to bring forward any house or, building forming part of any street or any part thereof, beyond the front wall of the house or building on either side thereof, nor to build any addition thereto beyond the front of such house or building on either side of the same as aforesaid without the previous consent of such local board."

E It is important, therefore, to note that from the time of 1861 there has been this power preventing a house in a street or forming part of a street from being brought forward without the consent of the local board or other persons in whom the authority is vested, and this s. 28, or the subsequent section which displaced it, has been considered from time to time and been the subject of judicial decision. It is to be observed that in the present case the mayor and corporation of Birkenhead have determined to make, or attempted to make, use of this section for, in effect, preventing any house being built along Hoylake Road nearer than 12 ft. from the unflagged road, and that really for the purpose of prescribing what shall be the line of building on the north side of Hoylake Road. The witness who was called on behalf of the plaintiffs, Mr. Charles Brownridge, was asked this:

F "Have you considered and have your corporation considered prescribing a building line along this road?—(A.) We have not done so in this case. (Q.) Because if you did it you would have to pay for the land you took?—(A.) Yes. (Q.) And the effect of a decision in the corporation's favour in this case—as I have been accused of not acting very generously we may as well have it clear—would be that for a space of 12 ft. along the whole of my land there I should be unable to build and the public would get the benefit of it without my getting a penny of compensation?—(A.) Not necessarily. (Q.) You are seeking to prevent me building?—(A.) That is right. (Q.) Had the corporation considered at all, in respect of this land, proceeding under the Town Planning Act?—(A.) There have been discussion but, of course, that was all postponed by the war. (Q.) You recognise yourself under that Act you would have to pay for any land you took?—(A.) Oh, I do not agree altogether to that. (Q.) You know in the Town Planning Act there is a provision for compensation?—(A.) I agree; compensation and betterment. There is a provision for betterment as well as compensation. (Q.) You might get something back on that basis, but the owner at least would have a chance of his case being heard from that point of view?—(A.) Quite."

I I do not read that for the purpose of making any comment or reflection upon the corporation of Birkenhead, whose duty it is to take the best steps they can in the interests of the public, whose rights they have to conserve, but for the purpose of making good what is stated to us, that in the present case there has been no building line fixed, such as we are familiar with in the metropolitan area under the

London Building Act, 1894, if, as there may be, there are powers to fix a general building line in the borough of Birkenhead. It appears rather, from Mr. Brownridge's evidence, that this is a possibility which has been contemplated but not adopted. I do not know whether they have powers to fix a general building line or not, and I do not stop to inquire. Next, it appears clear that they have not determined to adopt any town planning scheme. That may be also for reasons good and sufficient. I make no criticism upon it. But it is not to be forgotten that there are other remedies available to urban authorities in the matter of building, and that their powers are not alone confined to such powers as are given them under s. 3 of the Act of 1888. I make no comment either upon the question whether the corporation were acting or attempting to act improperly in taking the proceedings they did, or whether the defendants ought to have yielded to the request of the corporation. All those matters are really quite beside the point that we have to determine; the full facts upon such a question are not before us, and even if it were necessary to give an opinion, we have not got the material to enable us to do so. What this court has to decide is the question of law, whether or not *MACKINNON, J.*'s judgment was correct. I turn, therefore, to a more careful scrutiny of the words of s. 3, and what is forbidden without the consent of the urban authority is to erect or bring forward any house or building in any street beyond the front main wall of the house or building on either side thereof in the same street. First of all, what is a street? By the section it includes a highway; but turning back to *R. v. Fullford* (1), which was decided in 1864 by the Court of Crown Cases Reserved, upon consideration of s. 28 of the Act of 1861, which I have referred to, one finds some guidance given by the learned judges who took part in that decision. The Chief Justice of the Common Pleas, *SIR WILLIAM ERLE*, says this:

"I was very desirous that the parties who have to carry this Act into effect should have, from those whose duty it is to interpret it, a definition of what is a street within the meaning of the Act. I think the term 'street' in this statute refers to a row of houses in some degree proximate to one another. The whole question is, whether these houses have attained that degree of continuity and proximity?"

BLACKBURN, J., as he then was, says:

"The question is, whether the house or building of the defendants formed part of a street, and whether the adjoining house formed part of it? It is a question of more or less and, therefore, a question for the jury. Within the meaning of the Act, houses form part of a street when the houses and buildings on one side are so contiguous as substantially to form a continuous row."

He goes on:

"Had I to express an opinion respecting one part of this so-called street, I should say that it was a street; but with regard to the particular part where the defendant's house is situate, I think the jury might have well found either way. Had I been a jurymen, I am not certain what way I should have found."

POLLOCK, C.B., says:

"I should tell them that a set of detached houses, not being in a continuous line, and some facing one way and some another, and having no appearance of uniformity at all, was not a street within the meaning of this Act of Parliament."

I read that because it appears to me that upon the predecessor of s. 3 it was determined by a court of great authority that in defining the meaning of the word "street" one has to find a succession of houses and buildings, at least on one side, with some degree of continuity and proximity as will enable one, as a question of fact, to determine that a street has been built, and that what was a mere highway has now become a street.

In the House of Lords, in 1883, *Robinson v. Barton-Eccles Local Board* (2) was considered upon the question of by-laws relating to a new street and to its width and construction, under by-laws made under s. 157 of the Public Health Act, 1875. LORD SELBORNE, dealing with the word "street," says this (8 App. Cas. 801):

"In the natural and popular sense of the word 'street,' or the words 'new street,' I should certainly understand a roadway with buildings on each side (it is not necessary to say how far they must, or may be, continuous or discontinuous); and by 'new street,' a place which before had not that character, but which, by the construction of buildings on each side, or possibly on one side, has acquired it."

I will add what LORD BLACKBURN says at 8 App. Cas. at p. 809. He speaks of treating the word "street" in the popular and ordinary sense of the word, namely, a highway with houses on each side.

Reading those passages, it appears to me that what one has to find before one can find that one has a street, is that one must find, and it is a question of fact, because it is a question of degree, that a highway has become a street in the ordinary acceptance of that word, because by reason of the number of the houses, their continuity and their proximity to each other, you have turned what would be a road or a highway into a street, and that it is a question of degree. More than that, it appears from *R. v. Fullford* (1), and, indeed, it is accepted by counsel for the plaintiffs, that one may have a road which is a street in one part and not in another. It is all, therefore, a question of fact, and I now come to consider whether or not the Hoylake Road is, at the part which is material for the decision of this case, a street. The facts are simple for this reason, that the footpath, as I pointed out, on the north side is unflagged; there is only, between Challis Street and St. James' Church, other than the defendants' house, the building of the steam laundry, and between the defendants' house and the steam laundry, as pointed out, there is 696 ft. 11 in. on which there are no buildings at all. Speaking for myself, though it is not essential to the decision of this case, I should, without difficulty, hold that at this point Hoylake Road had not become a street, that there was not such proximity and such continuity of the houses on either side as to make it into a street. I agree in thinking, as BLACKBURN, J., said in *R. v. Fullford* (1) that houses on one side will be enough; I do not think that in order to call it a street it is necessary that there should be buildings on both sides.

Assuming, then, that Hoylake Road is a street, we have to find whether the house in question has been erected or brought forward beyond the front main wall of the house or building on either side thereof in the same street. Again, what is meant by "on either side thereof"? Can one say that the laundry is a building on the side of the defendant's house? I think it is not improper to refer to the preceding section which this section replaces, because I think that preceding section was intended to deal with the alteration of buildings in a place which had already become a street. The present section is wider, and it may well be claimed that with the widening of the powers by inserting the word "erect," it was intended to give a much wider power to s. 3. I doubt that, but at any rate we have some guidance upon what is the meaning of the section, because there have been a number of cases in which the section has been considered. In *Ravensthorpe Local Board v. Hinchcliffe* (4) FRY, L.J., and MATHEW, J., sitting as a Divisional Court, had to consider whether or not a house of which the footings were only then put in was a house which offended against s. 3, and FRY, L.J., said that there was no front wall or main wall of a house or building, and he decided the case on that ground avowedly, but he added this:

"There is another point in the case upon which I have not formed such a strong opinion. The Act forbids the erecting any house or building or any part thereof"

and he reads the section, and he says :

"I think that the expression 'house . . . on either side thereof,' means a house within some near distance, within some degree of proximity, and not one standing some considerable distance away. Burton's house was 300 ft. or 400 ft. distant from Hinchliffe's."

Now it is said those observations are obiter. I do not care to inquire whether they are to be treated merely as obiter or as part of the judgment. It is sufficient for my purpose to say that they are the dicta of FRY, L.J., concurred in by MATHEW, J., after an argument upon what is the meaning of the section. Nor do I forget that in using the phrases that he does, he brings in his definition and view of the section, and it is in accord with *R. v. Fullford* (1).

The next case in which the matter came to be determined I think was *Warren v. Mustard* (6) where MATHEW, J., was again one of the judges, and again the same s. 3 of the Act of 1888 was considered. In that case which was an appeal from the justices, upon a Case stated under the Act of 1879, no question of fact was open to the court ; they could only deal with the question of law. The court came to the conclusion that there was evidence before the justices upon which they could decide as they did decide. MATHEW, J., once more says that it is a question of fact in these cases :

"Can we say as a matter of law that a house 64 ft. distant from another is not on one side of that other house? It may be that only houses standing in roads or semi-detached from one another were contemplated by the legislature in passing this statute, but the Act also applies to houses at a little distance from one another."

And A. L. SMITH, J., refers to what was said by FRY, L.J., and concurred in by MATHEW, J., in *Ravensthorpe Local Board v. Hinchcliffe* (4) and approves of what they said. Counsel for the plaintiffs says one finds there a decision that the justices were right in the view that they took of the facts and that they convicted the persons against whom the proceedings were taken. To my mind it is of importance to observe that after argument both MATHEW, J., and A. L. SMITH, J., took the same view which had been taken as to the meaning of the section by FRY, L.J., in the previous case, and adds another measure to the sequence of, if you like, the dicta which have been expended upon the section.

Then comes the question before ROMER, J., in *A.-G. v. Edwards* (7). There he had a different case to deal with, because as the map ([1891] 1 Ch. at p. 196) shows, it is difficult to see whether or not there was a street and difficult to ascertain what line of buildings there was in that street, if it was a continuous and the same street. But again he says he feels himself bound to take all the circumstances into consideration, and he comes to the conclusion, looking at the distance from which the next building is situate, and to the character of the street and to all the circumstances, that in that particular case there was no building on the side of the defendant's shop to which the defendant's shops ought to conform. Once more the learned judge (afterwards ROMER, L.J.) expresses his opinion in agreement with the sequence of dicta or judgments, whichever you prefer to call them, which have been presented in the other cases.

In 1894 a decision was given again by MATHEW and KENNEDY, JJ., in *R. v. Ormsby Local Board of Health* (5). Again s. 3 of the Act of 1888 fell to be determined, and the question was whether or not there was in the same street a building on one side of the proposed building, there being a considerable distance, I think something like 70 ft. between the two buildings. MATHEW, J., says this :

"I can only say that it appears to me that there is no evidence of the existence, on the side of the original building and in the same street, of what is necessary under this Act. There is no evidence of the existence of any house on either side of the original construction and in the same street with it."

1 Once more he agreed with the view presented by ROMER, J., that he must consider all the circumstances of the case in order to come to his conclusion. There are other cases which I have not referred to, which have been presented to us from "The Times" newspaper, but are important and are to the same effect.

3 Lastly, we come to *Re Ellis and Ruislip-Northwood U.D.C.* (3) which was decided in this court. This case is a little difficult to understand, but when one has appreciated what had to be determined by the court, it comes to this. There was a claim made for compensation, which went before an arbitrator, and the answer to the claim was that no compensation ought to be paid to a person who built a house without the leave of the urban authority on a site without leaving a sufficient margin as he ought to have done and could have been forced to do under this same s. 3. It appears to me, from what BANKES, L.J., says, that one has to consider all the circumstances of the case. SCRUTTON, L.J., in a sentence, says, with regard to s. 3, and dealing with the question of the words of the section, "beyond the main front wall of the house on either side," this ([1920] 1 K.B. at p. 371):

5 "Some limitation, a limitation of fact, must be placed on the words 'on either side,' but it is clear that houses on some undefined length of Mr. Ellis's frontage would have the southern shop on one side of them, and would project beyond the main front of the southern shop, and therefore be illegal."

He agrees again that one has to consider the circumstances and the limitation in fact; that the mere fact that one finds at any distance a house which is built to the right or the left of the building in question is not enough without bringing your mind to bear upon the question whether or not the proximity and indeed the continuity of the street has been properly considered by those who have to administer the section.

4 Having looked at all those sections (and I think I have dealt with all that are immediately relevant to the point) I agree with the stream of dicta—for my part I think in some cases it amounts to authority—which have been expressed with regard to this section. It is true that, except in the last case that I have referred to, there is no case of a decision binding upon this court, but I agree with what has already been said in the case to which I last referred, and in the other cases and by the other judges, and it appears to me that in construing this section one must have regard to all the circumstances of the case, and it is a question of fact whether or not there is another house on either side of the building in question and in the same street. If one finds that the house on either side which is brought into play is so far distant that no person, in ordinary parlance, would say that they were in the same street, one cannot hold that the section has been transgressed. There must be some reasonable measure of continuity and proximity in order to find that there is a house on either side to which the house in question must conform. In the present case the distance is so great, the aperture is so large between the laundry and the defendants' premises, that I do not think it could be held that s. 3 applied. It appears to me that MacKINNON, J., who did not have the last case that I have cited brought to his attention, and perhaps in the hurry of the assize had not the opportunity of as full a consideration of the cases as we have had, has misapplied the law and come to a conclusion upon the facts after misdirecting himself in point of law. Inasmuch as I think he did misdirect himself in point of law, although one pays every respect to his conclusion of fact, I think that his conclusion of fact is not in any sense binding upon the court as would a finding of the justices where a case comes on appeal by way of Case Stated, and I think one is entitled to go into the facts, particularly where they are presented, as they are substantially in this case, upon documents. For the reasons which I have given, and upon the authorities which I have referred to, I think MacKINNON, J., misdirected himself in point of law, I do not accept his conclusions of fact, and I have come to the conclusion that s. 3 does not apply to the circumstances of

this case, and therefore, that the order made by MacKinnon, J., ought to be discharged, and the appeal allowed with costs.

SARGANT, L.J.—I am of the same opinion. There are two questions which this court has to decide: first, whether the laundry and what has been called in one case the incriminated building, that is to say the recently erected shop, are in the same street, within the meaning of s. 3 of the Public Health (Buildings in Streets) Act, 1888, and, secondly, whether, if they are in the same street, the incriminated building is on the side of the laundry within the meaning of the same section. Now it is material to notice that the legislation invoked by the relators in the present case is not legislation for turning an existing road into a well designed street, but has a much more limited scope. It seems to me to deal only with cases where there is already an existing street, although the word "existing" is not actually used; that is, it postulates a street. The original section, namely s. 156 of the Public Health Act, 1875, was held to deal only with cases where an existing building in an existing street was being replaced by a new building. That was so held in *Williams v. Wallasey Local Board* (8), and s. 3 of the Act of 1888 only enlarged the operation of s. 156 by including within it a site which so far had had no building on it. The requirement that the new building must be within an existing street was in no way relaxed. The problem under this legislation is, in my judgment, a static one and not a dynamic one; it is quite different from the problem under later Acts as to town planning and development, and it is to be noted that the evidence of the borough surveyor, both that quoted by my Lord and other evidence read to us to-day, was obviously directed in the main to this last dynamic problem, of turning a road into a well-constructed street, and not to the static problem under the earlier legislation. The first point, therefore, is: Are these two buildings in the same street? The learned counsel for the respondents agreed with the counsel for the appellants, namely in this, that "street" has to be construed in its ordinary meaning, and that the words "on the side of" are also to be construed in their ordinary meaning; and it has been long since held, in the case of *R. v. Fullford* (1), which was decided not under the same legislation but under legislation of a similar character and practically identical in substance on this point that a road might be a street in one part and not in another, and that a street in the ordinary sense and in the statutory sense meant *primâ facie* a road with more or less continuous buildings, at any rate on one side of the road, and the same view was taken in *A.-G. v. Siddall* (9). There the court held that the question whether the road was a street was one of fact and also one of degree. In that case they held that it was clearly a street though at the other end it was country road. That being so, the question being one of fact, it seems to me that we are practically in as good a position to determine the question of fact as the learned judge was in. The question depends not on the credibility of witnesses, or anything of that kind, but upon the relative positions of these two buildings and the other buildings in or near this road. Looking at the plan I agree that the road was probably a street down to the point at which it reached St. James' Church, and perhaps for a short distance further; and again further to the west, when it reached the Bidston Hill Hotel and thereafter for some distance, I do not know how long, the road again was probably a street. But for something like 700 ft. or 600 ft., if one counts from the west end of the houses on the south side and at east, there are no buildings at all on the north side of the street, the footpath is unflagged on that side, and there are no buildings on the south side, for very much the greater part of that distance, which front on to or have access to this road. There are certain buildings along various roads, Mercer Road, Egan Road, and Arkle Road, which diverge from the Hoylake Road; it may be that those roads are streets, but I do not think any inference is to be drawn from that circumstance as to Hoylake Road being a street. In my judgment the portion of the road from Challis Street to the steam laundry, or at any rate to a point some 100 ft. west of

the steam laundry, is a road and not a street, and that although at either end the same highway may have acquired the nature of a street.

Then comes a second question. Even assuming that this is a street so that the shop and the laundry are in the same street, can it properly be said that the shop is on the side of the laundry within the meaning of the section? Here the learned judge formed a strong view, which he maintained to the end of his judgment, that when once you had decided that the two buildings were in the same street there really was no second question at all; that if the gap between the houses was not sufficient to prevent their being in the same street, it must necessarily follow that a house was on the side of the building which was the next building along the road or along the street in question. He says that really in terms before he comes to examine the cases, and that is the conclusion which he ultimately arrived at. In my judgment there is a long line of authority which is absolutely and entirely opposed to that view. All through some half-dozen or more cases, without any case in any way to the contrary, it has been held that there is a second question to be determined, as to whether, although two buildings may be in the same street, they are in such a position relative to one another that one can be said to be on the side of the other, and one, and I think the most material circumstance, which has been looked at in these cases for the purpose of determining that question is the proximity of the two buildings to each other.

The first case in which the point was dealt with was the case of *Ravensthorpe Local Board v. Hinchcliffe* (4), in which FRY, L.J., sitting with MATHEW, J., as a Divisional Court, dealt with this point as a completely separate point, and expressed his view of it, although it was not the principal or main reason for which he arrived at the conclusion he did. That case was, I think, decided in 1889, and immediately after, in *R. v. Middlesbrough Corpn.* (10), the Divisional Court took the same view, that there was this separate point to be considered. They said this: The case was clear. The new road was not yet a street and there were no houses on either side of it. I think that in that case there was a distance of something like 800 ft. So that they dealt with the second point as being a second point. The same was the case in *Warren v. Mustard* (6), to which my Lord has also referred, and in the very elaborate judgment of ROMER, J., in *A.-G. v. Edwards* (7). The same was the case in *R. v. Ormesby Local Board of Health* (5). All through, whether by way of decision or by way of recognition of the previous views expressed, the courts have held that, although two buildings may be in the same street, it by no means necessarily follows that the two buildings, without any intervening building, can be said to be on the side of each other. There may be such an intervening space or such other circumstances as, while not sufficient to prevent the street being the same street, are amply sufficient to prevent the one house being properly said in ordinary language to be on the side of the other.

Finally, there is the very important case of *Re Ellis and Ruislip-Northwood U.D.C.* (3), in which the point was definitely decided by the Court of Appeal. In that case the appellant was the owner of a strip of land in the same street as two other buildings. On the north there was a public-house, and on the south there was what was called the southern shop, and the southern shop stood back a certain distance from the road. The appellant was building at the northern end of his strip of land, adjoining the public-house but 400 ft. or thereabouts from the southern shop, and he was building on a frontage nearer the road than the southern shop. The question arose whether he was to be compensated in respect of his land under the Town Planning Acts, and for that purpose it was necessary to determine whether he was prohibited from building in the way proposed under the legislation we have now to consider, which does not make any provision for compensation. If he was prevented under this legislation, then the arbitrator was not entitled to award him compensation under the Town Planning Acts. The court definitely took the view—it is expressly stated by BANKES, L.J., and SCRUTTON, L.J.—that the arbitrator ought to have considered down to what point south or

up to what point north along his strip of land he was disentitled to build with a set-back less than that of the southern shop: which clearly shows that they thought that the question whether the new buildings which would be on the southern side of the shop within the meaning of the legislation was a question to be determined mainly by the proximity of the new buildings to the southern shop. In that state of things it seems to me that we must disagree with the learned judge in coming to a conclusion that there really was no separate question. I think there was a separate question here, and that, as a matter of ordinary language, when you look at this plan, and when you consider that this steam laundry is 696 ft. 11 in. away, that there is a recreation-ground intervening, that there is not a single building of any kind throughout the whole of this 696 ft. 11 in. it is impossible, in my judgment, to say that any ordinary person would ever speak of this new house and shop being by the side of the laundry, or on the side of the laundry, or at the side of the laundry. I do not think it would come within the ordinary meaning of that phrase as used in the English language; the two buildings are so entirely remote from and independent of one another by reason to a great extent of the distance they are separated from one another, that, in my judgment, no person would say that the shop was on the side of the steam laundry. In my judgment, therefore, the learned judge was wrong in the conclusion that he has come to and the appeal ought to be allowed with costs.

ASTBURY, J.—I am also of opinion that this appeal must be allowed, and I further agree that there are two separate and distinct questions which have to be answered in order to decide the matter under the section in question. With regard to the first question, as to whether under all the circumstances of this case the house in question is a house in a street within the meaning of the section, I feel some doubt, and I do not propose to discuss that matter. With regard to the second question, as to whether this laundry is a building on one side of the house in question, I agree entirely with what has been said by my Lord and SARGANT, L.J., but as we are differing from the learned judge in the court below, I should like to add just a word upon it. This section is one depriving any owner of land of what, apart from it, would be one of his rights of dominion, and I think it must be strictly construed. The question is, what is the meaning of a building on either side of a house in the same street? The learned judge in the court below, after holding that this is a house in a street, appears to me, if I may respectfully say so, as has been pointed out by SARGANT, L.J., practically to come to the conclusion that that settled the whole matter. Now there are clear dicta and judgments of about ten or twelve different judges upon the meaning of this particular section. They every one of them, as I understand them, diametrically differ from the conclusion arrived at by the learned judge in the court below. Those cases have been fully referred to, and I do not propose to deal with them at any length, but I would say this: In the *Ravensthorpe Case* (4) the distance was 300 ft. to 400 ft.; in *R. v. Middlesbrough Corpn.* (10) the distance was 800 ft.; in *Warren v. Mustard* (6) the distance was 64 ft.; in *A.-G. v. Edwards* (7) the distance was 57 ft.; in *R. v. Ormesby Local Board of Health* (5) it was 70 ft. to 90 ft.; and in *Re Ellis and Ruislip-Northwood U.D.C.* (3) it was 420 ft. Now within that range the views expressed in these authorities seem to me absolutely plain and clear. Fry, L.J., said in the first case:

"I think that the expression 'house . . . on either side thereof' means a house within some near distance, within some degree of proximity, and not one standing some considerable distance away."

Some judges have thought 50 ft. or 60 ft. was a considerable distance, but there is no case in the slightest degree questioning this continuous stream of view or authority, that this section must be construed with regard to houses that are reasonably proximate the one to the other. Counsel for the plaintiffs has been forced to admit that, if he is right, a distance of half a mile or even a mile would

A not prevent sufficient proximity being allowed to exist under this section. I think that is absolutely and entirely contrary to the whole trend of authority, and for these reasons and those that have been much better expressed by the other members of the court, I think this appeal ought to be allowed.

Solicitors: *Field, Roscoe & Co.*, for *Oliver Jones, Billson & Co.*, Liverpool; *F. Venn & Co.*, for *E. Spencer*, Acting Town Clerk, Birkenhead.

[Reported by H. LANGFORD LEWIS, Esq., Barrister-at-Law.]

Re SWINBURNE. SUTTON v. FEATHERLEY

[COURT OF APPEAL (Sir Ernest Pollock, M.R., Warrington and Sargant, L.JJ.), October 16, 1925]

[Reported [1926] 1 Ch. 38; 95 L.J.Ch. 104; 134 L.T. 121; 70 Sol. Jo. 64]

D Gift—Incomplete gift—Cheque payable to donee—No effective presentation before death of donor.

A few days before her death, the testatrix, wishing to give the defendant a sum of £700, drew a cheque for that amount in her favour. At the time there was sufficient money at the testatrix' bank to meet the cheque, but it was not effectively presented at the bank for payment before the testatrix died. On a summons to determine the question whether the cheque was a valid gift of £700,

Held: to make an effectual gift inter vivos there must be an actual transfer of the subject of the gift or of the indicia of title to the gift; a cheque was neither money nor the indicia of title to money, but was merely an order to the person who had the custody of money belonging to the drawer to pay it or part of it to the specified payee, which, if not acted on in the lifetime of the drawer was of no effect; and, therefore, there was no effectual gift of the £700.

Bromley v. Brunton (1), (1868), L.R. 6 Eq. 275, disapproved.

Notes. Considered: *Timpson's Executors v. Yerbury* (1935), 79 Sol. Jo. 523; *Re Owen, Owen v. I.R. Comrs.*, [1949] All E.R. 901.

As to incomplete gifts see 18 HALSBURY'S LAWS (3rd Edn.) 396 et seq., and for cases see 25 DIGEST 529 et seq.

Cases referred to:

(1) *Bromley v. Brunton* (1868), L.R. 6 Eq. 275; 37 L.J.Ch. 902; 18 L.T. 628; 16 W.R. 1006; 25 Digest 533, 227.

(2) *Re Beaumont, Beaumont v. Ewbank*, [1902] 1 Ch. 889; 71 L.J.Ch. 478; 86 L.T. 410; 50 W.R. 389; 46 Sol. Jo. 317; 25 Digest 542, 292.

(3) *Hewitt v. Kaye* (1868), L.R. 6 Eq. 198; 37 L.J.Ch. 633; 32 J.P. 776; 16 W.R. 835; 25 Digest 547, 327.

(4) *Re Beak's Estate, Beak v. Beak* (1872), L.R. 13 Eq. 489; 41 L.J.Ch. 470; 26 L.T. 281; 36 J.P. 436; 25 Digest 548, 331.

(5) *Ward v. Turner* (1752), 1 Dick 170; 2 Ves. Sen. 431; 21 E.R. 234, L.C.; 25 Digest 552, 372.

Appeal by the defendant from an order of EVE, J., on an originating summons to determine the validity of a gift made by a testatrix a few days before her death.

W. A. Raeburn, for the defendant, cited *Bromley v. Brunton* (1) as explained in *Re Beaumont, Beaumont v. Ewbank* (2).

Arnold Jolly, for the plaintiff, administratrix of the will.

Dighton Pollock, for the Attorney-General, representing charitable legatees.

SIR ERNEST POLLOCK, M.R.—This appeal must be dismissed. The point raised is an interesting one, and it is unfortunate for the defendant, Mrs. Isabella Gifford, that the attempt by the testatrix to give her £700 has failed. A

The facts are quite short. Charlotte Mary Swinburne died on May 8, 1923, and the plaintiff is the executrix of her will, made in 1902. There was a nursing home kept by the defendant, Mrs. Gifford, at 76, St. George's Terrace, Newcastle, and at that home the testatrix died. She had lived at that home for no less than a year before her death, and she was attached to Mrs. Gifford. It appears that a few days before her decease she gave Mrs. Gifford what purported to be a cheque for £700, dated April 26. The cheque was presented by Mrs. Gifford at the bank on which it was drawn, but it was not honoured by the bank, owing to the fact that the signature of the testatrix was very badly written, and there had been an omission of the word "pounds" after the words "seven hundred," so that it was returned marked "signature requires verification, cheque incomplete." Thereupon the testatrix drew another cheque for £700 in favour of the same defendant, and that was presented by the defendant on April 30. The bank again refused to honour the cheque, and marked it "signature differs." It is plain from the signature on the cheque which is before me that it was drawn in a very shaky hand, and one cannot be surprised that the bank required a further confirmation before they paid the cheque. The cheque was not presented again before the testatrix died; and the result is that Mrs. Gifford did not get the cheque honoured by the bank. The question is whether or not the amount of the cheque—the £700—has been properly presented by the testatrix to Mrs. Gifford as a gift *inter vivos*. B

It is said by counsel for Mrs. Gifford that the money that stood at the bank to answer the £700 was, in effect, standing at the bank for the purpose of meeting this gift. In other words, it had been effectually transferred from the testatrix to Mrs. Gifford. He says that on that basis the cheque is effective as a gift. As a matter of fact, the testatrix had two accounts at her bank—one a current account, on which there was a sum of £131 9s. 5d. standing to her credit, and also a deposit account, on which there was a sum of £980 3s. 6d. standing to her credit. It appears from the affidavit which is accepted as the evidence to be relied on by the court that "the said deposit account was withdrawable at one week's notice," but it was the practice of the bank to honour cheques of the testatrix to the extent of her deposit account. I am prepared to take that as meaning that inasmuch as the bank knew by the deposit account that they had got a considerable sum which could be transferred to the current account, they would honour the cheque and debit it to the current account, looking to the ultimate return from the deposit account into the current account; and I am prepared to put it as high as that the cheque may be treated as if the whole amount was on current account. A cheque is clearly not an assignment of money in the hands of a banker. A cheque, as explained in or for the purposes of one of these cases, LORD ROMILLY says, is nothing more than an order to pay a certain sum of money and it makes no difference whether the money is at the bankers or anywhere else. It is an order to deliver the money; and if the order is not acted upon in the lifetime of the person who gives it, it is worth nothing. Assuming, therefore, that there was money on Mrs. Gifford's current account ready to meet this cheque as and when it was accepted for payment by the banker, it is clear law that the fact that this cheque was outstanding did not indicate that there had been any assignment of that money to meet the cheque. It is merely a mandate or authority in the hands of the holder of the cheque to go to the bank and get the money from it. C

In those circumstances, was there a good gift *inter vivos* between the testatrix and Mrs. Gifford? It appears to me quite plain according to authorities that there was not. In *Hewitt v. Kaye* (3) a cheque was given; it was not presented before the donor's death, and LORD ROMILLY held that the cheque did not operate as a good gift. In the present case it was presented, but the bank asked legitimately for confirmation of the signature. LORD ROMILLY said: "All the authorities decide D

A that there must be complete delivery," that is, delivery not merely of the authority to receive, but of some property. In *Re Beak's Estate* (4) a donor gave a cheque and with it the bankers' pass book, and SIR JAMES BACON, V.-C., who dealt with the case, said that he did not see that the delivery of the pass book made any difference. There was no passing of any property. There was merely an order to receive money, and, though it was very unfortunate that the intention of the parties should be disappointed by the death of the donor, he followed the principle of the decision by LORD ROMILLY and held that the gift was not effective. Those cases were considered by BUCKLEY, J., in *Re Beaumont* (2), and he says:

B "In all the cases, in order that the gifts may be valid it must, I think, be shown that the donor handed over either property or the indicia of title to property which belonged to him."

C He points out that a cheque is not property. It is only a revocable order such that, if the banker acts on it, the donee will have the money to which it relates, and he follows the authority of *Hewitt v. Kaye* (3) and *Re Beak's Estate* (4).

D Somewhat differing from that there is *Bromley v. Brunton* (1). It is fair to point out that SIR JOHN STUART, V.-C., decided that case, on the basis that the donor had dedicated to the purpose of the gift the sum which was indicated by the cheque, and he says that he conceives that in those circumstances no further act was necessary on the part of the donor to make the gift complete. If the Vice-Chancellor was able to find that there had been an actual dedication of the property and that no further act was necessary on the part of the donor to make the gift complete, then I think it falls into line with the other cases, and his judgment can be supported. Whether I should have been able to construe the facts as amounting to what the Vice-Chancellor finds them to be is quite another question. But unless the basis of the case is that there had been an actual transfer of property and no further act necessary on the part of the donor to make the gift complete, it appears to me that *Bromley v. Brunton* (1) stands apart from and is in contradiction to the authority of the other cases to which I have referred, and can no longer be considered as law. It is a case which may stand upon its own facts, and upon the principle as stated by the Vice-Chancellor it appears to stand good. Whether that principle was rightly applied may be another question. However, I cannot find that *Bromley v. Brunton* (1) is in any sense contrary to or divergent from the other authorities to which I have referred. It seems, therefore, upon these authorities quite plain that in this case all that was received by Mrs. Gifford was a cheque. No indication has been given by the bank by the certification of the cheque or otherwise, that they held a sum of money exclusively to answer the cheque; and in those circumstances it appears to me that the cheque remains a mere order to receive the money as and when it can be paid. It had no priority as against any other outstanding cheques. The banker was within his rights in what he did, and it was not an effective gift of the sum of £700 by the testatrix to Mrs. Gifford. I think the appeal must be dismissed.

I **WARRINGTON, L.J.**—I am of the same opinion. The question here is whether the testatrix made to Mrs. Gifford an effectual gift inter vivos of a sum of £700. [HIS LORDSHIP stated the facts and continued:] In the first place, in order to make an effectual gift inter vivos there must be an actual transfer of the subject of the gift or of the indicia of title to the gift. A cheque is not money. It is not the indicia of title to money. A cheque is nothing more than an order directed to the person who has the custody of money belonging to the drawer of the cheque requiring him to pay so much to the person in whose favour the cheque is drawn. The statement of the law by LORD ROMILLY in *Hewitt v. Kay* (3) (L.R. 6 Eq. at p. 200) is as follows, and it seems to me to be quite accurate:

"A cheque is nothing more than an order to obtain a certain sum of money, and it makes no difference whether the money is at the bankers or anywhere

else. It is an order to deliver the money, and if the order is not acted upon in the lifetime of the person who gives it, it is worth nothing." A

Those words apply exactly to the present case. The cheque here was an order to pay a certain sum of money. It was not acted upon by the person to whom it was directed in the lifetime of the testatrix, and, therefore, to use LORD ROMILLY's expression, "it is worth nothing." Does it make any difference that there happened to be money at the bank sufficient to satisfy the amount of the cheque? I will first suppose that there had been a sufficient balance to the credit of the current account. Is that a sufficient circumstance of distinction? It is said it is, and reliance is placed upon the decision of STUART, V.-C., in *Bromley v. Brunton* (1), where the account was in credit and the cheque in question was presented, but not honoured because there was some doubt of the signature. With all respect to that judgment of SIR JOHN STUART, I share the doubt expressed by BUCKLEY, J., in *Re Beaumont* (2) whether it can be supported. I think the vice of the judgment, if I may so express it, is found in the expression, B

"the effect of the cheque was to appropriate so much of the donor's money ; and my opinion is that the funds subject to the gift are in the hands of the executors, just as much liable to the payment of the cheque as they were in the hands of the bankers." D

With all respect to SIR JOHN STUART, the drawing of the cheque does not, in my opinion, appropriate money in the hands of the bankers to the payment of that cheque. It authorises and requires the bankers to pay it, but it is no appropriation of the money itself. E

BUCKLEY, J., differed entirely from the judgment of SIR JOHN STUART in *Bromley v. Brunton* (1), and he tried to explain it by the suggestion that there was a constructive payment of the money when the bank refused to pay, because they were not satisfied with the signature. It was as much as to say: "When we are satisfied it shall be treated as if we had paid the cheque when it was presented." I feel very great difficulty about introducing any such theory as that of constructive payment, and, on the whole, if it were actually necessary to decide it, as at present advised, I should not follow *Bromley v. Brunton* (1). I should even go further and say that *Bromley v. Brunton* (1) must be treated as overruled. It is not actually necessary in the present case to go quite as far as I have said I should be prepared to go, because the current account was not in credit, and, therefore, the bank might have refused to pay this cheque on other grounds than that of a defect in the signature. It is attempted to get over that by saying that the bank would be estopped from refusing to pay, because of the practice alleged in the affidavit. I cannot follow that. When one reads the affidavit in which the practice is referred to, in the terms in which the paragraph is expressed, there was nothing to estop the bank. The utmost that can be said was that the bank had on previous occasions allowed the customer to overdraw so long as there was sufficient security for the overdraft in the deposit account, but there would be nothing in that to compel the banker on another occasion to allow the customer so to overdraw her account. I think, therefore, that this cannot be treated as coming under the principle of *Bromley v. Brunton* (1), but, even if it does come within that case, I do not think we ought to follow *Bromley v. Brunton* (1), but must treat it as overruled. F G H

SARGANT, L.J.—I am of the same opinion. I think this is a very plain case indeed, but I want to add something to what has been said from this point of view. I think the matter has perhaps been a little confused inadvertently by counsel referring to cases or *donatio mortis causa*, though he in terms admitted that he was claiming this amount, not as *donatio mortis causa*, but as a *donatio inter vivos*. Looking at WHITE and TUDOR'S LEADING CASES IN EQUITY, I find this, in the notes to *Ward v. Turner* (5): I

A "A donatio mortis causa . . . also differs from a gift inter vivos in the following important particular, namely, that an incomplete voluntary gift inter vivos will not be perfected by the assistance of equity, whereas in the case of a donatio mortis causa, equity will insist upon executors or administrators, as trustees for the donee, doing what may be necessary to complete the gift."

B The cases which have been referred to were cases of donationes mortis causa when there was an incomplete gift, and where equity nevertheless, in some cases, stepped in to make that gift, which was otherwise incomplete, complete. But here there is nothing of that kind at all. Here, claiming as on a donatio inter vivos, a person has the legal temerity to assert that the handing to her of a cheque is a good gift of the amount represented by that cheque. I will take it in favour of the donee, not that the donor had a current account supplemented by a deposit account, which, as a matter of practice, was used or relied on by the bankers in order to allow an overdrawing of the current account, but that both the amounts were to the current accounts of the donor. The donor gives a cheque to the donee, and for some reasons—the insufficiency of the signature and on the first occasion the fact that the word "pounds" was not mentioned—the bank, who are merely the agents of the donor, do not pay the amount. That is simply an incomplete voluntary gift; and as the donee claims on a gift inter vivos it seems to me to be entirely plain that the gift gives no right at all to the donee to claim the sum of money represented by it and written on the face of the cheque. I go further and say that even if this had been claimed as a donatio mortis causa, the claim must fail. The mere instruction by means of a cheque to a banker to pay the drawee of the cheque is not a gift. It is merely a revocable authority to the agent to make the payment; and the piece of paper containing that revocable authority is not a piece of property when it is handed by the drawee to the drawer. It is merely the handing to the drawee of the means of entitling the drawee to obtain from the agent acting in pursuance of the authority the sum in question. In my judgment, even if this had been claimed as a donatio mortis causa, the claim must have failed; a fortiori when the claim is made as a gift inter vivos.

F I think I should add this, because I myself argued *Re Beaumont* (2) before BUCKLEY, J. I am quite sure that BUCKLEY, J., though he found a possible way of reconciling *Bromley v. Brunton* (1) with the decision he was about to give, really thoroughly disapproved of that case. I thoroughly disapprove of the case myself, and I think that from this time forward it cannot be relied on.

Appeal dismissed.

Solicitors: *Ford, Lloyd, Bartlett & Co.*; for Swinburne *S. Wilson*, Newcastle-upon-Tyne; *Milner & Bickford*, for *Thomas Gee & Co.*, Newcastle-upon-Tyne.

[Reported by H. LANGFORD LEWIS, Esq., Barrister-at-Law.]

WALL v. EXCHANGE INVESTMENT CORPORATION, LTD.

[COURT OF APPEAL (Sir Ernest Pollock, M.R., Warrington and Sargant, L.JJ.),
November 9, 1925]

[Reported [1926] Ch. 143; 95 L.J.Ch. 132; 134 L.T. 399]

Company—Meeting—Voting—Objection to vote—Vote allowed by chairman—No fraud or misconduct—Finality of chairman's decision.

A company by its articles provided: "No objection shall be made to the validity of any vote excepting at the meeting at which such vote shall be tendered" or any adjournment thereof, and "every vote . . . not disallowed shall be deemed valid for all purposes whatsoever." An objection having been taken to a block of votes given by proxy at an extraordinary general meeting of the company, the chairman, after due consideration, disallowed it, and included the votes.

Held: in the absence of any fraud or misconduct on the part of the chairman such as would be sufficient to invalidate the award of an arbitrator, his decision could not be set aside, and, therefore, the votes were to be deemed valid.

Per SARGANT, L.J.: It may well be that where a vote has been disallowed the shareholder whose right has been impeached to that extent would have a right to apply to the court. Here all that has been done is to take away from a shareholder a right of appeal against a decision disallowing an objection by him against the votes of some other shareholder.

Notes. As to the proceedings at company meetings see 6 HALSBURY'S LAWS (3rd Edn.) 337 et seq., and for cases see 9 DIGEST (Repl.) 605 et seq.

Case referred to:

- (1) *Wall v. London and Northern Assets Corpn., Ltd.*, [1899] 1 Ch. 550; 68 L.J.Ch. 248; 80 L.T. 70; 6 Mans. 312; 9 Digest (Repl.) 610, 4051.

Appeal by the plaintiff from an order of ROMER, J., who refused an application for an injunction to restrain the defendant company from proceeding with a resolution for a voluntary winding-up on the ground that the resolution had not been carried by the necessary majority.

W. F. Swords for the plaintiff.

J. H. Stamp, for the defendants, was not called on to argue.

SIR ERNEST POLLOCK, M.R.—In my opinion, this appeal must be dismissed. It raises a short, but interesting point as to the powers of the chairman under one of the articles of the defendants, the Exchange Investment Corpn., Ltd. The company was incorporated in the year 1888, and the plaintiff was a member of the company, the holder of a total number of ninety-two shares. It appears that under date Aug. 10, 1925, notice was sent out to call an extraordinary general meeting of the company for Aug. 25 to consider, and if deemed desirable, to pass a resolution that the company should be wound-up voluntarily and appoint two liquidators. That meeting was held. The chairman was Mr. George Edwin Okell, who is a solicitor practising in Liverpool. Before the meeting it appears that he had received certain proxies. At the meeting it was found that the voting was 2,059 in favour of the resolution and 659 against, but in reaching the total of 2,059 the chairman counted 292 votes which had been given under proxy addressed to him and signed by William Timmis, who had a power of attorney from his mother, the registered owner of these 292 shares as the administratrix of the late J. J. Timmis. The question which arose at the meeting was whether or not the proxy which enabled the chairman to count the 292 votes in favour of the resolution was good, so that the votes were good votes. The plaintiff, Mr. Wall, raised the point that these 292 votes ought not to be counted, but the chairman, when objection was taken, decided that

A the votes were valid. Article 58 of the articles of association of the company says :

B "No objection shall be made to the validity of any vote excepting at the meeting at which such vote shall be tendered, or at the meeting (if any) to which such meeting shall be adjourned in the regular course of business, and every vote whether given in person or by proxy not disallowed at any one of such meetings shall be deemed valid for all purposes whatsoever."

C After the objection had been taken by Mr. Wall, Mr. Okell exercised his powers under this article, and he refused to disallow the 292 votes, with the result that under art. 58 these votes are to be deemed valid for all purposes whatsoever. It has been said on behalf of Mr. Wall that art. 58 does not prevent the matter being re-considered by the court, and that Mr. Okell was wrong in the decision at which he arrived. It was pointed out that the votes are to be deemed to be valid. It may, perhaps, be of service to point out that the word "deemed" seems to be necessary because, if the chairman's discretion or powers are to be wide enough for him to determine the matter, and if he does not disallow them they are to be deemed to stand as votes and to be valid for all purposes whatsoever.

D This article has already been considered in a case that came before NORTH, J., *Wall v. London and Northern Assets Corpn., Ltd.* (1). The article in question in that case was *literatim* the same as the article in the present case. Objection was taken there that the powers of the chairman were not to prevent the intervention or the re-consideration of the matter by the court, and that it would be possible to show before the court that the chairman had come to a wrong decision. In that case NORTH, J., says this :

E "The article in question is not of very general application; it does not go to the extent of making the chairman's decision final as to a resolution being passed. If he made a mistake in counting, for instance, the article would not apply. All the rule says is that any objections to votes are to be taken at the meetings, and every vote not disallowed at any one of such meetings shall be deemed valid for all purposes whatsoever. That is the same as shall be valid or shall be treated as valid. In my opinion, the meaning of the article is that all objections to votes at a meeting must actually be taken and dealt with at the meeting and the decision as to their validity by the person who presided is to be final on that point."

G I agree with NORTH, J. I do not see the purpose of art. 58 in the present case unless the effect which he has summarised in the sentence which I have read is to be given to it. The chairman is to exercise his power and come to a decision whether or not votes which are in question shall be deemed to be valid. If he come to that decision quite properly and with the limitation which NORTH, J., pointed out—that fraud is not suggested—it appears that the action of the chairman cannot afterwards be questioned. He acts in effect as if he was an arbitrator chosen by the parties who are concerned, whose decision is to bind the parties on a question whether those votes are to be treated as valid votes or not. No point is made here against Mr. Okell that he was guilty of any misconduct, and certainly no suggestion that he was guilty of such conduct as in the case of an arbitrator would invalidate his award. All that is said is that upon further and better inquiry he ought to have come to a different decision. Perhaps I may mention the fact, as it has not been stated, that Mr. Okell says he did not deal with the matter lightly, because he had examined the proxy and had come to a conclusion upon it before ever the meeting was held ; but, apart from that, it appears to me that in the absence of any charge of fraud or misconduct which would be sufficient to invalidate the award of an arbitrator, Mr. Okell, as chairman of the meeting, was entrusted with the power, under art. 58, for the purpose of getting through the business of the meeting, to decide whether or not the votes should be deemed to be valid. He has come to the conclusion that they ought not to be disallowed,

with the consequence that they were to be deemed to be valid, and that decision, A
come to by him, cannot now be set aside, because the article makes his decision
binding upon the parties who were attending at the meeting. For these reasons it
appears to me that ROMER, J., came to the right conclusion, and that this appeal
must be dismissed with costs.

WARRINGTON, L.J.—I am of the same opinion. ROMER, J., has refused the B
injunction asked for by the plaintiff to restrain the defendants, until judgment or
further order, from acting upon certain extraordinary resolutions for winding-up, and
this appeal is from that order. The chairman, Mr. Okell, at a meeting of the
company refused, on the plaintiff's objection, to disallow 292 votes of a proxy which
he held from the attorney of the registered holder, who was so registered as adminis- C
tratrix of her deceased husband. The power of attorney had been entered at the
registered office of the company, which is Mr. Okell's office, and was perused by
Mr. Okell, who is a solicitor, and he came to the conclusion that the proxy was
valid. He says, and there is no suggestion to the contrary, that he acted in good
faith. Accordingly, at the meeting he refused to disallow the votes in question, and
the resolution was carried. Without these votes the resolution would not have been
carried. D

Article 53 provides :

"No objection shall be made to the validity of any vote excepting at the meeting
at which such vote shall be tendered or at the meeting (if any) to which such
meeting shall be adjourned in the regular course of business, and every vote,
whether given in person or by proxy, not disallowed by any one of such meetings
shall be deemed valid, for all purposes whatsoever." E

The terms of that article, in my opinion, are perfectly plain. It leaves it to the
chairman to say, if an objection is made, whether or not the votes to which objection
s taken should be disallowed, and, if he comes to the conclusion that they ought
not to be disallowed and of course refuses to disallow them, then those votes shall
be deemed to be valid for all purposes whatsoever. Without authority I should F
have come to the conclusion that the action of the chairman, taken as it was in
good faith, and after considering the construction of the power of attorney, whether
it did or did not authorise the signature of the proxy in coming to the decision
to which he did come, was final and that no objection could be taken to it. The
matter is not free from authority. There is an exactly similar case of *Wall v.*
London and Northern Assets Corpn., Ltd. (1), which came before NORTH, J., G
on an article in precisely the same terms, and he came to the conclusion that in the
absence of any fraud or *malâ fides* the resolution could not be impeached on the
ground that the votes had not been disallowed by the chairman, seeing that the
chairman had properly refused to disallow the votes. It seems to me that ROMER, J.,
was right in refusing the injunction, and that this appeal ought to be dismissed. I
will only add this. I have looked at the power of attorney. To express any opinion H
on its construction would be quite irrelevant. I will only say that having perused
it, I think it was quite possible for the chairman to have come to the conclusion at
which he arrived.

SARGANT, L.J.—I agree. We are in effect being asked to overrule the judgment
of NORTH, J., given in the year 1899, with regard to an article in precisely the
same terms as the article now before us. I have looked carefully through the
decision in view of the criticisms of it made by counsel for the plaintiff, and I think
that the decision was perfectly right and was founded on perfectly justifiable
grounds. Here, so far from there being any fraud or misconduct put forward as
against the chairman, it appears that in the ordinary course of business he examined,
before the meeting, the proxies which had been lodged and came to the conclusion
that this proxy was sufficient to entitle a vote to be given under the powers of the
proxy. In that state of things it seems to me that he was entitled to refuse to I

A disallow the votes given under the proxy, and, therefore, the result followed that the votes were valid for all purposes and valid so as to give the requisite majority to pass the resolution as a special resolution. It is obviously desirable that questions of this sort should be determined in a summary way, and without having necessity of coming to the courts. Counsel says that, according to the terms of this article, if the chairman had disallowed a vote his decision is not conclusive. It may well be that in the case where a vote has been disallowed the shareholder whose right has been impeached to that extent would have a right to apply to the courts. Here all that is done is to take away from a shareholder a right of appeal against a decision disallowing an objection by him against the votes of some other shareholder, and it seems to me quite reasonable that such a case may be allowed to be decided summarily and finally by the chairman, although there should not be the same summary and final effect given to a decision against the right of a shareholder to vote.

Appeal dismissed.

Solicitors: *Evans, Jarvis & Sherry; Balderston, Warren & Co., for Robert Davies & Co., Warrington.*

[*Reported by H. LANGFORD LEWIS, Esq., Barrister-at-Law.*]

THORN AND OTHERS v. MADDEN

[CHANCERY DIVISION (Tomlin, J.), July 17, 1925]

[*Reported* [1925] Ch. 847; 95 L.J.Ch. 52; 135 L.T. 91; 41 T.L.R. 628; 70 Sol. Jo. 75]

Landlord and Tenant—Covenant—Restriction of use of premises—Not to be used for trade or business or otherwise than as private dwelling-house—Reception of “paying guests”—No advertisement to obtain guests.

By a sub-lease the sub-lessee covenanted that she would not “at any time during the said term use or permit the said dwelling-house and premises to be used for the purpose of any trade or business whatsoever . . . or otherwise than as a private dwelling-house or professional residence only.” The sub-lessee took as “paying guests” friends and also strangers recommended by friends. She never advertised or mentioned the address of the premises in any public announcement. The number of persons so received into the house was usually three or four, but on one recent occasion there had been six or seven.

Held: the sub-lessee was keeping the house permanently available for the accommodation of any approved person who cared to pay for staying there; that amounted to using the premises for the purpose of a business and otherwise than as a private residence only; and, therefore, the sub-lessee was in breach of the covenant in the sub-lease and an injunction would be granted to restrain her from continuing so to act.

Notes. Followed: *Tendler v. Sproule*, [1947] 1 All E.R. 193.

As to covenants restricting the user of demised premises see 23 HALSBURY'S LAWS (3rd Edn.) 620–625, and for cases see 31 DIGEST (Repl.) 160 et seq.

Cases referred to:

(1) *German v. Chapman* (1877), 7 Ch.D. 271; 47 L.J.Ch. 250; 37 L.T. 685; 42 J.P. 358; 26 W.R. 149, C.A.; 40 Digest (Repl.) 350, 2822.

- (2) *Hobson v. Tulloch*, [1898] 1 Ch. 424; 67 L.J.Ch. 205; 78 L.T. 224; 46 W.R. 331; 14 T.L.R. 241; 42 Sol. Jo. 290; 40 Digest (Repl.) 350, 2825. A
- (3) *Porter v. Gibbons and Bissett* (1904), 48 Sol. Jo. 814, C.A.; 31 Digest (Repl.) 167, 3020.
- (4) *Tompkins v. Rogers*, [1921] 2 K.B. 94; 90 L.J.K.B. 591; 124 L.T. 478; 85 J.P. 113; 37 T.L.R. 299; 19 L.G.R. 265, D.C.; 31 Digest (Repl.) 650, 7533. B

Witness Action for an injunction.

Under a lease dated April 28, 1884, one Lily S. Thorn and the plaintiffs were possessed of the messuage and premises, No. 69, Elm Park Gardens, Chelsea, together with the use of the ornamental gardens adjoining, called Elm Park Gardens, as joint tenants for a term of ninety-nine years from March 25, 1875. C

By a sub-lease dated April 14, 1921, Lily S. Thorn and the plaintiffs demised to Arthur Hungerford Pollen the messuage and premises, together with the use of the gardens, for a term of seven years from March 25, 1921, at the yearly rent of £180 and £3 for the garden. By the sub-lease the sub-lessee covenanted (inter alia) that he, his executors, administrators, and assigns

"will not at any time during the said term use or permit the said dwelling-house and premises to be used for the purpose of any trade or business whatsoever . . . or otherwise than as a private dwelling-house or professional residence only. . . ." D

Lily S. Thorn died on June 5, 1921, and in April, 1924, Arthur Hungerford Pollen assigned the premises to the defendant for the residue of the sub-term of seven years. The plaintiffs alleged that the defendant had broken the covenants in the sub-lease by using the premises for the purpose of carrying on the business of a boarding-house or of letting lodgings or of receiving lodgers or paying guests, and by using the premises otherwise than as a private dwelling-house or professional residence only. The plaintiffs claimed an injunction to restrain the defendant "from using or permitting to be used the premises for the purpose of the business of a boarding-house or of letting lodgings and/or of receiving lodgers and/or paying guests or of any trade or business or otherwise than as a private dwelling-house or professional residence only. . . ." E

By her defence the defendant, who was a married woman, admitted that she "for the first time in her life, in order to meet rent, rates and outgoings of the said premises greatly in excess of any sum ever paid for like purpose by her . . . husband, and incurred through inability to secure a house at less rent on transfer to London from Liverpool, where she formerly resided, on her said husband's change of professional status, and in order to provide against reduction of income and loss through the said change and also her said husband's long illness, has temporarily taken and is taking friends and others as paying guests, who have been secured by private notifications and never by public announcement of the address of the said premises . . ." She contended that in so doing she had not committed any breach of the restrictive covenant in the sub-lease. The plaintiffs also relied on a letter in evidence, dated Nov. 2, 1924, written by the defendant to a Capt. Haworth in Liverpool, in which she said : F

"Dear Sir,—I have a few paying guests staying in my house, and as a doctor and his wife leave on Tuesday next, their room will be free for a few days. I would charge 9s. 6d. each for bed and breakfast ; other meals would be provided if required. Will you let me know by return if you would like me to keep the room for you?" G

A stepdaughter of the defendant gave evidence that it was generally old friends who were received as paying guests, but sometimes a stranger recommended by a friend. The letter in evidence was written to a person not personally known to the defendant. It was unusual to offer to provide bed and breakfast only for a daily I

A sum. The paying guests generally contributed a weekly sum towards the expenses and took their meals with the family. They had about three bedrooms usually available for guests, but in August, 1924, there were six or seven paying guests, although that number was somewhat unusual.

B *Gavin Simonds, K.C., and F. Baden Fuller*, for the plaintiff, referred to *German v. Chapman* (1), *Hobson v. Tulloch* (2), *Porter v. Gibbons and Bisset* (3); see also *Tompkins v. Rogers* (4).

Ross-Brown, K.C., and Nicholas Cockshutt for the defendant.

C **TOMLIN, J.**—This is an action in which the lessees of a house known as 69, Elm Park Gardens, Chelsea, seek to restrain an under-lessee from the breach of certain covenants in the under-lease. The plaintiffs' lease is for a term of ninety-nine years from March 25, 1875. The defendant is the assignee of a sub-lease, which is dated April 14, 1921, and is for a term of seven years from March 25, 1921.

D The matter which gives cause for consideration is an alleged breach of a covenant as to the user of the premises. The covenant in the sub-lease, follows the terms of the head lease and is in these terms. [His Lordship read the covenant.] The case has been brought on upon the admission in the defence as to the character of the user of the premises. I have also had my attention called to a letter written by the defendant to a Capt. Haworth, near Liverpool, dated Nov. 2, 1924, and I have also seen in the box the defendant's stepdaughter who lives on the premises and has given me some information as to what takes place. She has told me that there were as many as six or seven paying guests there in August last, although that number was somewhat unusual. She told me that in November of last year E they had four guests, that the number of bedrooms available for guests was about three, and that most of the guests were charged a weekly sum for board and residence, and I gather that they shared meals in common with the defendant and her family. I have to determine on those facts whether there is anything being done which constitutes a breach of the restrictive covenant, having regard to its F true meaning. I must not concern myself with any question of hardship to the defendant, or with such questions as housing shortage or the like. All those matters are irrelevant to the questions which I have to decide, and, however much sympathy I may have with the defendant, it remains my duty to construe the document in the same way and arrive at the same conclusion as I should have done if my sympathy had been absent.

G I think that where, as here, a lady is of set purpose occupying a house which she is aware is beyond her means, and, for the purpose of supplementing her means and enabling her to live in the house, is securing, to use a neutral term, visitors to come and live there for short or long periods upon payment for board and residence, it is impossible to say that the house is being used as a private residence only. It seems to me to be used by her in precisely the same way as it would be used by one who kept a lodging-house or a boarding-house (whatever the strict distinction H between them may be), although there may be some differences in the actual methods employed. This is not like a case between two friends when, to the one desiring to pay a visit, the other says: "I cannot afford to keep you, but I shall be delighted to see you if you will pay." Here what is being done is to keep the house permanently available for the accommodation of any approved person who I cares to come and stay there and pay for doing so. I think that such a case as this falls into a different category, and amounts to carrying on a business. It does not seem to me to be a necessary quality of a business that it should be advertised in an obtrusive manner or at all. For carrying on a business all that is necessary, I apprehend, is to take the steps required to secure the necessary customers, and I think it is plain from the letter I have read that the defendant takes steps, by means which she thinks adequate, to secure customers when she wants them. Nor, again, do I think it makes any difference that she limits her customers to those of a particular kind, and says: "I will not have anybody here whom I do not know

personally, or who is not vouched for by somebody I know personally." It is admitted that she seeks to bring within her net her friends and those whom her friends recommend, and in those circumstances such limitation as she puts upon those whom she admits to her house does not seem to me to be a limitation which excludes the transaction from being the carrying on of a business. A

In those circumstances I must hold that there has been a breach both of that part of the covenant which related to using the premises as a private residence only and of that part which forbids the carrying on of a business, and it follows that some form of injunction must be granted. But it seems to me a case where nothing ought to be done which is harsh, and I shall safeguard the defendant to the extent that any injunction I grant will be suspended for such reasonable time as will enable her to readjust her relations with those who are in the house and to make other such arrangements as she may desire. B C

[His LORDSHIP granted an injunction "to restrain the defendant from using or permitting the said dwelling-house and premises to be used for the purpose of any trade or business or otherwise than as a private dwelling-house," but suspended the injunction, so far as the retention of the existing guests was concerned, over Sept. 29, 1925.]

Solicitors: *Holt, Beever & Co.; Slaughter, Colegrave & Cockshutt.* D

[Reported by L. MORGAN MAY, Esq., Barrister-at-Law.]

SPENCER v. ASHWORTH PARTINGTON & CO. E

[COURT OF APPEAL (Bankes, Scrutton and Atkin, L.JJ.), January 19, 1925] F

[Reported [1925] 1 K.B. 589; 94 L.J.K.B. 447; 132 L.T. 753]

Company—Shares—Transfer—Partly paid shares—Implied liability of transferee to indemnify transferor in respect of calls.

Where partly paid shares in a limited company are transferred by the owner to a transferee in blank it is implied in the contract that the transferee shall be liable to indemnify the transferor in respect of calls which are made on those shares, whether they are made during the time when the transferee is the owner in equity of the shares or after he has transferred them to a third party. G

Per ATKIN, L.J.: The principle is that when a person has bought a property with a burden attached to it, and he has, under the contract, become entitled in equity to have the property delivered to him, he at the same time undertakes that he will discharge the burdens on that property. On an agreement for the purchase and sale of shares there is an implied obligation on the purchaser to indemnify the vendor against all subsequent liabilities on those shares. The question of a blank transfer appears to me to throw no light on the matter at all. The obligation arises, not from the mode of the completion of the contract, but from the operation of the original contract. H

Humble v. Langston (1) (1841), 7 M. & W. 517, overruled. I

Notes. As to the transfer of shares see 6 HALSBURY'S LAWS (3rd Edn.) 248-262, and for cases see 9 DIGEST (Repl.) 332-353, 358 et seq.

Cases referred to:

(1) *Humble v. Langston* (1841), 7 M. & W. 517; 2 Ry. & Can. Cas. 533; H. & W. 72; 10 L.J.Ex. 442; 151 E.R. 871; 9 Digest (Repl.) 339, 2163.

- A** (2) *Walker v. Bartlett* (1856), 17 C.B. 446; 25 L.J.C.P. 156; 27 L.T.O.S. 104; 2 Jur. N.S. 261; 4 W.R. 300; reversed 18 C.B. 845; 25 L.J.C.P. 263; 27 L.T.O.S. 299; 2 Jur. N.S. 643; 4 W.R. 681; 139 E.R. 1604, Ex. Ch.; 10 Digest (Repl.) 1190, 8307.
- (3) *Loring v. Davis* (1886), 32 Ch.D. 625; 55 L.J.Ch. 725; 54 L.T. 899; 34 W.R. 701; 2 T.L.R. 645; 9 Digest (Repl.) 364, 2332.
- B** (4) *Levi v. Ayers* (1878), 3 App. Cas. 842; 47 L.J.C.P. 83; 38 L.T. 725; 27 W.R. 79, P.C.; 9 Digest (Repl.) 427, 2772.
- (5) *Hardoon v. Belilios*, [1901] A.C. 118; 70 L.J.P.C. 9; 83 L.T. 573; 49 W.R. 209; 17 T.L.R. 126, P.C.; 9 Digest (Repl.) 210, 1328.
- (6) *Phené v. Gillan* (1845), 5 Hare, 1; 15 L.J.Ch. 65; 5 L.T.O.S. 389; 9 Jur. 1086; 67 E.R. 803; 9 Digest (Repl.) 430, 2798.
- C** (7) *Maxted v. Paine* (1871), L.R. 6 Exch. 132; 24 L.T. 149; 19 W.R. 527; sub nom. *Maxsted v. Paine*, 40 L.J.Ex. 57, Ex. Ch.; 9 Digest (Repl.) 362, 2319.
- (8) *Roberts v. Crowe* (1872), L.R. 7 C.P. 629; 41 L.J.C.P. 198; 27 L.T. 238; 9 Digest (Repl.) 340, 2166.
- (9) *Kellock v. Enthoven* (1874), L.R. 9 Q.B. 241; 43 L.J.Q.B. 90; 30 L.T. 68; 22 W.R. 322, Ex. Ch.; 9 Digest (Repl.) 381, 2459.
- D**

Appeal from an order of ACTON, J., in an action tried by him without a jury at the Manchester Spring Assizes.

The plaintiff and the defendants were both stock and share brokers. On Sept. 6, 1921, the plaintiff sold to the defendants 200 partly paid shares in the Pilot Spinning Co. To complete that transaction he had bought 200 shares in the company from a Mr. and Mrs. Marsland, and on Sept. 15, 1921, he forwarded a transfer of the shares in blank to the defendants. The latter had purchased the shares as brokers on behalf of a client, Mr. Buckley Henthorne, to whom they passed on the transfer. Between January, 1922, and April, 1923, calls were made upon the shares, which Mr. and Mrs. Marsland, whose names still appeared on the register in respect of the shares, were compelled to pay, Henthorne having taken no steps to have himself registered as owner of the shares. Subsequently Henthorne was adjudicated bankrupt. Mr. and Mrs. Marsland then commenced an action against the plaintiff claiming to be indemnified by him against their liability on the calls, and the plaintiff thereupon instituted the present action against the defendants claiming (i) specific performance by the defendants of the contract of Sept. 6, 1921; and (ii) a declaration that the defendants were liable to pay him all sums of money for which he had been or might be liable by reason of the defendants omitting to register their names as owners of the shares. At the trial ACTON, J., held, upon the authority of *Humble v. Langston* (1), and *Walker v. Bartlett* (2), that, as the calls had not been made until after the defendants had parted with the transfer in blank to Henthorne, they were not liable to indemnify the plaintiff. The plaintiff appealed.

H *Courthope Wilson, K.C.*, and *John Bennett*, for the plaintiff.
Eastham, K.C., and *Edward Talbot*, for the defendants.

BANKES, L.J.—This is an appeal from a judgment of ACTON, J., which raises a very important point. The question for our decision is whether, as between the original transferor and the original transferee of shares transferred in blank, the original transferee is liable to indemnify the original transferor in respect of any calls which are made on those shares, whether or not they are made during the time when the original transferee was the owner in equity. Counsel for the defendants satisfied the learned judge that his clients were not liable for the claim made against them in the action on the ground that they had parted with the shares before the calls were made, and he decided in favour of the contention, almost entirely, if not entirely, upon *Humble v. Langston* (1), which was decided by PARKE, B., in 1841.

In considering this question it seems to me that there are three possible sets of circumstances which have to be considered, and considered separately. There is, first, the case of the transferor who has transferred shares in blank and is suing the original transferee upon the original contract. Then there is the case of the original transferor suing a transferee from the original transferee; in that case, if he can succeed, he must succeed upon equitable principles. Then there is the third case, where the original transferor is suing, it may be, an original transferee, or possibly a subsequent transferee and that original transferee or subsequent transferee is in the position to say: "Whatever the circumstances may have been in other cases, in this particular case there has been a novation, and, therefore, I am not liable." It is not necessary to discuss the last set of circumstances, except to say that in some of the authorities that have been referred to the explanation of the decision is found in the fact that there was a novation.

I want to confine what I have to say to the first two sets of circumstances. In the case where the original transferor is suing a transferee from the original transferee, it is quite plain that he cannot sue in contract. He must, therefore, establish some other cause of action arising out of equitable principles, the principle being that, so long as a transferee is the equitable owner of the shares, as between him and the original transferor, where there has been a transfer in blank, the original transferor is a trustee for the person entitled for the time being to the equitable interest in the shares. There are three cases founded on that principle. One is *Loring v. Davis* (3), another is *Levi v. Ayers* (4), and the other is *Hardoon v. Belilios* (5). I will refer to a very few passages in those authorities in order to show that what the court was dealing with was a case where there was no contract between the plaintiff and the defendant. In *Loring v. Davis* (3) CHITTY, J., says (32 Ch.D. at p. 629):

"With regard to the facts there is very little controversy between the parties. Quite apart from Leeman's Act [Banking Companies' (Shares) Act, 1867] there is no pretence for saying there was any contract between the plaintiff and the defendant Davis."

In the absence of contract the learned judge goes on to consider whether any liability can be established; and then he points out (*ibid.* at p. 634):

"If a man makes a transfer, there being no previous contract whatever, and executes a transfer to another of shares or stock, on the face of the transfer it is a sale, and if the intended transferee pays the purchase money upon the transfer, and takes the transfer into his own possession and keeps it, has not the transferee by thus accepting the transfer of the shares, as between himself and the transferor, become the equitable owner of the shares, and that notwithstanding that the transferee does not execute the transfer? I say, adopting LORD CAIRN's view, that Davis has become equitable owner of the shares, and, therefore, it follows that as equitable owner of the shares he is bound to indemnify the person who legally holds the shares for him as the only and absolute cestui que trust."

That being the principle, of course, the indemnity only covers the period during which the relationship of trustee and cestui que trust exists, and, therefore, if the person sued has, before the obligation is incurred, himself transferred the shares and ceased to occupy the position of cestui que trust, he cannot any longer have a claim made against him on the footing of the relationship existing between trustee and cestui que trust. The present case is not founded on a liability arising out of the position of trustee and cestui que trust, but it is said that the claim is in contract, and that, arising out of that contract, the law will imply an obligation to indemnify in respect of any claim in respect of his own shares so long as the original transferor, by continuing on the register and not being removed at the instance of some transferee, is himself liable to pay. I agree that, if the case of *Humble v. Langston* (1) is good law, there is ample evidence for counsel's argument and for

A the learned judge's judgment, but undoubtedly PARKE, B., there goes the length of saying that, where there is a transfer of shares, the transfer being in blank, if the transferor has not taken the trouble to secure that the transferee performs the whole of his obligation by either placing himself on the register, or getting somebody else placed on the register in substitution for the transferor, the law implies no contract of indemnity whatever. I myself think that, when the authorities
B are examined, the conclusion which is arrived at in FRY, L.J.'s, book that that decision has been overruled is amply justified ; and I think that the time has come when we ought to say that that decision is no longer law.

Humble v. Langston (1) was decided in 1841, and I think that I have correctly summarised the ground upon which PARKE, B., rested his judgment. He says (7 M. & W. at p. 529) :

C "The plaintiff did not pursue the course which, according to law, he ought to have done. The defendant appears to have been satisfied with the title, and both the plaintiff and he to have been content, the one to deliver, and the other to accept, a transfer with the name of the vendor in blank. . . . On this occasion, when this probably the customary course, was adopted, instead of that which
D the law, in the absence of custom, prescribes, the plaintiff might have insisted that he would not deliver such a blank conveyance."

Then he says that, if the defendant refused to do his duty, he might be sued for breach of contract, and damages might be recovered. He goes on :

"We cannot therefore think that the plaintiff and defendant ever contemplated such an undertaking as the declaration in this case describes."

E One speaks with the greatest submission of anything that PARKE, B., said. He may be speaking of the state of things in 1841, but I do not think that anybody who is familiar with the course of business nowadays could possibly say that where a man executes a transfer in blank, he does not contemplate being indemnified. I should have thought that the ordinary inference to be drawn, having regard to
F the present state of business, would be that a person does contemplate, when at the instance and request of the purchaser he executes a transfer in blank, that he will not be put in a worse position by executing a transfer in blank than if he executed a transfer in the name of the transferee. However, PARKE, B., took a different view. He said :

G "We cannot therefore think that the plaintiff and defendant ever contemplated such an undertaking as the declaration in this case describes ; and that the evidence does not warrant the jury in drawing an inference of any such engagement. Does the law raise any such contract? We think it does not. The plaintiff, by his neglect to get the conveyance completed and the transfer entered, becomes a trustee for the defendant and his assigns, and receives the profits, and must pay the outgoings ; but there is no authority for saying
H that the law makes any promise by a cestui que trust to a trustee, simply to repay all that the trustee may pay on his own account, still less on that of the subsequent cestui que trust."

I So that the learned baron is there saying that there is no implied contract, and that the remedy, if any, arises out of the relation of trustee and cestui que trust. But he then goes on, as it seems to me, to negative the existence of the promise to indemnify which, upon the other cases to which I have referred, clearly exists : a promise to indemnify, at any rate, for such a time as the relationship of trustee and cestui que trust exists. Be that as it may, as regards the reference to the law arising out of the law of trusts by the learned baron, it seems to me that, whenever that decision has been referred to, it has been referred to either with obvious expressions of dissent or in language which, if not in terms, necessarily implies that the court is not following the decision. In *Walker v. Bartlett* (2), it is quite plain, from the observations of the learned judges during the argument,

that they were not prepared to accept the view of PARKE, B. During the argument of Mr. Byles, when *Humble v. Langston* (1) was referred to, WILLES, J., said: A

"*Humble v. Langston* (1) is recognised by WIGRAM, V.-C., in *Phené v. Gillan* (6), which seems to show that there may be a remedy in equity, though none be enforceable in a court of law."

JERVIS, C.J., said (17 C.B. at p. 453):

"It is difficult to see why there should be a different rule prevailing at law from that observed in equity, where there is direct privity between the parties. . . . It is the practice of this court always to defer to decisions of other courts of co-ordinate jurisdiction." B

The Chief Justice, in giving judgment, said that he could not distinguish the case from *Humble v. Langston* (1), and he said: C

"Upon the authority of the case of *Humble v. Langston* (1) we are of opinion that the ruling of my brother WILLIAMS at the trial was correct."

CROWDER, J., said:

"I wish merely to add that I yield a reluctant assent; and that I yield solely under pressure of the authority of *Humble v. Langston* (1)." D

So there is no doubt as to what the view of the learned judges there was. When the case came to appeal it was distinguished, but it seems to me that WIGHTMAN, J., in giving the judgment, laid down the law in terms which are quite inconsistent with the judgment of *Humble v. Langston* (1) being correct. He said (18 C.B. at p. 863):

"It could hardly have been the intention of the parties that, if the defendant for his own benefit omitted to make a perfect transfer by registration in the company's books, the plaintiff should still continue to pay the calls; and, if that was not their intention, was it not understood between them that the defendant should save the plaintiff harmless from any calls made during the time when he was virtually owner of the shares?" E

It is quite true that is an expression of opinion limited to the time during which the defendant was owner of the shares, but it is an expression of opinion that, arising out of a contract as between the original transferor and transferee, there was, at any rate, a promise to indemnify to that extent, and that view of the law is exactly the opposite to what PARKE, B., said in *Humble v. Langston* (1). When one comes to *Maxted v. Paine* (7), it seems to me, and indeed I think it is admitted by counsel for the defendants, that if what BLACKBURN, J., says is the correct view of the law, *Humble v. Langston* (1) can no longer have been regarded as law. In *Maxted v. Paine* (7) BLACKBURN, J., says (L.R. 6 Exch. at p. 154): F

"The vendor in *Humble v. Langston* (1) had, at the request of his purchaser, abstained from requiring him to pursue this strict course, and the Court of Exchequer decided that there was no contract at law to indemnify him, his only remedy being in equity, as it is expressed." G

He then reads the passage which I have already read, where it is said: H

"The plaintiff, by his neglect to get the conveyance completed and the transfer entered, becomes a trustee for the defendant and his assigns, and receives the profits, and must pay the outgoing; but there is no authority for saying that the law makes any promise by a cestui que trust to a trustee simply to repay all that the trustee may pay on his own account, still less on that of the subsequent cestui que trust'." I

BLACKBURN, J., proceeds:

"The latter part of the judgment was, however, reversed in the Exchequer Chamber in the case of *Walker v. Bartlett* (2), where WIGHTMAN, J., in delivering the judgment of the court, says:

A "The defendant, however, did not cause the shares to be registered in his name ; and the plaintiff was, in consequence of his name being continued on the register, obliged to pay some calls'."

After reading a long passage from WIGHTMAN, J.'s, judgment, he goes on to say :

B "The Court of Exchequer Chamber decided that there was [a contract to indemnify the plaintiff] and that the plaintiff was entitled to recover on the first count, which alleged the contract to be, on the plaintiff's part, to execute and deliver to the defendant a transfer generally, not a transfer to the defendant himself. And it is obvious that to put any other construction on the contract would be very inconvenient. It would prevent the making of a contract for the purpose of applying the shares to the fulfilment of an obligation already

C contracted to supply shares to another, as, for instance, to vest them in the trustees of a marriage settlement ; and it would render it impracticable for two brokers to deal with each other as principals for a sale for cash, when, in fact, each was acting for an undisclosed principal, and this would be without any corresponding benefit to the vendor. For it is obvious that so long as the supplier of the shares has the personal liability of his contractor, who is

D bound to see that by the registering of the transfer the burthen of the ownership is removed from him, it is immaterial to him whether that object is to be attained by registering one name or another. If it is done he is free, if it fails he still has the personal liability of the original contractor, and in no case could he under the contract have more."

E That is a definite statement by that very learned judge as to the obligation of the original transferee arising out of the contract, and, in my opinion, when the case is cleared away from any stock exchange rules, or from any question of novation arising out of those rules, and when the question of the relationship of trustee and cestui que trust is put on one side, and the question is confined to a consideration of the obligation arising out of the original contract between the original transferor

F and the original transferee in the case of a transfer in blank, where it must be assumed that the transfer is in that form at the request of the transferee, it seems to me that the view taken by the learned judge is obviously the right one, and that there is no reason whatever for the suggestion that, as between the original contracting parties, the limitation which arises out of the peculiar relationship of trustee and cestui que trust is to be superimposed. For these reasons I think the

G judgment must be set aside. Judgment must be entered for the plaintiff, and I think that this court should definitely state that, in its view, *Humble v. Langston* (1) is no longer law.

SCRUTTON, L.J.—I agree in substance with the judgment which has been delivered by my Lord, and I only express my views shortly in my own language, because we are differing from the learned judge below and because we are expressing

H an opinion that the judgment of PARKE, B., is wrong. It is fair to say, with regard to the learned judge below, that the case was heard on circuit, where there are not great facilities for consulting authorities. He was not supplied with the abundant mass of cases with which we have been supplied in the course of the argument, and not unnaturally he dealt with the judgment of PARKE, B., in a way

I in which he would not have dealt with it if he had been reminded by counsel that BLACKBURN, J., thought that it was wrong. We have had the advantage of being referred to various authorities, and we have found for ourselves more authorities on the subject. As the result of consideration I do not think that the judgment of the learned judge below can stand.

The owner of shares in a cotton mill, on which there was a heavy liability for calls, because the shares were unpaid, sold them to another person, and he gave that other person a transfer in blank, not stating the name of the nominee. The purchaser again sold those shares to a third person, handing over the transfer in blank, and the

third person, who had apparently bought them for speculation did not register the transfer (there having been calls in the meantime), and went bankrupt. Consequently, any attempt to make the ultimate purchaser liable was not likely to be financially very profitable. Thereupon the original vendor sued the original purchaser on an implied contract to indemnify him as to the calls made. The learned judge in the court below, in following the judgment of PARKE, B., has held that, from the circumstances, there can be no implied contract to indemnify, particularly as, at the time when the contract is sought to be enforced, the intermediate purchaser, the original purchaser from the vendor, is not the beneficial owner of the shares.

Once a transfer gets registered, unless in the case of winding-up and enforcement in claims against the previous owner under the "B" list, registration of the transfer frees the original vendor from liability for calls and leaves the registered owner liable. If the transfer is not registered, but a contract for sale is made and the transfer executed, the transferee or transferees are then owners in equity one after the other, and the question then arises as to what is their position. I think that the law as regards implied contracts is accurately stated in FRY ON SPECIFIC PERFORMANCE (6th Edn.), para. 1497 :

"The vendor will be entitled to a direction that the defendant execute a proper deed of transfer and concur in all steps necessary to procure its registration, and also, in the case of the vendor being plaintiff, to a declaration of his right to indemnity in respect of calls on the shares accruing after the purchaser has become the owner in equity."

When he has become the owner in law by registration, the vendor does not want such a declaration, because there is no longer any liability upon him. The implied contract appears to me to rest ultimately on the principle that, if you have the benefit, you must also take the burden. If you have the ownership of property, you must also take the burden with it. That way of putting it is used in some of the authorities. Another way of putting it is the way it was put by WILLES, J., in *Roberts v. Crowe* (8). He was dealing with a case where another judge had treated the matter as one of principal and surety, and he said (L.R. 7 C.P. at p. 636) that he thought that the case of the transferor and transferee was not that of principal and surety.

"Where two persons are equally liable for a debt, and the person who is not in the enjoyment of the property in respect of which the debt arises, and therefore only secondarily liable, is called upon to pay, he shall have an indemnity from the other."

This is the way in which WILLES, J., thought that the matter should be approached.

Obviously, when you have the beneficial interest in a man who has no contractual relation with the original vendor, you cannot rest the liability to indemnify on implied contract ; you have then to rest it on the law of trustee and cestui que trust. The two ways of doing that are stated in *Levi v. Ayers* (4) in the judgment of SIR BARNES PEACOCK (3 App. Cas. at p. 852) :

"First, that the transferee of shares in a company formed under the Companies Act, 1862, who takes the beneficial ownership, is bound to indemnify the transferor against all liabilities in respect of them subsequent to the date of the transfer."

That is practice.

"Secondly, that a trustee whose name is on the register, though personally liable as a shareholder, is entitled to be indemnified by his cestui que trust."

That is, if you cannot get a contract, if there is not privity of contract between the vendor and the person who then has the beneficial interest, and yet it is desired to resort to indemnity, it is said that that may be so, but that the indemnity and

A the trust both rest on the defendant's having, at the time you claim an indemnity, a beneficial interest in the contract. It appears to me that the judgment of the Exchequer Chamber in *Kellock v. Enthoven* (9) disposes of that. In that case, where a man had actually passed—a transferee who had actually parted with—the legal property, so that the vendor was face to face with the fact that his purchaser had legally transferred to another purchaser who was registered, the vendor was

B able to recover against the man who had parted with the property. The reason given for that was this. At the time the property was sold there was a liability with it, and the liability was that, if the company was wound-up within a year, all previous owners might be put into List B and be called upon to make good, having contribution or indemnity according to the facts of the case between them, and it was said :

C “Inasmuch as at the time of sale there was a liability, it is quite immaterial to consider that the calls were made when the man had not a beneficial interest.”

In the same way in this case, at the time when the property was sold there was a liability for calls if and when the calls were made, because the shares were not fully

D paid up ; and it appears to me that, as a matter of contract, the purchaser of such property undertakes to indemnify the vendor against calls made subsequent to his purchase. He takes the benefit and must also take the burden. The only way in which he could free himself is, as it appears to me, by complying with the first part of the rule stated in FRY, L.J.'s, book by seeing that someone, himself or his nominee or purchaser, executes a proper deed of transfer and gets it registered.

E With regard to the authorities, I only want to say this. *Humble v. Langston* (1) seems to me directly to decide, in the case where the vendor tenders and the purchaser accepts a blank transfer, that there is no covenant by the purchaser to indemnify the vendor. It is put in the plainest language by PARKE, B. (7 M. & W. at p. 528) :

F “We are of opinion that, under the circumstances of this case, there was no undertaking implied by law, to indemnify against all subsequent calls, nor any evidence of such an undertaking in point of fact.”

When fifteen years later, the memory of PARKE, B., was still great in the courts, the courts had to consider, in *Walker v. Bartlett* (2), whether there was an implied contract to indemnify. They decided that there was. That appears to me to be directly the opposite of *Humble v. Langston* (1), and, in my view, BLACKBURN, J.,—if it is not presumptuous for me to approve of BLACKBURN, J.—was quite right in saying in *Marted v. Paine* (7) that *Walker v. Bartlett* (2) overruled the second part of the statement in *Humble v. Langston* (1). Again, the note in FRY, L.J.'s, book (p. 679 n.),

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H “*Walker v. Bartlett* (2), which must be taken to overrule *Humble v. Langston* (1) on the point of indemnity,”

is, in my view, correct. The learned judge in the present case did not have his attention called to the fact that the authority on which he was acting, in the opinion of authorities who ought, at any rate, to be considered, had been overruled. *Walker v. Bartlett* (2) did not in terms say, “This is wrong.” When one was still under the shadow of PARKE, B., I can quite understand that the courts would prefer to say that there were different circumstances rather than to say outright that a judge of so great an authority had made a mistake, as, I suppose, every judge, however great, does at some time or another. *Walker v. Bartlett* (2) decided that there was an implied contract limited, at any rate, during the time the beneficial interest existed, and the court distinguished *Humble v. Langston* (1), because they said that the claim there was for all time and not for the time that the beneficial interest existed. It appears to me that the question whether the indemnity extended and the contract extended after the purchaser had passed on

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the equitable interest, but the legal interest had not been transferred by registration, was not before the court in *Walker v. Bartlett* (2). In my view, it was before the court in *Kellock v. Enthoven* (9), where one registered purchaser was claiming indemnity against a subsequent registered purchaser. As I read the judgments, both of the court below and of the Exchequer Chamber, it was said in the clearest language that the liability to indemnify was not got rid of by the purchaser passing over the property to another. That is the language of BLACKBURN, J. QUAIN, J., after stating the contention that

"the liability is to be limited to the time during which the transferee is the actual possessor of the shares, and ceases when he transfers them,"

said :

"There is nothing in the cases or in the language of s. 38, or the nature of things, which goes so to limit the liability."

That has been my difficulty, in listening to the very able argument of counsel for the defendants, to find what there is in the cases or in the language of s. 38, or in the nature of things, that make such a distinction between blank transfers and the legal registered transfers in *Kellock v. Enthoven* (9). I have always understood that blank transfer had two purposes, or, at any rate, two effects. One very satisfactory effect for the people concerned was that they only paid one stamp duty instead of a stamp duty for each transfer, and I should imagine that the amount of revenue lost in that way is something enormous. The other is that one is able, where one buys meaning to sell, to take a document which will enable one to transfer to one's purchaser when the time comes and one to know who he is. Those two reasons or causes of blank transfers, both of which are in favour of the purchaser and neither of which is to the advantage of the vendor, appear to me to be quite insufficient to suggest that the vendor, by assenting to something for the advantage of the purchaser, loses the advantage which he otherwise would get, which advantages are stated in FRY, L.J.'s, book and which I have already read in the case of the declaration or contract of indemnity to which he is entitled. I respectfully think that, if the learned judge had had before him the authorities with which we have been favoured, he would have come to the same conclusion. We, having the advantage of a further consideration and a greater opportunity of considering the authorities, must, I think, come to the conclusion that his judgment was erroneous, and that the plaintiff is entitled to the relief which he seeks.

ATKIN, L.J.—But for the decision of the Court of Exchequer in 1841, which was the foundation of the judgment of the learned judge, I should have thought that this was a very simple case, and, as I am quite clear that the case in the Court of Exchequer was wrong and has in fact been expressly dissented from by courts of authority a long time ago, I feel that there should be no doubt as to the decision that we ought to give in this particular case. Indeed, I have felt that the vigorous argument to which we have listened has amounted to a subversion of the principles and the practice relating to dealing in stocks and shares as long as I have known them, and I am afraid that for that reason I have not listened to counsel for the defendants with the patience with which I nearly always listen to the remarks which he addresses to the court.

The plaintiff is a stockbroker who carries on business at Blackpool, and he sold 200 shares in a cotton mill company to the defendants, who also are stockbrokers, carrying on business at Manchester. There was another block of shares, but I will only deal with the 200. The shares were £5 shares, £1 paid, and the price paid for them was 1s. 10½d. per share, which seems to indicate fairly plainly that it was obvious to the parties that there was a likelihood of there being a liability upon those shares. The plaintiff, in order to perform his contract, bought the shares from a Mr. and Mrs. Marsland, who were the owners of the shares and were fortunate enough to be able to get rid of them ; and the defendants, having

A obtained the shares, re-sold them to a man named Henthorne. In order to complete the transaction the plaintiff, some days after the contract had been made, received a transfer in blank of these shares from Mr. and Mrs. Marsland ; he then passed the transfer on to the defendants, the defendants passed the transfer on to their purchaser, Henthorne, and all parties were paid the respective prices at which they had dealt with them. Henthorne did not register the shares in his name.

B Eventually he became bankrupt, and thereupon legal proceedings ensued. I am not quite clear as to which event first occurred in order of time, but I think the first was that Mr. and Mrs. Marsland brought their action against the plaintiff to recover the calls which they had to pay upon the shares, and they eventually recovered judgment in default of defence, the present plaintiff conceding that he was under a liability to indemnify his vendor. He thereupon commenced this action against

C the present defendants for specific performance and an indemnity, but unfortunately he found that his view of the law was not shared by counsel for the defendants and—still more important—was not shared by the learned judge. Accordingly, he lost his case before the learned judge, and thereupon appealed to this court.

It seems to me that the principle is that in a contract such as that of the purchase and the agreement for the purchase of shares which have a liability upon

D them, the purchaser impliedly agrees with the vendor that he will indemnify the vendor from all future liabilities upon those shares, and that the contract is in existence until or unless it has been discharged by novation, as it very often is in the course of the completion of such contracts either on the stock exchange or apart from the stock exchange. The principle is that when a person has bought a

E property with a burden attached to it, and he has, under the contract, become entitled in equity to have the property delivered to him, he at the same time undertakes that he will discharge the burdens on that property. The authority against that proposition is *Humble v. Langston* (1), decided very early in the history of transactions of this kind—namely, in 1841—certainly long before there was the elaboration of the practice that has followed in the decisions of the courts in the last eighty years. In that case the transaction was very similar to the present

F one. There was an agreement to sell shares with the liability upon them and the performance of the contract by delivery of the transfer in blank. The Court of Exchequer, giving judgment by PARKE, B., came to the conclusion that there was no implied contract of indemnity at all in such a contract as that. Indeed, I think that the grounds of the decision are that in an agreement for the sale of

G shares there is no implied contract of indemnity at all, because, says the learned judge, if it is completed in the ordinary way, the vendor ought to execute a transfer signed by himself to the purchaser in the purchaser's name, and the purchaser ought to see that the transfer is duly registered and that he is made a member of the company, and, if he does that there will be no liability for calls, but, if he does not do that, the remedy in respect of any calls which fall upon the vendor

H will be, not that of implied indemnity, but that of breach of a contract to procure oneself to be registered, so that the liability to pay falls upon the vendor, instead of, as it ought to fall, on the purchaser. Then he says that, when one comes to deal with a blank transfer, inasmuch as the true inference from that is that the purchaser does not undertake to register it himself at all, but that it is made with the object of passing on the title to somebody else, the obligation which alone

I will support the claim for damages—namely, the obligation to procure registration—is not there, and therefore there will be no right to recover damages. In neither case, according to the Court of Exchequer, is there an implied contract to indemnify.

It appears to me that that is wrong in the first place in the statement of the contract which assumes that the obligation on the purchaser is to procure himself to be registered, whereas, in my judgment, BLACKBURN, J., is quite right in saying that it is an obligation to procure himself or some other satisfactory person to be registered ; and, secondly, it is wrong in imputing to the fact of completion by blank transfer the effects which were given to it in that case. However, the

foundation of that case seems to me to have been entirely destroyed in the next case which is referred to, *Walker v. Bartlett* (2), because in that case the Court of Exchequer Chamber held in fact that there *was* an implied contract to indemnify in the case of the agreement for the purchase and sale of shares. It is true that they limited the indemnity in terms to an indemnity against such liabilities as were imposed upon the holder of the shares while the defendant was still the beneficial owner of the shares ; but the substance of the case is that it entirely denies what is obviously the foundation of the decision in *Humble v. Langston* (1) that there is not the implied contract of indemnity. The restriction that was put in *Walker v. Bartlett* (2), which was unnecessary for the purposes of the case (because all the liabilities in question did arise in that case while the defendant was the owner of the shares) was, to my mind, removed by the Court of Exchequer Chamber in *Kellock v. Enthoven* (9), because in that case there had been an agreement for the sale of shares, the original vendor had in fact transferred to the defendant, and the defendant had transferred to a third party and had executed the transfer to him, and that third party on the liquidation of the company had been placed on List A of the contributors—in other words, he had been placed on the list of the present members of the company—and, therefore, he had acquired the full and complete title, so far as the full and complete title could be given to him, and the intermediate purchaser, the defendant, had ceased to have any beneficial interest of any sort or kind in the shares. Nevertheless when he was sued by the original vendor on the implied indemnity to meet the liabilities on the shares, he was held by the Court of Exchequer Chamber to be liable, and, therefore, the last vestige of authority of *Humble v. Langston* (1), as it seems to me, entirely disappeared.

The result, I think, is that the law is as I have stated it—that, on an agreement for the purchase and sale of shares, there is an implied obligation on the purchaser to indemnify the vendor against all subsequent liabilities upon those shares. That obligation can, of course, be disposed of as I have said, by a novation of the contract such as constantly takes place. In completion, for the original purchaser there is substituted the person whose name is given, in the case of stock exchange transactions, as the person who is to complete the contract ; and, in ordinary transactions outside the stock exchange, there may be a novation when the original purchaser has put into the transfer deed the name of a person, either his nominee or sub-purchaser whom the vendor accepts as the person with whom he is going to complete the contract. I do not think anything more need be said about that. Subject to that, it appears to me that the right of indemnity exists. The question of a blank transfer appears to me to throw no light on the matter at all. The obligation arises, not from the mode of completion, but from the operation of the original contract, and it would certainly be very odd if, when once a vendor has obtained the benefit of an implied contract of complete indemnity it should be in some way destroyed by the mere fact that it is completed in a form which is convenient to the purchaser by giving him a transfer which does not contain his name or the name of any other person as the transferee. It is plain that the effect of a blank transfer is to entitle the person who receives it to put in his name or the name of any other person, who is qualified to act, to become a member of the company ; and, in a similar way, he may pass on that authority, for value or otherwise, to an assignee from himself. The object of a blank transfer is to facilitate transactions. I do not think that there is anything sinister about it ; it is, of course, the usual form in which certain securities are transferred—for instance, nearly all American shares are transferred and delivered from hand to hand by reason of there being a blank transfer endorsed on the back of the shares. It is a form of transaction which very often affords considerable facilities in business whereby people receive a security rapidly and without having to wait until a transfer is completed. No doubt, in a case of this kind, too, it may have had quite a big significance, because I can quite imagine that people are carrying on businesses in the provinces apart

A from one another and it may be an advantage to the purchaser not to have to give the name either of the person for whom he has acted or the person to whom he disposes of the shares. However that may be, it seems to me that a blank transfer in no way operates to defeat the right of the vendor. An argument was addressed to us by counsel for the defendants which I appreciated. He said, as I understood him, that if the transfer had been completed in the ordinary course, B the plaintiff would have executed a transfer to a named transferee, the defendants or somebody else, and that named transferee would then be inferred to be the person whom the plaintiff had expected to perform the contract. That may be so, and I do not at the present moment say whether it is so or not, but it is obvious that in this case that did not take place, because in this blank transfer there never was a transferee who ever did execute the transfer. Henthorne allowed the transfer C to remain blank and there never was a person with whom there was a novation. Short of novation, it seems to me that the implied contract had not been completed. For these reasons it appears to me that the judgment of the learned judge must be set aside and that the plaintiff must receive appropriate relief. I do not know whether all the calls have been made, but, if so, I should think it would be very easy to convert this into a simple money judgment and to avoid having to make a D decree of specific performance.

Appeal allowed.

Solicitors : *Megson & Nicholson*, Oldham; *Armstrong & Taylor*, Oldham.

[*Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.*]

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NICHOLSON v. ENGLAND

[KING'S BENCH DIVISION (Sankey and MacKinnon, JJ.), December 11, 1925]

[*Reported* [1926] 2 K.B. 93; 95 L.J.K.B. 505; 134 L.T. 702]

Limitation of Action—Recovery of land—Effect of extinguishment of title—
Tenancy at will—Tenancy from year to year—Subsequent payment on
 G *account of rent—No revival of tenancy—Real Property Limitation Act, 1833*
(3 & 4 Will. 4, c. 27), ss. 7, 8, and 34.

A tenancy that has been extinguished by the operation of the Real Property Limitation Act, 1833, cannot be revived by a payment in respect of rent subsequent to the extinguishment, and this principle applies equally whether the tenancy be a tenancy at will or one from year to year.

H *Sanders v. Sanders* (1881) (1), 19 Ch.D. 373, applied.

Bunting v. Sargent (1879) (2), 13 Ch.D. 330, not followed.

Notes. The Real Property Limitation Act, 1833, was repealed by the Limitation Act, 1939. Sections 7, 8, and 34 of the Act of 1833 have been replaced by s. 9 (1) and (2) and s. 16 of the Act of 1939 respectively.

I As to limitation of actions to recover land subject to tenancies and acknowledgments see 24 HALSBURY'S LAWS (3rd Edn.) 243 et seq., 297 et seq. For cases see 32 DIGEST 459, 460, 483 et seq. For Limitation Act, 1939, see 13 HALSBURY'S STATUTES (2nd Edn.) 1159.

Cases referred to :

(1) *Sanders v. Sanders* (1881), 19 Ch.D. 373; 51 L.J.Ch. 276; 45 L.T. 637; 30 W.R. 280, C.A.; 32 Digest 458; 1250.

(2) *Bunting v. Sargent* (1879), 13 Ch.D. 330; 49 L.J.Ch. 109; 41 L.T. 643; 28 W.R. 123; 32 Digest 440, 1106.

- (3) *Re Threlfall, Ex parte Queen's Benefit Building Society* (1880), 16 Ch.D. 274; 44 L.T. 74; 29 W.R. 128; sub nom. *Re Threlfall, Ex parte Blakey*, 50 L.J.Ch. 318, C.A.; 31 Digest 478, 6037. A
- (4) *Day v. Day* (1871), L.R. 3 P.C. 751; 8 Moo. P.C.C.N.S. 152; 40 L.J.P.C. 35; 24 L.T. 856; 36 J.P. 118; 19 W.R. 1017; 17 E.R. 270, P.C.; 32 Digest 451, 1184. B
- (5) *Re Hobbs, Hobbs v. Wade* (1887), 36 Ch.D. 553; 57 L.J.Ch. 184; 58 L.T. 9; 36 W.R. 445; 32 Digest 461, 1275. B
- (6) *Re Alison, Johnson v. Mounsey* (1879), 11 Ch.D. 284; 40 L.T. 234; 27 W.R. 537, C.A.; 32 Digest 479, 1416. B

Appeal from the Banbury County Court.

The plaintiff sued the defendant for the possession of a house and for £138 arrears of rent. The defendant, in her defence, relied on the Real Property Limitation Act, 1833, and the plaintiff, in her reply, contended that the operation of the statute was prevented by certain payments that the defendants had made on account of rent. The plaintiff was the stepmother of the defendant. In 1909 the defendant was about to be married, and she persuaded her father, George Nicholson, to buy a house in Warwickshire for £675 with a view to his residing there on his retirement from business and allowing her to reside there in the meantime. The county court judge found as a fact that on April 24, 1909, Mr. Nicholson made a verbal agreement that the defendant "should be allowed to occupy the house as a kind of tenant at a rent of £17 per annum, but that she should not be pressed for the rent." In October, 1921, the defendant's mother died, and in February, 1923, Mr. Nicholson married the plaintiff. In December, 1924, he assigned to her the house and the rent owing to him in respect of the defendant's tenancy. In March, 1925, the plaintiff brought the present action against the defendant. At the trial the plaintiff sought to rely on two entries in a note-book produced by Mr. Nicholson. The first entry was as follows: "August, 1911.—J. paid £8 10s.," and the second: "March 27, 1913.—£8 10s." The county court judge found as a fact that both entries were in the handwriting of the first Mrs. Nicholson, but held that he could not draw the inference that these entries referred to payments on account of rent by the defendant. The plaintiff also relied on a payment of £100 by the defendant to her father on May 31, 1922. The county court judge found that this was a payment on account of rent, but that the plaintiff could not avail herself of it, as the tenancy which had commenced on April 24, 1909, was extinguished by the operation of the Real Property Limitation Act, 1833, on April 24, 1922, and could not be revived by a payment subsequent to that date. He gave judgment for the defendant, and the plaintiff appealed. C

Foa and Bromley, for the plaintiff, referred to *Sanders v. Sanders* (1), *Bunting v. Sargent* (2), *Re Threlfall* (3), *Day v. Day* (4) and the Real Property Limitation Act, 1833, ss. 8 and 34. D

G. B. Hurst, K.C., and *Rand*, for the defendant, also cited *Re Hobbs, Hobbs v. Wade* (5). E

By the Real Property Limitation Act, 1833: F

"Section 7: When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent, shall be deemed to have first accrued, either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined. . . ." G

"Section 8: When any person shall be in possession of or in receipt of the profits of any land, or in receipt of any rent, as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject H

A thereto, or of the person through whom he claims, to make an entry or distress or to bring an action to recover such land or rent shall be deemed to have first accrued at the determination of the first of such years or other period, or at the last time when any rent payable in respect of such tenancy shall have been received (whichever shall last happen)."

B "Section 34: At the determination of the period limited by this Act to any person for making an entry or distress, or bringing any . . . action or suit, the right and title of such person to the land [or] rent . . . for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, shall be extinguished."

C **SANKEY, J.**—The plaintiff is the second wife of a gentleman, aged seventy-one, named George Nicholson, and the defendant is Mr. Nicholson's daughter by his first wife. During the lifetime of the first wife Mr. Nicholson was engaged as a colliery accountant, and he was minded to look out for a place to which he could retire when old age overtook him. He said in the course of his evidence: "We
D had no idea of coming down here till the defendant thought of getting married; then she told me this house was for sale and she wanted me to buy it for her to live in. I talked it over with my wife, and she thought it would be a nice place for us to retire to eventually, and for the defendant to occupy in the meantime. Accordingly, I paid £675 for the house. On April 24, 1909, the defendant was married to Mr. England." The arrangement, as he says and as was accepted by the judge, was that the defendant should pay £17 per annum, but was not to be pressed for the rent. The sum of £17 is arrived at as follows. The interest
E on the sum of £675 was £34, and of that amount the daughter agreed to pay one-half while looking after the house during her occupation, to use a neutral word. That state of affairs continued till October, 1921, when the defendant's mother died, and in February, 1923, Mr. Nicholson married his second wife, the plaintiff. In 1924 he assigned to her the house and the rent that was due to him. Mrs. Nicholson
F then, apparently, asked her stepdaughter for some money and disputes arose between them, which resulted in this action, brought by the plaintiff for possession of the house and alleged arrears of rent. It was said by the defendant that the plaintiff's right to possession was barred by the Real Property Limitation Acts, and that, therefore, she was not entitled to succeed. To that the plaintiff relied that it should be observed that the tenancy, of whatever kind it was, began in April, 1909, and by the operation of the Real Property Limitation Acts, if there was no
G rent paid, or acknowledgment made that rent was due, for a period of thirteen years, then the plaintiff's title would be barred. In this case the period of thirteen years would have expired on April 24, 1922. The defendant contended that she never did pay any rent, and that, therefore, the plaintiff's title ceased as from that date. The plaintiff, however, contended that on two separate occasions—namely, in
H August, 1911, and on March 27, 1913, the defendant paid two sums of £8 10s. each on account of rent. It is to be observed that the first of these two payments could not be of any value, but it is contended on behalf of the plaintiff that the second payment saves the statute from running. The plaintiff further alleges that on May 31, 1922, the defendant paid her father £100 on account of rent. There was a dispute on that point, but the judge found, as a fact, that the last-mentioned
I payment was paid as rent. With reference to these payments, the defendant contends that there is no proper evidence that the earlier one was paid as an acknowledgment of rent, and that the later payment of £100 came too late because, by that time, the title to the premises was extinguished. In this unfortunate family dispute the father and daughter both gave evidence, and the judge found that the daughter was not telling the truth and that the father was to be believed.

These are the facts, and before I discuss the law I will state what appear to me to be the issues. The first question seems to me to be, what was the nature of the tenancy? Was it a tenancy at will, or a tenancy from year to year? It

is necessary to deal with this question because counsel for the plaintiff invites the court to say that the law is a little different according to whether we find the tenancy to be a tenancy at will or one from year to year, with regard to the effect of the acknowledgment or the revival of the tenancy by it. I dismiss the contention that there was no tenancy at all, as I do not think that point can be argued again here. I propose, therefore, to state what, in my opinion, the nature of the tenancy was, and then to give an alternative judgment. [His Lordship then reviewed the evidence, and continued:] In my view, having regard to the evidence, the tenancy was a tenancy at will. If that be right, *Sanders v. Sanders* (1) appears to me to be conclusive on this matter. It is not necessary to enter into all the facts of the case, which was tried to a great extent on certain admissions, which are set out (19 Ch.D. at p. 375). It is sufficient to say that, in that case, in the judgment of JESSEL, M.R., there is at the commencement the following passage:

"This case is singularly circumstanced. It is an appeal from a decision of MALINS, V.-C., who appears to have decided that where a tenant in common has gained an adverse title to another share of the property under the statute of limitations, a complete title which extinguishes any other, he can by payment of rent or by subsequent acknowledgment restore the title which has been extinguished. There appears to have been some authority in support of that conclusion and some against it, but I must express my dissent from so much of his judgment as affirms that proposition. As I said in *Re Alison* (6), when a title has been extinguished by the statute no mere acknowledgment by the person who has acquired under the statute as good a title as if a conveyance had been made to him can restore the old title."

It is thus clear that the payment of the £100 could not revive a tenancy that was already extinct. Counsel for the plaintiff endeavoured to say that there is another part of the judgment in *Sanders v. Sanders* (1), in which the decision of MALINS, V.-C., was affirmed, that an admission showing that rent was regularly paid subsequent to the expiry of the title was evidence on which it could be found that a tenancy did in fact exist. That point, however, cannot arise here. The facts in *Sanders v. Sanders* (1) were very different, and I do not think that here the county court judge can have held that because a sum of £100 was paid subsequently to the expiry of the tenancy, and, as he found as a fact, was paid on account of rent, that, therefore, it should be inferred that the rent was regularly paid before. The mere fact that a sum of £100 was subsequently paid shows that it was not. For these reasons it is sufficient to say that the plaintiff was not entitled to succeed, assuming the tenancy to have been a tenancy at will.

I desire, however, to express my view in regard to the other part of the argument. Suppose that the tenancy was one from year to year, then, says counsel for the plaintiff, a different section of the Real Property Limitation Act, 1833, must be considered, for while the section applying to tenancies at will is s. 7, the section applying to tenancies from year to year is s. 8. He goes on to say that, although it may have been right to decide, as was decided in *Sanders v. Sanders* (1), that in the case of a tenancy at will the subsequent payment will not revive the tenancy, yet, when one passes to the construction of s. 8 there is a case in favour of the plaintiff's contention that such a payment will revive the tenancy, namely, *Bunting v. Sargent* (2). Counsel for the defendant says that *Bunting v. Sargent* (2) has not been followed or acted upon in any of the subsequent authorities, and is in effect wrong. The decision was one of JESSEL, M.R., sitting alone. The ratio decidendi is set out in his judgment, which was not a considered one. In it he discusses the law, and apparently he does say that, in the case of a tenancy from year to year, there can be revival by such a payment as has occurred in the present case, for he says:

"The construction contended for would lead to this absurd result; a tenant might pay no rent for twenty years, and then in the twenty-first year he might

A pay it, and then turn round and say that he was the owner in fee simple of the land."

The question of this court is whether we ought to follow that case, and with great respect to one of the greatest judges of his time I am of opinion that we cannot follow it. I hesitate, especially as a common lawyer, to express any disagreement, but I think the decision is not to be followed for these reasons. First, I think that the most important section in the Real Property Limitation Act, 1833, to be considered is s. 34, which reads :

B "At the determination of the period limited by this Act to any person for making an entry or distress, or bringing any . . . action or suit, the right and title of such person to the land [or] rent . . . for the recovery whereof such entry, C distress, action, or suit respectively might have been made or brought within such period, shall be extinguished."

D The words "shall be extinguished" seem to me to put an end to the tenancy. The statute does not say, "shall be extinguished in the case of a tenancy at will." The words are perfectly general. The statute says that when the period has expired the obligation is extinguished, and I do not think that it can be revived by a subsequent payment of rent. JESSEL, M.R., in his judgment, relied on the words at the end of s. 8, which reads :

E "When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or to bring an action to recover such land or rent shall be deemed to have first accrued at the determination of the first of such years or other period, or at the last time when any rent payable in respect of such tenancy shall have been received . . ."

F It is contended that, although the time has expired, when rent payable in respect of the tenancy has been received, an action can be brought. I think that construction of s. 8 is wrong, and that when the section says "rent payable in respect of such tenancy," it must refer to an existing and not to an extinguished tenancy, and that "received" means "properly and legally received." Here it is clear that no such tenancy was existing at the time of payment.

G For these reasons I am of the opinion that the decision in *Bunting v. Sargent* (2) should not be followed. I desire to say also that the case never appears to have been followed or relied upon in any of the subsequent decisions. If we are to accept the observations of LUSH, L.J., in *Sanders v. Sanders* (1) it shows that at any rate he was not following the earlier decision, for he says :

H "If it had been proved that for twenty years before 1864 no payment or acknowledgment had been made by Thomas Sanders the son to John Sanders or persons claiming under him, then I think that no acknowledgment after 1864 would give them a title, and that no payment of rent after that year would give them a title unless it was continued for such a period as to give a new statutory title."

I That statement appears to be against the decision in *Bunting v. Sargent* (2). I cannot help thinking that JESSEL, M.R., himself had in his mind a feeling that his decision in *Bunting v. Sargent* (2) might not have been right, because he says, in reference to the proposition that payment of rent or subsequent acknowledgment can restore a title which has been extinguished: "There appears to have been some authority in support of that conclusion and some against it." I need not refer in this judgment to writers of text-books who have disagreed with the decision in *Bunting v. Sargent* (2); the subject is discussed in DARBY AND BOSANQUET'S STATUTES OF LIMITATION (2nd Edn.), from p. 362 onwards. I am of opinion that this appeal should be dismissed.

MACKINNON, J.—I agree, and it is not necessary for me to add anything except that, in my opinion, the decision in *Bunting v. Sargent* (2) cannot be reconciled with the reasoning in *Sanders v. Sanders* (1) or with the language of s. 34 of the Act itself.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, for *Bramley & Coombe*, Sheffield; *Field, Roscoe & Co.*, for *Whitehorns*, Sheffield.

[Reported by T. R. FITZWALTER BUTLER, ESQ.; Barrister-at-Law.]

Re TURTON. WHITTINGTON v. TURTON

[CHANCERY DIVISION (Astbury, J.) November 19, 1925]

[Reported [1926] Ch. 96; 95 L.J.Ch. 136; 134 L.T. 439]

Will—Condition—Condition precedent—Performance rendered impossible by testator—Devise of real estate subject to condition—Validity.

A testator, who carried on the business of a coal merchant on a freehold wharf, by his will devised the freehold wharf and the business assets and goodwill to his trustees upon trust to carry on the business until the younger of his two named nephews should attain twenty-five, and then to hand over to the two nephews the business and the assets thereof, which business he desired his nephews to carry on as partners, and, if they should carry on the business for five years to the satisfaction of his trustees, he directed his trustees to convey to them the freehold wharf in equal shares as tenants in common, and devised the same to them absolutely. In the event of the business not being so carried on, he directed his trustees to hold the wharf as part of his residuary estate, and to deal with it accordingly. In 1912 the testator discontinued his business and disposed of the business assets, retaining the wharf which he let for other purposes. Both the nephews had attained twenty-five before the discontinuance of the business, but neither had taken any part in it. The testator died in January, 1925. The question arose whether, as the performance of the condition precedent to the devise of the wharf to the nephews has been rendered impossible by the testator's own act, the wharf belonged to the nephews or formed part of the residuary estate.

Held: although it had been decided in the case of personalty that where the performance of a condition precedent had been rendered impossible by the testator the condition was discharged and the bequest was good, in the case of realty the old rule was that, in the event of the non-performance of a condition precedent, the devise failed; in the present case the will must be construed as devising the wharf to the nephews only if they should carry on the business on the lines laid down by the testator, and if that condition precedent could not be complied with, whether through the testator's own act or otherwise, there was a devise of the wharf to form part of the residuary estate.

Notes. Referred to: *Re Elliott, Lloyds Bank Ltd. v. Burton-on-Trent Hospital Management Committee*, [1952] 1 All E.R. 145.

As to the discharge of conditions in a will see 34 HALSBURY'S LAWS (2nd Edn.) 116 et seq., and for cases see 44 DIGEST 478 et seq.

A Cases referred to :

- (1) *Darley v. Langworthy* (1774), 3 Bro. Parl. Cas. 359; 1 E.R. 1369, H.L.; 44 Digest 478, 2962.
- (2) *Gath v. Burton* (1839), 1 Beav. 478; 3 Jur. 817; 48 E.R. 1025; 44 Digest 479, 2966.
- (3) *Walker v. Walker* (1860), 2 De G.F. & J. 255; 29 L.J.Ch. 856; 45 E.R. 619, L.C.; 44 Digest 479, 2968.

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Adjourned Summons to determine whether a condition in the will of the testator was still effective.

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By his will, dated July 23, 1906, the testator, Robert Turton, who was then carrying on the business of a coal merchant on a freehold wharf at Crown Point in the city of Leeds, appointed his brother, George William Turton, his nephew, Alan Fillingham, and George Whittington, trustees and executors thereof, and after giving certain specific and pecuniary bequests, devised his freehold wharf, and also all the machinery, plant, fixtures, boats, horses, wagons, carts implements, utensils, stock in trade, effects, goodwill, book and other debts, and the capital money used or employed in his said business, unto his trustees upon trust to carry on his business until the younger of his nephews, John Turton, and the said Alan Fillingham, should attain the age of twenty-five years, or the survivor of them should attain that age, or die under that age. The testator gave his trustees power to employ a competent manager, and such other persons, including his said two nephews, as they should think necessary, and directed them to invest the net annual profits and the accrued income from such investments until the younger of his said nephews, or the survivor of them, should attain twenty-five years, or the survivor of them should die under that age, and on the younger of his said nephews attaining twenty-five years—they being both then living—he directed his trustees to hand over to them his said business and all the effects before mentioned, and the capital money used or employed in his said business, which he desired his said nephews to carry on in copartnership, and if they should so carry on the said business for a period of five years to the satisfaction of his trustees—other than the said Alan Fillingham—he directed his trustees to convey the freehold wharf to them in equal shares as tenants in common, and devised the same to them absolutely. He also directed his trustees to transfer, assign and hand over to his nephews the investments of profits, and gave the same to them in equal shares. In the event of either of his nephews dying before the younger of them should have attained the age of twenty-five years, the testator gave, devised, and bequeathed the wharf, the business, and everything connected therewith, and all such investments as aforesaid, to the survivor of his nephews absolutely, conditionally on his carrying on the business for a period of five years as aforesaid, but in the event of the business not being carried on by his nephews, or nephew, as the case might be, for a period of five years to the satisfaction of his trustees—other than the said Alan Fillingham—he directed his trustees to hold the wharf as part of his residuary estate, and to deal with it accordingly. The testator gave and devised all the residue of his real and personal estate to his trustees upon trust for sale and conversion, and after paying thereout his debts, funeral and testamentary expenses, and the legacies and duties payable under his will, to divide the same into four equal parts, and to hold the same upon the trusts therein declared for a brother and sister who predeceased the testator, and for all his nephews and nieces, including John Turton and Alan Fillingham. In 1912 Robert Turton discontinued his business of a coal merchant and sold the boats, horses, wagons, carts, implements, stock in trade and other effects used in the business, but he retained the freehold wharf which he let to tenants who used it for a different kind of business. Both the nephews mentioned in the will, John Turton and Alan Fillingham, attained the age of twenty-five years before Robert Turton discontinued his business, and neither of them was at any time employed in the business, or had any connection with it.

Robert Turton died on Jan. 22, 1925, without having revoked or altered his will, and the will was proved in the Wakefield district probate registry on March 31, 1925, by Alan Fillingham and George Whittington, George William Turton having predeceased Robert Turton. The freehold wharf was valued for probate at £2,540. A

The question arose whether, in the circumstances, the devise in the will of the freehold wharf to John Turton and Alan Fillingham, subject to the condition precedent that they should carry on the business for five years to the satisfaction of the trustees, took effect, as the testator had by his own act in discontinuing the business and selling the business effects rendered the performance of the condition by his nephews impossible. George Whittington issued this summons, to which John Turton and Alan Fillingham and the other nephews and nieces who constituted all the next-of-kin of Robert Turton were defendants, asking whether, upon the true construction of the will and in the events which had happened, John Turton and Alan Fillingham were absolutely entitled to the freehold wharf, or whether the wharf formed part of the residuary estate of Robert Turton. B

Attwater for the plaintiff trustee. C

G. R. B. Whitehead, for John Turton and Alan Fillingham, referred to *Darley v. Langworthy* (1), *Gath v. Burton* (2), *Walker v. Walker* (3), *THEOBALD ON WILLS* (7th Edn.), p. 569. D

Robert Peel, for the next-of-kin other than the two nephews, referred to *JARMAN ON WILLS* (6th Edn.), vol. 2, pp. 1469, 1489, *SHEPPARD'S TOUCHSTONE* (7th Edn.), p. 133, *COKE UPON LITTLETON*, vol. 2, s. 206 (b). E

ASTBURY, J.—The question raised by the summons is one of difficulty. What is the effect of a condition precedent the fulfilment of which is rendered impossible by the testator's own act? What construction is to be placed upon the devise of the wharf in the will? The old rule unquestionably was that, where land was devised upon an impossible condition precedent, the devise was void. In *COKE UPON LITTLETON*, vol. 2, s. 206 (a), *LORD COKE* says: F

"And so it is in case of a feoffment in fee with a condition subsequent that is impossible, the state of the feoffee is absolute: but if the condition precedent be impossible no state or interest shall grow thereupon." G

In *SHEPPARD'S TOUCHSTONE* (7th Edn.), p. 133, referring to impossible conditions, it is said: H

"If the condition be subsequent, the condition is void only, and the estate is absolute; and if the condition be precedent, the condition and the estate both are void, for an estate can neither commence nor increase upon an impossible condition." I

In *THEOBALD ON WILLS* (7th Edn.), p. 569, it is, however, stated:

"As regards personalty, a condition precedent which becomes impossible, by the act of the testator, is discharged: . . . *Darley v. Langworthy* (1), *Gath v. Burton* (2) *Walker v. Walker* (3)." J

The real question here is whether the ratio decidendi of these cases ought to be applied to real estate, notwithstanding the earlier rule.

In each case, of course, the will itself must be construed. This testator gives his business and business assets to his nephews on attaining twenty-five, and desires them to carry on the business. Then, "if they shall so carry on the said business for a period of five years to the satisfaction of my trustees," he directs his trustees to convey the freehold wharf to them in equal shares as tenants in common, and devises the same to them absolutely. After making provision for the case of one nephew dying under the age of twenty-five, the will proceeds:

"But in the event of the business not being carried on by my said nephews or nephew as the case may be for a period of five years to the satisfaction of my trustees I direct my trustees to hold the said wharf as part of my residuary estate and deal with it accordingly."

A This will was made in 1906. In 1912 the testator discontinued his coal business, and sold the plant employed in it, and although he retained the wharf, he let it for the purposes of a different kind of business. He died in January, 1925.

The question is whether the two nephews are entitled to the wharf, or whether it goes to residue. On the whole, I think that I ought to construe the will as only devising the wharf to the two nephews if they carry on the testator's business in the manner therein laid down. Otherwise the testator desires it to go to residue. By his own act the testator has made it impossible for the two nephews to carry on his business. He has devised the freehold wharf to them, subject to a condition precedent, which by his own act he has made impossible of performance. On the construction of the will as a whole, I think that the testator meant that if, for any reason whatever, including his own act, the condition was not complied with, the wharf should go to residue. There is therefore an absolute gift to residue in the events which have happened, the conditional specific gift having failed by the condition becoming impossible, and on the language of the will and the general intention of the testator I am of opinion that the wharf forms part of the residuary estate.

D Solicitors: *Smiles & Co.*, for *Whittington & Talbot*, Leeds.

[Reported by E. K. CORRIE, Esq., Barrister-at-Law.]

E

Re KUYPERS. KUYPERS v. KUYPERS

[CHANCERY DIVISION (Tomlin, J.), January 23, 1925]

F

[Reported [1925] Ch. 244; 94 L.J.Ch. 253; 133 L.T. 468; 69 Sol. Jo. 366]

Will—Ademption—Change in nature of property given—Shares converted into other shares with reduced rights—Additional shares allotted to testatrix.

G

By her will the testatrix bequeathed 600 15 per cent. cumulative preferred ordinary £1 shares in a company to her trustees to pay the income arising therefrom to a life tenant. On the re-organisation during the lifetime of the testatrix of the capital of the company the 15 per cent. shares were converted into 8 per cent. cumulative preference shares, each shareholder receiving an additional 8 per cent. share.

H

Held: the 8 per cent. shares into which the 15 per cent. shares had been converted were substantially the same as the 15 per cent. shares, which had been changed in name and form only, although these shares had lost the right to the larger dividend, and, therefore, to the extent of these shares the gift was effective, but the additional shares, although allotted to the testatrix as part of the re-organisation, were in the nature of compensation for lost rights and not part of the official holding, and therefore, they did not pass under the gift.

I

Notes. Considered: *Re O'Brien, Little v. O'Brien* (1946), 175 L.T. 406.

As to failure of a testamentary gift see 34 HALSBURY'S LAWS (2nd Edn.) 126 et seq., and for cases see 44 DIGEST 403 et seq.

Cases referred to:

- (1) *Re Leeming, Turner v. Leeming*, [1912] 1 Ch. 828; 81 L.J.Ch. 453; 106 L.T. 793; 44 Digest 411, 2426.
- (2) *Re Clifford, Mallam v. McFie*, [1912] 1 Ch. 29; 81 L.J.Ch. 220; 106 L.T. 14; 28 T.L.R. 57; 56 Sol. Jo. 91; 44 Digest 411, 2425.

- (3) *Re Gray, Dresser v. Gray* (1887), 36 Ch.D. 205; 56 L.J.Ch. 975; 57 L.T. 132; 35 W.R. 795; 44 Digest 411, 2421.
- (4) *Oakes v. Oakes* (1852), 9 Hare, 666; 68 E.R. 680; 44 Digest 413, 2438.
- (5) *Re Lane, Luard v. Lane* (1880), 14 Ch.D 856; 49 L.J.Ch. 768; 43 L.T. 87; 28 W.R. 764; 44 Digest 411, 2417.
- (6) *Re Slater, Slater v. Slater*, [1907] 1 Ch. 665; 76 L.J.Ch. 472; 97 L.T. 74; 51 Sol. Jo. 426, C.A.; 44 Digest 405, 2378.

Adjourned Summons asking whether the defendant was entitled during his life to the dividends and income of 1,200 8 per cent. cumulative A preference shares in Lever Bros., Ltd., received in respect of an original holding of 600 15 per cent. cumulative preferred £1 ordinary shares in the company, or to any other and what dividends or income.

The testatrix, by her will, bequeathed 600 15 per cent. cumulative preferred shares of £1 each in Lever Bros., Ltd., to her trustees upon trust to pay the income arising from the shares or any investment representing the same to the Rev. F. Thornton during his life. She directed that, at his death, the shares or the investments representing the same should fall into her residuary estate. At the date of her will the testatrix was the registered holder of 1,500 15 per cent. cumulative preferred ordinary shares of £1 each in Lever Bros., Ltd. These shares had a preferential right to a dividend of 10 per cent., and in a winding-up to payment of the capital and arrears of dividend. They conferred no further right to participate in the profits or assets. In 1920 Lever Bros., Ltd., re-organised the capital of the company by issuing 20,000,000 8 per cent. cumulative A preference shares, and by converting (inter alia) the 15 per cent. cumulative preferred ordinary shares into shares of this class. It was a part of the arrangement that the holders of the 15 per cent. cumulative preferred ordinary shares should receive, in respect of each share held by them, fully paid 8 per cent. cumulative A preference shares. These shares were subscribed and paid for out of the company's reserve funds.

K. G. Metcalfe, for the summons.

W. E. Vernon, for the Rev. F. Thornton, referred to *Re Leeming, Turner v. Leeming* (1), *Re Clifford, Mallam v. McFie* (2).

J. V. Nesbitt, for persons interested in residue, referred to *Re Gray, Dresser v. Gray* (3), *Oakes v. Oakes* (4), JARMAN ON WILLS (6th Edn.), p. 1080, *Re Lane, Luard v. Lane* (5).

Vernon, in reply, cited *Re Slater, Slater v. Slater* (6).

TOMLIN, J.—The question which I have to determine is the effect in the events which have happened of a gift by the testatrix to her trustees of 600 15 per cent. preferred ordinary shares of £1 each in Lever Bros., Ltd., on trusts under which the income of the shares is given to a tenant for life with a direction that after his death the shares should fall into residue.

The shares in question were in effect preference shares entitled to a fixed cumulative dividend of 15 per cent., and nothing more in the way of a dividend, and, in a winding-up, to preferential payment of the capital and arrears of dividends, but to no further interest in the assets. The testatrix had, at the date of the will, a substantially larger number of these shares than was mentioned in this bequest. At a later date there took place a re-organisation of the capital of Lever Bros., Ltd., under which the capital of the company was raised by the creation of 20,000,000 new shares of £1 each, to be called 8 per cent. A preference shares. These shares were paid up by means of the appropriation for the purpose of sums standing to the credit of reserve, and at the same time the existing 15 per cent. preferred ordinary shares had their rights modified to the extent that their dividend was cut down from 15 per cent. to 8 per cent. per annum and their name was changed to 8 per cent. A preference shares. They were made to form one class with the new 20,000,000 shares. As a result of the re-organisation each holder of a 15 per cent. preferred ordinary share retained his share altered in name and with its rights curtailed in the

A manner I have indicated, and at the same time he had allotted to him another share of the same class which had been fully paid by the application of part of the reserve fund for the purpose. No alteration was made by the testatrix in her will as the result of this alteration in her holding of shares, and the question now arises what effect is to be given to the bequest in the will.

B The principle to be applied is stated by LORD COZENS-HARDY, M.R., in *Re Slater* (6), when he says:

“Where is the thing which is given? If you cannot find it at the testator’s death, it is no use trying to trace it unless you can trace it in this sense, that you find something which has been changed in name and form only, but which is substantially the same thing.”

C On that principle cases such as *Re Clifford* (2) have been decided. There was in that case a gift of twenty-three shares that were originally shares of £80 each. They were afterwards sub-divided into a larger number of shares of £20 each, so that the testator had at his death four times the number of shares of this reduced nominal value. It was held that the twenty-three shares bequeathed by the will were still substantially in existence in their subdivided form and passed under the gift. *Re Leeming* (1) was an even stronger case and the facts there were very different as they marked the function of a new company. Except as an example of the application of the same principle this case does not appear to have any precise value in connection with the present case.

E It seems to me that I must come to the conclusion in this case that the gift takes effect, but as to the original shares only. I can find here the actual shares that were referred to in the will. It is true that their name has been changed and that they have lost some of their attractiveness; but they remain the same shares with a continuous history since before the will was made. The other shares were wholly new shares subscribed and paid for out of the reserve fund; and although those allotted to the testatrix were allotted as part of the arrangement and in view of the alteration in the rights of the original shares, that circumstance does not, to my mind, justify me in coming to the conclusion that they are part of the original holding of shares. They seem to me to be in the nature of a form of compensation for loss of rights, but a form of compensation which cannot be treated as the thing itself. If I took any other view, that which passed would be something greater than that which was given. It would not only be a gift of shares of double the nominal value, but it would be a gift of shares having a somewhat greater return by way of dividend than the shares in the original gift. I am not in a position to apportion, and the result of the arrangement made by the company was not a mere substitution of one thing for another of equal value, but a substitute of something different and greater in value. I do not think, therefore, that the tenant for life can substantiate a claim to the income of, not merely 600, but of 1,200 of the 8 per cent. A preference shares. I will, therefore, declare that the gift takes effect as to H the 600 original shares and no more.

Solicitors: *Gasquet, Metcalfe & Walton.*

[Reported by L. MORGAN MAY, Esq., Barrister-at-Law.]

ATKINSON v. LONDON AND NORTH-EASTERN RAIL. CO.

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Sankey, JJ.), November 18, 1925]

[Reported [1926] 1 K.B. 313; 95 L.J.K.B. 266; 134 L.T. 217; 90 J.P. 17; 42 T.L.R. 79; 23 L.G.R. 702; 28 Cox, C.C. 112]

Factory—Dangerous machinery—Duty to fence—“Equally safe as it would be if it were securely fenced”—Shaft and pulley thirteen feet above ground—Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 10 (1) (c).

The respondents were the occupiers of a factory where there was a tube-cutting machine driven by a belt on a pulley fixed on a horizontal shaft. The shaft and pulley were about 13 ft. above the floor and were unfenced. The belt came off the pulley, and while the shaft was running an employee of the respondents went up a ladder and was injured in attempting to move the belt from the shaft back to the pulley.

An information was preferred against the respondents for a contravention of s. 10 (1) of the Factory and Workshop Act, 1901, which provides: “With respect to the fencing of machinery in a factory, the following provisions shall have effect: . . . (c) All dangerous parts of the machinery and every part of the mill gearing must either be securely fenced or be in such position or of such construction as to be equally safe to every person employed or working in the factory as it would be if it were securely fenced. . . .” The justices, being of opinion that any fence would have been useless owing to the shaft being 13 ft. above the ground, decided to dismiss the case.

Held: as the fact of the shaft and pulley being 13 ft. from the ground did not necessarily show that they were in such a position as to be equally safe to every person employed or working in the factory as if they had been securely fenced, and as there was no evidence on which the justices could have so found, the case must be remitted to them with a direction to convict.

Notes. The Factory and Workshop Act, 1901, was repealed by the Factories Act, 1937, of which now see s. 13 and s. 14.

Considered: *Sowter v. Steel Barrel Co.* (1935), 154 L.T. 85; *Wing v. Soar*, [1938] 1 K.B. 379, n. Referred to: *Findlay v. Newman, Hender & Co.*, [1937] 4 All E.R. 58; *Fowler v. Yorkshire Electric Power Co.*, [1939] 1 All E.R. 407; *Carroll v. Andrew Barclay & Sons, Ltd.*, [1948] 2 All E.R. 386.

As to safeguarding factory machinery see 17 HALSBURY'S LAWS (3rd Edn.) 70 et seq., and for cases see 24 DIGEST (Repl.) 1048 et seq. For Factories Act, 1937, see 9 HALSBURY'S STATUTES (2nd Edn.) 996.

Cases referred to:

- (1) *Davies v. Thomas Owen & Co.*, [1919] 2 K.B. 39; 88 L.J.K.B. 887; 121 L.T. 156; 83 J.P. 193; 17 L.G.R. 407; 24 Digest (Repl.) 1049, 183.
- (2) *Blenkinsop v. Ogden*, [1898] 1 Q.B. 783; 67 L.J.Q.B. 537; 78 L.T. 554; 46 W.R. 542; 14 T.L.R. 360; 42 Sol. Jo. 450; 24 Digest (Repl.) 1045, 170.
- (3) *Shaxby v. Excel Co., Ltd.* (1924), Oct. 31, unreported.
- (4) *Hindle v. Birtwistle*, [1897] 1 Q.B. 192; 76 L.T. 159; 61 J.P. 70; 45 W.R. 207; 13 T.L.R. 129; 41 Sol. Jo. 171; 18 Cox, C.C. 508; sub nom. *Birtwistle v. Hindle*, 66 L.J.Q.B. 173, D.C.; 24 Digest (Repl.) 1053, 207.
- (5) *Butler v. Glacier Metal Co., Ltd.* (1924), Oct. 23, unreported.
- (6) *Scott v. Brookfield Linen Co.*, [1910] 2 I.R. 509; 24 Digest (Repl.) 1060, *106.

Case Stated by justices for the Isle of Ely.

An information was preferred by the appellant, Harold Watts Atkinson, against the respondents, the London and North-Eastern Rail. Co., for that on April 23, 1925, they were the occupiers of a certain factory within the meaning of the Factory and Workshop Acts, 1901 to 1911, at Whitemoor Sidings, in the parish of March,

A Cambridgeshire, and that on the said date that factory was not kept in conformity with the Acts, that was to say, a part of the mill gearings, to wit, a part of the main shafting with the pulley on it used for driving a tube-cutting machine in the engineers' shop, was not securely fenced nor in such position nor of such construction as to be equally safe to every person employed or working in the factory as it would have been if it had been securely fenced, contrary to s. 10 (1) (c) of the Factory and Workshop Act, 1901, and that in consequence of such neglect one Frederick George Stanley Cresswell suffered bodily injury.

Upon the hearing of the information the following facts were proved or admitted :

C (a) On April 23, 1925, the respondents were the occupiers of a factory within the meaning of the Factory and Workshop Acts, 1901 to 1911, situate at Whitemoor Sidings, and in that part of the factory described as the engineers' shop there was a tube-cutting machine driven by a pulley fixed on a horizontal shaft. (b) On the said date at about 7.30 a.m. the belt used for driving the tube-cutting machine was off the pulley, and Frederick George Stanley Cresswell, a person employed by the respondents, was requested by Edward Smith, another of their employees, to move the belt from the shaft to the pulley while the shaft was running, and in attempting to do this Cresswell was injured. (c) The shaft and pulley were elevated about 13 ft. from the floor of the shop, and when attempting to put on the belt Cresswell went up a ladder and stood on a beam about 7 ft. from the floor. (d) The shaft and pulley were not in any way fenced or guarded. On the part of the appellant it was contended that the shaft should have been fenced, as it was not in such a position as to be equally safe to every person employed or working in the shop as it would have been had it been securely fenced. On the part of the respondents it was contended that the shafting was safe by reason of its position, that Cresswell was acting contrary to regulations in attempting to move the belt from the shaft to the pulley while the engine was running, and that any guard which could have been used for fencing the shaft and pulley must have been removed before the belt could have been put on the pulley. The attention of the justices was directed to the following decisions: *Davies v. Thomas Owen & Co.* (1), *Blenkinsop v. Ogden* (2), and *Sharby v. Excel Co., Ltd.* (3). The justices, being of opinion that any fence would have been useless owing to the shaft being 13 ft. above the ground, decided to dismiss the case. The appellant appealed.

By the Factory and Workshop Act, 1901, s. 10 (1) :

G "(c) All dangerous parts of the machinery and every part of the mill gearing must either be securely fenced, or be in such position or of such construction as to be equally safe to every person employed or working in the factory as it would be if it were securely fenced ; and (d) All fencing must be constantly maintained in an efficient state while the parts required to be fenced are in motion or use, except where they are under repair or under examination in connection with repair, or are necessarily exposed for the purpose of cleaning or lubrication or for altering the gearing or arrangements of the parts of the machine."

H *H. M. Giveen* for the appellant.

W. Eric Bousfield for the respondents.

I **LORD HEWART, C.J.**—The justices have arrived at a conclusion expressed in these words: "The justices, being of opinion that any fence would have been useless owing to the shaft being thirteen feet above the ground, decided to dismiss the case." The relevant part of s. 10 (1) of the Factory and Workshop Act, 1901, is para. (c). It is common ground that what is referred to here is a part of the mill gearing, and that it was not fenced or guarded. Therefore, an offence has been committed unless it was

"in such position or of such construction as to be equally safe to every person employed or working in the factory as it would be if it were securely fenced"

or quite shortly, in the paraphrase which one finds in REDGRAVE'S FACTORY ACTS (13th Edn.), p. 26, the machinery "need not be fenced if it is as safe as it would be if fenced."

The justices have not found in the terms of that section, and, though invited to do so, have refrained from finding, that the machinery was

"in such position or of such construction as to be equally safe to every person employed or working in the factory as it would be if it were securely fenced."

They do not say that. What they mean is no doubt a question of some difficulty, but one of the contentions before them was that the man who was injured was acting contrary to regulations. What they may have had in mind was that for the great majority this gearing was safe. But that is not enough. It has to be "equally safe to every person employed or working in the factory as it would be if it were securely fenced." The law is clearly stated in three cases: *Hindle v. Birtwistle* (4), *Blenkinsop v. Ogden* (2), and *Davies v. Thomas Owen & Co.* (1). The facts in *Butler v. Glacier Metal Co., Ltd.* (5) were curiously like the present case. In my judgment in that case I said:

"The unfortunate man who suffered injury on the occasion here referred to was not a person employed in the factory, but he was a person working in the factory. He was a person employed by the North Metropolitan Electric Supply Co., Ltd., who at that time were renewing the whole of the electric light installation in the factory, and the case finds that upon Nov. 14 last two persons employed by that company were engaged on certain work in connection with the renewal of the electric light wiring on the inside of the roof of a bay at the end of the machine shop of the said factory. The main driving shaft, which was part of the mill gearing as defined by s. 156 of the Factory and Workshop Act, 1901, extended from the machine shop into the said bay at a height of 10 ft. above the floor level. On Nov. 14, 1923, this shaft was revolving at a speed of about 180 revolutions per minute. Part of the wiring which was being renewed was attached to the inside of the ridge of the roof almost directly above the said shaft, but about 9 ft. from it. On Nov. 14, 1923, for the purpose of gaining access to a point in the roof of the said bay above, and to one side of, the said driving shaft, the two said persons in the employ of the North Metropolitan Electric Supply Co., Ltd., placed a pair of steps underneath the shaft, and erected a ladder on the third tread thereof, the top of the ladder resting against the roof, and one of the persons ascended the ladder in connection with his work. In descending he stepped from the ladder on to the steps, and the result was that his coat was caught by the revolving shaft, and he sustained serious injuries. The question which these justices had to determine was whether it was proved that, in fact, this part of the mill gearing was in such position, or of such construction, as to be equally safe to every person employed or working in the factory as it would be if it were securely fenced. But it does not appear from the Case that the justices really directed their minds to that question. On the contrary, it does appear from the Case that, no matter what warnings may have been addressed to them by the learned counsel, they directed their minds to other questions, and answered those other questions in a way that was erroneous. . . . Counsel, who urged everything that could possibly be urged on behalf of these respondents, has painted, or at any rate has outlined, a dismal picture of certain commercial consequences which he fears might follow if upon a large scale it became necessary to fence mill gearing. Speaking for myself, I regard these consequences with marked composure. I think this case must go back."

Here counsel for the respondents invites the court, on no material, to assume two findings of fact which do not occur in the case: (i) That this shaft is never approached by anyone except for such a temporary purpose as this; (ii) that if there had been fencing no human ingenuity could have devised fencing which in

A such an emergency as this would not have had to be removed. There is no such finding of fact. The justices have stated their conclusion in quite simple and intelligible terms. But there is in this section nothing which grants a dispensation merely because the mill gearing is 13 ft. above the ground. The justices have come to an erroneous decision and the appeal must be allowed.

B **AYORY, J.**—I entirely concur, and I think it sufficient to add that the finding of the justices that the shaft was 13 ft. above the ground is not sufficient to bring it within the words of the statute. In other words, it is not the same thing to say that "the shaft is 13 ft. above the ground" as to say that "it is in such position or of such construction as to be equally safe to every person employed or working in the factory as it would be if it were securely fenced." There was no evidence on which the justices could have found that, and, therefore, the case must go back to the justices with a direction to convict.

C **SANKEY, J.**—I agree. Section 10 (1) contemplates three classes of machinery. One class is mentioned in para. (a), and it must be securely fenced; a second class is mentioned in para. (b) and it must be securely fenced; and para. (c) requires that all dangerous parts and all mill gearing shall either be securely fenced or be as safe as if they were. Paragraph (d) on which counsel for the respondents relied deals with certain exceptions, but I cannot see that para. (d) has anything to do with this case at all. If this had been a case of machinery which had been fenced, but the fencing had been temporarily removed, the remarks of **PALLES, C.B.**, in *Scott v. Brookfield Linen Co.* (6) would have been applicable, but, in my view, that decision does not apply to a case where the machinery is not fenced at all. In my opinion, the justices were wrong, and the appeal must be allowed.

Appeal allowed : Case remitted.

Solicitors : *Solicitor to the Treasury ; Thomas Chew.*

[*Reported by J. F. WALKER, Esq., Barrister-at-Law.*]

F

REID v. REID

G [PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merrivale, P.), October 22, 1925]
[*Reported* [1926] P. 1; 95 L.J.P. 30; 134 L.T. 24; 42 T.L.R. 30]

Divorce—Permanent maintenance—Amount—Consideration of circumstances of each case.

H The practice of the Divorce Court of ordering as the amount of permanent maintenance for a wife a sum equal to one-third of the joint income of the parties did not proceed on a rule, but was merely a rule of practice. All the circumstances of each case must be considered in arriving at the proper sum.

Divorce—Permanent maintenance—Deed of separation still effective—Covenant to pay weekly sum to wife—Wife restrained from proceeding under deed.

I A deed of separation, which provided for the payment of an allowance to the wife, contained no provision terminating it in the event of the marriage being dissolved. The wife, having been granted a divorce, obtained an order for permanent maintenance,

Held: as the deed of separation remained alive and effective and could be sued upon, the wife would be restrained from suing under it for so long as the registrar's order for permanent maintenance should remain effective.

Notes. While the considerations which applied in the ecclesiastical courts to awards of alimony must have due weight in determining the proper amount of permanent maintenance the assumption of the "one-third rule" is erroneous and

disregards the duty imposed on the court by statute of considering the facts: see *Horniman v. Horniman*, [1933] All E.R. Rep. 790. A

Referred to: *May v. May*, [1929] All E.R. Rep. 484; *Hyman v. Hyman*, *Hughes v. Hughes*, [1929] P. 1; *Jeffrey v. Jeffrey*, [1952] 1 All E.R. 790.

As to orders for permanent maintenance see 12 HALSBURY'S LAWS (3rd Edn.) 430 et seq., and for cases see 27 DIGEST (Repl.) 616-621, 683.

Appeal against an order of a registrar made on a petition by a wife for permanent maintenance. B

By a deed of separation dated June 1, 1922, the wife, Beatrice Berkley Reid, and the husband, Barty Floyd Reid, agreed to live separate and apart, and the husband covenanted to pay to the wife 25s. a week. On Sept. 17, 1924, the wife obtained a decree absolute for the dissolution of her marriage with the husband. On Oct. 7, 1924, she filed a petition for permanent maintenance, alleging that the husband's income was £4 a week and upwards, and that he had also a reversionary interest in certain property. The husband, in his reply, said in substance that his average income was only £3 10s. a week and that the reversionary interest was of little value, and he alleged that the wife had separate property consisting of an annuity of £72 a year and that she also earned money. He submitted that the wife was not entitled to an order for permanent maintenance and prayed for the dismissal of the petition, with costs. On July 15, 1925, a registrar made an order, on the wife's petition for permanent maintenance, for payment by the husband of 25s. a week for joint lives. This was an amount similar to that payable under the deed of separation, but the latter amount had not been paid since Dec. 8, 1924. A petition to vary the deed had not been proceeded with. The deed contained no provision to render it void in the events which had happened. The husband appealed to the judge from the registrar's order on the petition for permanent maintenance, and on July 27, 1925, the appeal was adjourned into court and there argued before LORD MERRIVALE, P., on July 31, 1925. C
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E

Acton Pile for the husband.

H. W. Barnard for the wife.

Cur. adv. vult. F

Oct. 22. **LORD MERRIVALE, P.**—This was an appeal arising out of a dispute between the husband who had been divorced by his wife, and the wife, in respect of the maintenance the husband might properly be required, under the statutes and practice of the court, to be directed to provide for the wife. The circumstances were a little out of the ordinary course, and the appeal raised one or two questions of some general consequence. One question which was at issue, the main question, was the amount of the maintenance to be provided. Another question arose upon a separation deed which had been executed by the parties during the marriage and under which they had separated; and there was a good deal of discussion between counsel at the Bar as to the position of the parties with regard to the separation deed and what ought to be done in respect of it. The husband had obtained leave to apply under s. 5 of the Matrimonial Causes Act, 1859, to set aside the deed. The court has power in proceedings for divorce to vary or to annul settlements, and that power was appealed to on the part of the husband. That was a strong measure because he was the guilty party in the transaction, and I think the records of the court will be searched in vain for any instance where the court, at the request of a guilty party, has varied or annulled the settlement in his favour. G
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The question of the amount of the maintenance was the main question raised by the husband's notice of appeal, and he contended that the order of the registrar which was for payment by the husband to the wife of 25s. a week under the Matrimonial Causes Act, 1907, was an order which the registrar could not make having regard to the practice of the court in that it increased the wife's income to an amount which would bring that income to a sum exceeding one-third of the joint income of the parties. The general practice of the court no doubt is that provision for per-

A manent maintenance will not be more than one-third of the joint income of the parties. In the present case there was no dispute that, under a marriage settlement which existed at the time of her marriage, she had secured income of £70 a year. The trustees of that settlement have allowed her to have the use of some furniture and she has a house on a weekly tenancy by letting which at a profit rental she adds to her income something like 12s. or 14s. a week. In addition to that, in 1922 the parties separated upon the terms that the husband during the joint lives of the parties should pay to the wife a weekly sum, which as events have happened—because there were shifting provisions as to the exact amount—would be 25s. a week. That is the separation deed which the husband seeks to have dealt with under the powers of the court. The income of the husband was not much in dispute. He is a paper stenciller, and roughly his income is £200 a year, taking one year with another, so the joint income would be £270 and one-third would be £90. The wife, dealt with upon that footing, would have perhaps 8s. a week added to her secured income. But the 12s. or 14s. a week must be taken into account, and if that is taken as £30 a year, it makes her total income £100. Then the joint income is £300, and one-third would be £100, and if the appeal of the husband is well founded in point of principle—that is, if there is not a substantial amount of elasticity in the powers of the court—there is no ground for a new order.

The appeal, so far as amount goes, has proceeded on the footing that there is a hard and fast rule. If one thing is clearer than another in the decisions upon this frequently contested matter it is that each case is dealt with upon its circumstances and that the practice of providing for a wife the amount of one-third of the joint income does not proceed upon a rule of law. It is found to be a just and convenient practice. The grounds for it will be found explained in three judgments, I think, of SIR JOHN NICHOLL, the eminent authority upon matters of this kind in the days of the ecclesiastical courts, which are reported in volume 2 of PHILLIMORE'S ECCLESIASTICAL REPORTS. But I take that matter to be well settled. I have so often stated it that, for my own part, I do not doubt that it is well settled. This case must, therefore, be dealt with upon its merits. The wife has a secured income of £70. She may add some shillings to that income by receiving the rent of the house. The husband has an income of £200. The husband was the wrongdoer. While the marriage was subsisting he agreed, upon the separation, to provide to the wife, during her life, not less than 25s. a week. She had then the settled moneys she has now, and he believed, and I think she believed, she could contribute a good deal to her own maintenance by appearing as a stage artiste. The learned registrar has had regard to what the husband agreed to three years ago when these parties were separated by agreement, and he has said: "You must pay that 25s. a week." It is quite clear that the order for alimony pendente lite was founded upon that view; that the husband had agreed to pay that amount and that it was proper he should pay it. It seems to me, taking into consideration that the husband was the wrongdoer and that three years ago he agreed, when he himself was in the same position as he is now, and the wife had at any rate as good prospects as she has now, that the amount should be 25s. a week, to be impossible for me to overrule the judgment at which the learned registrar has arrived and the appeal fails.

The separation deed must be dealt with, because it is alive and effective and could be sued upon. It may be that there is some process in equity by which it could be controlled. That has never been decided. But there is power in this court to control it, and I propose to amplify the order made by the registrar by directing that the maintenance to be provided will be the sum assessed by the registrar, 25s. a week, but the wife will be restrained, so long as this order is effective, from taking any proceedings under the separation deed.

Solicitors: *Firth & Co.; George Brown, Son & Ward.*

[Reported by HERBERT ROLFE, Esq., Barrister-at-Law.]

JENKINS & CO. v. SIMON

[KING'S BENCH DIVISION (Salter and Fraser, JJ.), October 16, 1925]

[Reported [1926] 1 K.B. 111; 95 L.J.K.B. 97; 134 L.T. 88; 42 T.L.R. 39; 70 Sol. Jo. 162]

County Court—Costs—Remitted action—Refusal of costs to date of remission on High Court scale—View of judge that action should have been brought in county court—Judge's discretion—Need for judicial exercise—County Courts Act, 1919 (9 & 10 Geo. 5, c. 73), ss. 1, 11 and 12.

Where an action is remitted from the High Court to the county court the whole discretion over all costs in the action is, subject to any order of the transferring court, with the county court judge, but this discretion must be judicially exercised, and it is not such a judicial exercise if a successful plaintiff, in the absence of any misconduct on his part, is deprived of High Court costs, wholly or in part, on that part of the proceedings which has taken place in the High Court, because the county court judge thinks that the proceedings ought to have been commenced in the county court.

Notes. The County Courts Acts, 1888 and 1919, were repealed by the County Courts Act, 1934, which is now replaced by the County Courts Act, 1959, of which see ss. 45, 47 and 76.

Distinguished: *Hardman v. Causton*, [1936] 1 All E.R. 61; *Goadby v. Orridge*, [1937] 4 All E.R. 610. Referred to: *Gallivan v. Warman* (1930), 169 L.T. Jo. 327.

As to costs of remitted or transferred proceedings in the county court see 9 HALSBURY'S LAWS (3rd Edn.) 311–314, and for cases see 13 Digest (Repl.) 412–415. For County Courts Act, 1934, see 5 HALSBURY'S STATUTES (2nd Edn.), 11.

Appeal from Leeds County Court.

The plaintiffs brought an action in the High Court to recover a sum of £23 18s. 11d., the balance of moneys due for work and labour done and materials supplied. A summons was taken out by the plaintiffs under Ord. 14 for leave to sign final judgment. The defendant did not deny that £21 of the amount claimed was due to the plaintiffs, but denied any further liability. On Jan. 7, 1925, the district registrar made an order that, unless the defendant paid to the plaintiffs £21 within seven days, the plaintiffs were to be at liberty to sign judgment for that amount. The defendant was granted leave to defend the action as regards the balance of the claim, and the action was remitted to the Leeds County Court. The defendant paid the £21 within the seven days, and, therefore, no judgment was signed in the High Court. The action for the balance of the plaintiffs' claim, namely, £2 18s. 11d., proceeded in the county court, and the hearing was fixed for Feb. 26, 1925, but three days before that date the defendant paid the £2 18s. 11d. into court. There was, therefore, at the hearing no need for any application for judgment, and the only remaining question was that of costs. The plaintiffs solicitor applied to the county court judge for an order for costs on the High Court scale up to the time of transfer, and on the county court scale after transfer. The county court judge refused to accede to this application, and ordered the costs of the whole proceedings to be taxed on the county court scale. He subsequently gave a note of the grounds for his decision as follows: "In the exercise of my discretion I was of opinion that it was a case that ought to have been brought in the county court, and no good reason was shown for the proceedings to be brought in the High Court." Against this order the plaintiffs appealed.

R. J. Sutcliffe for the plaintiffs.

Hallett for the defendant.

A **SALTER, J.**—This is an appeal by plaintiffs from an order of a learned county court judge as to the costs of proceedings in respect of an action tried in the High Court. The learned county court judge has ordered that the plaintiffs shall have the costs both of the High Court action and of the part of the action remitted to the county court, to be taxed in each case on the county court scale. Upon that order two questions arise. The first is whether the county court judge had jurisdiction to make such order, and the second is, assuming that he had such jurisdiction, whether he has exercised his discretion judicially.

Section 113 of the County Courts Act, 1888, gives to county court judges, in wide and general terms, jurisdiction over the costs of county court actions. It reads as follows :

C “All the costs of any action or matter in the court, not herein otherwise provided for, shall be paid by or apportioned between the parties in such manner as the court shall think just, and in default of any special direction shall abide the event of the action or matter. . . .”

Section 1 of the County Courts Act, 1919, gives power to the High Court to transfer to a county court actions commenced in the High Court. Section 11 of the Act **D** deals with the costs of actions brought in the High Court which could have been commenced in a county court, and provides that successful plaintiffs shall recover in some cases no costs and in some cases only county court costs, according to the amount recovered. The second proviso to s. 11 is as follows :

“(ii) If in any action founded on contract the plaintiff within twenty-one days after the service of the writ, or within such further time as may be allowed by the court or a judge, obtains an order under Order XIV of the Rules of the Supreme Court that he shall be at liberty to sign judgment for a sum of twenty pounds or upwards either unconditionally or unless that sum is paid into court or to the plaintiff’s solicitor, he shall, unless otherwise ordered by the court or a judge, be entitled to costs on the High Court scale.”

E Section 12 of the same Act deals with the costs of transferred actions, and, as regards actions transferred from the High Court to a county court, provides that

“. . . the costs of the whole proceedings, both before and after the transfer or removal, shall, subject to any order made by the court which orders the transfer or removal, be in the discretion of the court to which the matter is transferred or removed, and that court shall have power to make orders with respect thereto and as to the scales or columns on or under which the several parts of the proceedings are to be taxed, and the costs of the whole proceedings shall be taxed in that court.”

G It is difficult to imagine wider words than these. Then follows this proviso :

“Provided that, as regards so much of the proceedings in any action transferred from the High Court to a county court as take place in the High Court before the transfer, the costs thereof shall be subject to the provisions of the last foregoing section of this Act, and the powers of a court or judge under that section to make an order allowing costs on the High Court scale or on or under any county court scale or column shall, subject to any order of the court or judge by whom the transfer was ordered, be exerciseable, by the judge of the county court.”

I Counsel for the defendants argued that the word “allowing” in this proviso was limited to increasing the normal scale of costs, and did not cover disallowance, total or partial. I think this is too narrow a reading, and that the word “allow” is equivalent to “award.”

I think that these sections, read together, show that in the case of actions transferred to a county court the legislature intended, subject to any order of the transferring court, that the whole discretion over all costs of the action should be with the county court judge. The learned judge, therefore, had jurisdiction and the

only remaining question is whether he exercised his discretion judiciously. He has A
given his reasons as follows :

"In the exercise of my discretion I was of opinion that it was a case that
ought to have been brought in the county court, and no good reason was shown
for the proceedings to be brought in the High Court."

I think this is not a judicial exercise of the discretion. The plaintiffs had been B
completely successful and had recovered in the action every penny of their claim.
There was, therefore, no discretion to deprive them of costs unless for some mis-
conduct. In the events which happened they were entitled to High Court costs
up to transfer, unless guilty of misconduct. To say that they were guilty of mis-
conduct because they did a thing which *prima facie* entitles them to High Court
costs, and for no other reason, is to nullify the second proviso to s. 11. The appeal C
must be allowed and the order as to costs varied by directing that the costs to the
date of transfer be taxed on the High Court scale.

FRASER, J.—I am of the same opinion and for the same reasons.

Appeal allowed.

Solicitors : *Church, Adams, Tatham & Co.*, for *J. H. Milner & Son*, Leeds; *Rawle, D*
Johnstone & Co., for *L. Godlove*, Leeds.

[*Reported by T. R. FITZWALTER BUTLER, ESQ., Barrister-at-Law.*]

Re PENNINGTON AND OWEN, LTD.

[COURT OF APPEAL (Sir Ernest Pollock, M.R., and Warrington, L.J.), July 27, 1925] F

[Reported [1925] Ch. 825; 95 L.J.Ch. 93; 134 L.T. 66; 41 T.L.R. 657;
69 Sol. Jo. 759; [1926] B. & C.R. 39]

*Company—Winding-up—Set-off—Debt owed by company to partner—Debt owed
by partnership firm to company.*

A limited company which had originally been a partnership was ordered to be G
compulsorily wound-up. One of the partners had a claim against the company
which was proved in the winding-up and which the partner then assigned. The
liquidator refused to pay the assignees until a joint debt owed by the partner-
ship to the company had been paid, and he claimed to set-off that debt against
the sum owed by the company to the assignees of the partner.

Held: the debt of a partnership firm being a joint and not a joint and several H
debt, the debt due to the company by the partnership could not be set-off
against the separate debt due by the company to the partner, and, therefore,
the assignees were entitled to the amount of the proved debt.

Notes. As to set-off of mutual debts and credits see 6 HALSBURY'S LAWS (3rd I
Edn.) 647 et seq., and for joint and several debts see *ibid.* (2nd Edn.) vol. 29, p. 490,
para. 696, and for cases see 10 DIGEST (Repl.) 988 et seq.

Cases referred to :

- (1) *Cherry v. Boulton* (1839), 2 Keen, 319; 4 My. & Cr. 442; 9 L.J.Ch. 118;
3 Jur. 1116; 41 E.R. 171, L.C.; 4 Digest 418, 3769.
- (2) *Turner v. Turner*, [1911] 1 Ch. 716; 80 L.J. Ch. 473; 104 L.T. 901, C.A.;
23 Digest (Repl.) 447, 5157.
- (3) *Kendall v. Hamilton* (1879), 4 App. Cas. 504; 48 L.J.Q.B. 705; 41 L.T. 418;
28 W.R. 97, H.L.; 36 Digest (Repl.) 491, 599.

- A (4) *Re Akerman, Akerman v. Akerman*, [1891] 3 Ch. 212; 61 L.J.Ch. 34; 65 L.T. 194; 40 W.R. 12; 23 Digest (Repl.) 448, 5163.
- (5) *Re Rhodesia Goldfields, Ltd., Partridge v. Rhodesia Goldfields, Ltd.*, [1910] 1 Ch. 239; 79 L.J.Ch. 133; 102 L.T. 126; 54 Sol. Jo. 135; 17 Mans. 23; 10 Digest (Repl.) 796, 5170.
- B (6) *Re Jewell's Settlement, Watts v. Public Trustee*, [1919] 2 Ch. 161; 88 L.J.Ch. 357; 121 L.T. 207; 43 Digest 922, 3618.
- (7) *Smith v. Smith* (1861), 3 Giff. 263; 81 L.J.Ch. 91; 5 L.T. 302; 7 Jur. N.S. 1140; 66 E.R. 408; 23 Digest (Repl.) 446, 5150.

Appeal from part of an order made by EVE, J., on July 1, 1925, sitting in Companies (Winding-up), refusing to direct the liquidator of Pennington and Owen, Ltd., to pay to M. Dunn, Ltd., assignees of Philip Sidney John Owen, the amount of the debt, a proof of which had been allowed in the winding-up of the company, due from the company to P. S. J. Owen, for £5,816 17s. 8d., on the ground that there was a sum of £4,702 15s. 2d. owing by the partnership firm of Pennington and Owen to the company, and which must first be paid. The facts are shortly stated in the headnote, and are also set out in the judgment of WARRINGTON, L.J. EVE, J., refused to order the liquidator to pay the £5,816 17s. 8d. due to P. S. J. Owen, and ordered that the call of 5s. per share made on March 10, 1920, on the 5,000 Participating Preference shares allotted to P. S. J. Owen not paid by him, and any calls payable prior to, and in the course of the winding-up of the company on the shares must be set-off against the claim of M. Dunn, Ltd., as assignees. From that decision M. Dunn, Ltd., appealed.

E *Edward Clayton, K.C.*, and *St. John Field*, for the assignees, referred to *Cherry v. Boulton* (1), *Turner v. Turner* (2), *Kendall v. Hamilton* (3).

B. A. Hall, for the liquidator, referred to *Cherry v. Boulton* (1), *Turner v. Turner* (2). The following cases were also referred to: *Re Akerman, Akerman v. Akerman* (4), *Re Rhodesia Goldfields, Partridge v. Rhodesia Goldfields* (5), *Re Jewell's Settlement, Watts v. Public Trustee* (6).

F *R. W. Turnbull* for a contributory.

SIR ERNEST POLLOCK, M.R.—This appeal must be allowed. It raises a short but an important point. The position is this. The assignee of one Owen asks that a sum should be paid to him by the liquidator, a sum of £5,816 17s. 8d., a debt which has been established in the winding-up of the company as due to be paid by the liquidator to Owen. What the liquidator says is: I am not going to pay to the assignee of Owen until I have received a debt which is due to the company. The debt that he seeks to recover is not one due from Owen, but due from Owen and Pennington, who were partners, and the liquidator says that he is entitled to withhold the payment of this established debt of £5,816 17s. 8d. until in some way the partnership has paid up that debt, because Owen is one of the members of that partnership. The liquidator would be entitled to deduct from that debt due to Owen sums which are due from Owen to him as liquidator, for instance, in respect of calls upon shares which had been made before the liquidation took place and in respect of which there is a direct liability of Owen to the liquidator; but the assignee is quite satisfied to provide and to undertake that calls shall be deducted, and, more than that, he has assented to the course that all calls whether made before or in the course of the liquidation shall be treated as owing from Owen and shall be provided for before the sum is paid over to Owen's assignee. The assignment by Owen to Dunn provides also for a sum being paid to the solicitors, Messrs. Kenneth Brown and Baker, but Mr. Dunn says he is quite satisfied to receive the sum paid by the liquidator subject to provision being made for the calls on the shares which are due from Owen and subject to the payment to Messrs. Kenneth Brown and Baker of some £800 which were due from Mr. Owen to Kenneth Brown and Baker; but what he says he does not assent to is that there should be a set-off, as it is rather roughly and imperfectly called, of a debt which is

due to the liquidator from the partnership of Owen and Pennington. The learned judge, although all the facts were before him, was minded not to assent at the present time to the application of Mr. Dunn ; but Mr. Hall has very frankly admitted that the debt of £5,816 17s. 8d. has been duly established, that all conditions have been fulfilled for the purpose of that sum being paid over and that it ought to be paid over unless he can apply the principle which has been laid down in *Cherry v. Boulton* (1). That case has been applied in a number of cases, but perhaps the best statement of it can be found in *Turner v. Turner* (2). There COZENS-HARDY, L.J., says this :

"I think that the more logical and correct mode of explaining that doctrine is this : You, the debtor, have in your hands part of the assets of the testator and you cannot claim any part of the assets of the testator, out of which of course your legacy must be paid, without bringing into the estate that portion which is now in your pocket ; or, in other words, your legacy must be treated as paid pro tanto out of the assets of the testator which you have in your pocket."

It will be observed that this doctrine of restoring to the mass a sum which is due from a debtor before the debtor is entitled to receive a sum out of that mass, be it by way of legacy or possibly otherwise, is only applied where there is a direct and specific mutuality between the mass and the particular debtor. It does not apply to the case in which the liability is to pay a particular person and the attempt is made before that payment over is made to require a sum to be paid which is owing not from that particular person but from that particular person and another, as in the case of a partnership debt.

We have been referred to a number of cases, but it all comes back to this point, that in *Kendall v. Hamilton* (3) it was determined that the partnership debts are not joint and several, but are joint only, although in the case of a partner being deceased there is a right as against the estate of the deceased partner. By s. 9 of the Partnership Act, 1890, it is declared that every partner in a firm is liable jointly with the other partners. What the liquidator is seeking to do in the present case is to set-off or to withhold payment from Mr. Owen until a sum which is due from the partnership of Owen and Pennington has been paid to him. It appears to me that the doctrine of *Turner v. Turner* (2), explaining *Cherry v. Boulton* (1), does not apply to such a case. It is impossible to stretch such a doctrine as we have been invited to do—until some loose principle of what may be called rough justice is applied as between the liquidator and two persons, the right of Mr. Owen and his assignee is to be paid this sum. Applying the doctrine which does apply, of mutual dealings—the mutual dealings clause in bankruptcy applied only as between the same parties—a joint debt cannot be set-off against a separate debt, nor can a separate debt be set-off against a joint debt, and what is really asked for here is that we should withhold the payment of a separate debt due to one person until a joint debt has been collected from that person and another. It appears to me that the doctrine of *Cherry v. Boulton* (1) and *Turner v. Turner* (2) does not apply to such a case, and inasmuch as all conditions have been fulfilled showing that there is this sum of £5,816 17s. 8d. due to Mr. Owen, his assignee has a right to have it paid subject to the deductions which he assents to in respect of calls due and to be made, or to fall due, and to payment to the solicitors, and there is no right to withhold that sum until another debt, due from quite a different entity, has been paid over into the liquidator's hands. The appeal will, therefore, be allowed with costs, and an order must be made for the payment of the sum.

WARRINGTON, L.J.—I am of the same opinion. The company in liquidation is a company, the name of which is Pennington and Owen, Ltd. Pennington and Owen, Ltd., is a private company which consists of two shareholders, one Pennington and one Owen. Pennington is the holder of 50,000 out of 55,000 shares, and Owen is the owner of the remaining 5,000. So far, therefore, as contributions to the fund for payment of the debts of the company are concerned, Pennington is a very much

A larger contributor than Owen. I mention these facts not because I think they are material, but because an argument was founded upon them and was addressed to us, and because EVE, J., appears to have considered them of importance in the relations between Pennington and Owen.

The material facts upon which this case must, I think, be decided are these: By an order in the winding-up of Feb. 17, 1925, a proof of a debt of £5,816 due from the company to Owen was allowed in full. For the present purposes, therefore, it is established that the company owes to Owen £5,816. Owen assigned that debt to the present applicants, Dunn, Ltd., subject to a prior charge of £800 in favour of the solicitors, and, as is now conceded, it was also to be subject to any sums due from Owen to the company in respect of calls owing before the winding-up and in respect of his liability to contribute as a member of the company. Then an application was made by Dunn, Ltd., for payment of the debt. The liquidator, by his affidavit filed in opposition to the summons, alleged that there is a debt owing at the date of the winding-up by the partnership firm of Pennington and Owen to the company, amounting to £4,702, exceeding with the deductions which admittedly would have to be made any sum which would be payable to Owen in respect of the debt of £5,816, and therefore he resisted the order for payment of that debt or any part of it to Owen's assignees out of the assets. The learned judge refused to make the order. It is a little difficult to understand on what grounds the learned judge did refuse to make the order. Of course, the claim set up by the affidavit of the liquidator is, at first sight, a hopeless claim, because it is a claim to set-off against a debt due to one person separately a debt due from that person and another person jointly—which obviously would be a hopeless defence. But there seem to have been referred to before the learned judge and there have been referred to before us cases in which, where the court is administering a fund and it finds that a person who is entitled to receive a part of that fund is also indebted to the fund, he must be taken to have in his hands so much of what is due to him from the fund as he owes to the fund and, therefore, he cannot, while he retains that part of the fund in his hand, call upon those who have the distribution of the fund to pay him anything more than the difference between what he is entitled to and that which he owes them. That principle is perfectly well established and there is no question about it; but even that principle does not apply to a case like the present. The point is expressly decided in *Turner v. Turner* (2) by this court, consisting of the then Master of the Rolls, LORD COZENS-HARDY, FLETCHER-MOULTON, and BUCKLEY, L.JJ., and the decision in that case was that

G "The principle that a legatee who is indebted to the testator's estate can receive nothing from the testator's bounty until he has brought into account the amount due in respect of the debt does not apply where the debt is owed by a partnership of which the legatee is a member."

H Therefore, even if this was a case—which in my opinion it is not—in which the principle which has been generally referred to as the principle of *Cherry v. Boulthbee* (1) would otherwise be applicable, it would not be applicable in the present case because the debt which Owen owes, if he owes anything at all—it is not yet established—the debt which it is alleged he owes is a debt which he owes with another person jointly, whereas that which he is entitled to receive he is entitled to on his own account and for his own account alone. What FLETCHER-MOULTON, I L.J., says is this:

"It is clear to me that there is no power in an executor to retain a legacy to one partner of a firm in virtue of a partnership debt to the estate. I can see no authority and no justification or reason for the contrary doctrine. I fully accept the explanation of the case of *Smith v. Smith* (7) which the Master of the Rolls has given, and so interpreted it may have been correctly decided, but certainly it gives no justification for the principle contended for by Mr. Levett of setting off individual legacies against partnership debts."

It could not be put shorter or more plainly than that. Therefore, those cases have nothing to do with it. I rather gather from the note of EVE, J.'s judgment that what he thought he ought to do was to refrain from making any order for payment to Owen's assignee until the position of the accounts as between Owen and his partner Pennington had been ascertained. With all due respect to the learned judge, I fail to see how the state of accounts as between the two joint debtors can have any bearing at all on the question whether the joint debt can be retained as against the separate debt the one due to and the other due from an entity which is a legal entity, which is a partnership. In administering the affairs of the company in the winding-up the court has nothing to do with the possible claims which one member of the company may have against another. That is quite immaterial for the purpose of the administration of the assets, and therefore it seems to me that the only thing the learned judge had to determine was: Had the company a right to set off the joint debt alleged to be due to them against the separate debt proved to be due from the company to Owen? In my opinion there is no such right and the learned judge had no alternative but to make the order which he was asked to make, which would involve the payment of the ultimate balance of the debt to Dunn Ltd., after discharging the prior charges.

Appeal allowed.

Solicitors: *Woolfe & Woolfe; Le Brasseur & Oakley.*

[Reported by GEOFFREY P. LANGWORTHY, Esq., Barrister-at-Law.]

LONDON COUNTY COUNCIL v. HUTTER

[CHANCERY DIVISION (Tomlin, J.), May 14, 15, 29, 1925]

[Reported [1925] Ch. 626; 95 L.J.Ch. 1; 134 L.T. 56]

Landlord and Tenant—Covenant—Covenant not to cut or maim walls—Erection of advertisement by iron framework covering whole frontage.

The fixing of an electric light advertisement by means of an iron framework spread over the whole frontage of a building and fixed thereto by means of brackets let into holes cut in the walls to a depth of 6 in. and 2½ in. square is a breach of a covenant in a lease not to "cut or maim any of the principal walls or timbers of the building, or commit or permit any waste or damage to the said building, or to the floors or timbers thereof, or make or permit to be made any alterations in the elevation of the building or in the architectural decoration thereof."

Joseph v. L.C.C. (1), (1914), 111 L.T. 276, distinguished.

Notes. As to covenants and restraint of altering buildings see 23 HALSBURY'S LAWS (3rd Edn.) 595 et seq. and for cases see 31 DIGEST (Repl.) 176 et seq.

Cases referred to:

- (1) *Joseph v. L.C.C.* (1914), 111 L.T. 276; 30 T.L.R. 508; sub nom. *Re L.C.C. and Weir's Lease*, *Joseph v. L.C.C.*, 58 Sol. Jo. 579; 31 Digest (Repl.) 177, 3112.
- (2) *Bickmore v. Dimmer*, [1903] 1 Ch. 158; 72 L.J.Ch. 96; 88 L.T. 78; 51 W.R. 180; 19 T.L.R. 96; 47 Sol. Jo. 129, C.A.; 31 Digest (Repl.) 177, 3110.
- (3) *West Ham Central Charity Board v. East London Waterworks Co.*, [1900] 1 Ch. 624; 69 L.J.Ch. 257; 82 L.T. 85; 48 W.R. 284; 44 Sol. Jo. 243; 31 Digest (Repl.) 390, 5158.
- (4) *Hyman v. Rose*, [1912] A.C. 623; 81 L.J.K.B. 1062; 106 L.T. 907; 28 T.L.R. 432; 56 Sol. Jo. 535, H.L.; 31 Digest (Repl.) 365, 4972.

A Witness Action.

The following statement of facts is taken from the judgment: By a lease dated March 6, 1886, the Metropolitan Board of Works demised to one Robert Edwin Villiers a piece of land situated at the corner of Piccadilly and Shaftesbury Avenue, in the County of London, together with the building erected thereon and known as the Piccadilly Restaurant, for the term of eighty years, from March 25, 1885, at the yearly rent of £350. The lease contained a covenant by the lessor for himself, his heirs, executors and administrators and assigns with the lessees, their successors and assigns, which, so far as material, is in the following terms:

“That the lessee his executors, administrators or assigns will not during the said term without the previous written consent of the lessors their successors or assigns cut or maim any of the principal walls or timbers of the building for the time being on the land hereby demised or commit or permit any waste or damage to the said building or to the floors or timbers thereof, or make or permit to be made any alteration in the elevation of the buildings or in the architectural decoration thereof. . . .”

The plaintiffs as the statutory successors and assigns of the Metropolitan Board of Works, were entitled to the freehold reversion in the premises expectant on the determination of the lease, and the defendant had become by virtue of divers assignments entitled to the leasehold premises for all the unexpired residue of the term of eighty years, subject to the payment of the rent reserved by the lease and the observance and performance of the lessees' covenants and conditions. The building had a frontage to both Shaftesbury Avenue and Piccadilly Circus, with a rounded-off corner at the junction of the two streets. The defendant had (without the plaintiffs' consent) installed on the façade of the building on both frontages an electric light advertisement set in a large iron framework, which was about 75 ft. long and 10 ft. high, and ran round the whole frontage of the building at the level of the top floor. The framework was bolted to and supported by twelve T-irons and eleven iron brackets, all of which were cemented into holes cut in the stonework of the wall of the building. Twenty-three holes had been cut for this purpose, each hole being about 2½ in. square and 6 in deep. One of the holes had been cut through the architrave of the window on the rounded corner overlooking Piccadilly Circus. The electrical advertisement related to a make of gin, and the defendant received payments for its display. The advertisement had no connection with any business carried on by the defendant or his under-tenants on the premises. The plaintiffs alleged that the installation of this advertisement in this manner involved a breach of the above covenant and claimed: (i) a declaration that the framework constituted a breach of the covenant; (ii) a mandatory order for the removal of the framework and the making good of the principal walls and timbers of the buildings so far as they had been cut or maimed or otherwise damaged by its erection.

Gavin Simonds, K.C., and Attwater, for the plaintiffs. Bickmore v. Dimmer (2), Joseph v. L.C.C. (1).

Greene, K.C., and Sir Arthur Underhill, for the defendant. West Ham Central Charity Board v. East London Waterworks Co. (3), Joseph v. L.C.C. (1) Bickmore v. Dimmer (2), Hyman v. Rose (4).

Cur. adv. vult.

I May 29. TOMLIN, J.—This is an action by the London County Council as lessors of a building known as the Piccadilly Restaurant against the assignee of the lease of the premises, claiming a declaration that a framework carrying an electric sign installed on the façade of the building constitutes a breach of certain covenants in the lease, and for an order for the removal of the framework, and for the making good of the damage caused by the installation thereof. [His Lordship then stated the facts with regard to the erection of the framework and the manner in which it was attached to the building, and continued:] It is not clear whether

all the holes were cut for the purpose of erecting the present structure. Most of them were undoubtedly so cut, but some of them may have been cut in the first instance in connection with a previous advertising sign on the removal of which the plaintiffs successfully insisted. At any rate, all the cutting of the stone and the embedding therein of the T-irons and brackets has been done or permitted by the defendant. The framework is not used for advertisement or otherwise in connection with any business carried on by the defendant or his under-tenants on the premises. It is the advertisement of a stranger which the defendant permits to be displayed on the front of the building. The lease under which the defendant holds is dated March 6, 1886, and is for a term of eighty years from March 25, 1885, at a rent of £350 per annum. The lease contains full repairing covenants on the part of the lessee and also a covenant by the lessee in the following terms :

"The lessee, his executors, administrators or assigns will not, during the said term, without the previous written licence of the lessors, their successors or assigns, cut or maim any of the principal walls or timbers of the building for the time being on the land hereby demised, or commit or permit any waste or damage to the said buildings or to the floors or timbers thereof, or make or permit to be made any alteration in the elevation of the building or in the architectural decoration thereof."

The covenant is divisible into three branches: first, a covenant not to cut or maim any of the principal walls or timbers of the buildings; secondly, a covenant not to commit or permit any waste or damage to the buildings or to the floors or timbers thereof; and, thirdly, a covenant not to make or permit to be made any alteration in the elevation of the buildings or in the architectural decoration thereof. The plaintiffs contend that there has been a breach of the covenant in each of its branches. Now, the stonework of the wall has been cut, and there have been embedded in and cemented into the holes so cut in the stone twenty-three T-irons and iron brackets, and if the framework of the sign were unbolted and removed these irons and brackets would remain as a permanent addition to the fabric of the buildings unless cut out, and if cut out would leave the stonework holed and deteriorated. The cutting of the stone has been done not for any purpose reasonably necessary or incidental to the ordinary use and occupation of the premises as a house of residence or business, but to enable the outside wall to be used as an advertising station. I think this is a breach of the first branch of the covenant. Further, it is, I think, plain that what has been done has actually damaged to some extent the stonework of the wall and is a breach of the second branch of the covenant. With regard to the third branch of the covenant, a covenant in identical terms contained in a lease of premises on the opposite side of Shaftesbury Avenue, was considered by ASHBURY, J., in *Joseph v. L.C.C.* (1). The act complained of in that case was the suspension in front of the building of an electric sign without any cutting into or interference with the structure of the building, and the learned judge held that alteration in the elevation of the buildings or the architectural decoration thereof related only to alterations to the fabric of the building, and did not cover alterations to its appearance by temporary advertisements, hung outside, which could be removed at any time. There has been in the present case, by the operations I have described, an appreciable alteration in the fabric of the front of the building, and the moulding round one of the windows has been cut through. I do not think the principle upon which ASHBURY, J., proceeded applies here. In my opinion, it can fairly be said that there has been, within the meaning of the covenant, not only an alteration in the architectural decoration by the cutting through of part of the architrave (and for this purpose it does not seem to me to matter whether the defendant caused the cutting through to be done to enable the existing sign to be erected or permitted it on the former occasion), but also an alteration in the elevation of the building by the cutting of holes in the stone, and the permanent embedding therein of the T-irons and iron brackets. Further, the

A alteration is not one which was reasonably incidental to the ordinary user of the premises, and cannot, in my opinion, fall within any such exception as is illustrated in *Bickmore v. Dimmer* (2).

B I shall, therefore, make a declaration that the operations by which the T-irons and iron brackets were fixed in the stone of the walls of the buildings, and the retention of such irons and brackets as so fixed, constitute breaches of the covenant, and that the defendant is bound to remove the irons and brackets, and is liable to make good the damage to the buildings occasioned by the fixing and removal of the same. There will be a mandatory order for the removal of the irons and brackets, and the defendant must pay the costs of the action.

Solicitors : *David Palmer Andrews; Lane & Cottier.*

C [Reported by L. MORGAN MAY, Esq., Barrister-at-Law.]

ILFORD URBAN DISTRICT COUNCIL v. BEAL

[KING'S BENCH DIVISION (Branson, J.), February 3, 4, 12, 1925]

E [Reported [1925] 1 K.B. 671; 94 L.J.K.B. 402; 133 L.T. 303; 89 J.P. 77; 41 T.L.R. 317; 23 L.G.R. 260]

Nuisance—Ordinary user of land—Drainage to sewer—Wall built by owner of land above sewer—Ignorance of landowner as to existence of sewer—Subsidence of wall—Damage to sewer—Liability of landowner.

F Where damage is caused to an underground sewer by acts done or omitted by a landowner upon his land, the landowner is not liable if he did not know and could not reasonably be expected to know of the existence of the sewer. The doctrine in *Rylands v. Fletcher* (1) (1868), L.R. 3 H.L. 330, does not apply in the case of normal user of land.

G The defendant had bought land under which, unknown to her, the plaintiffs, the local authority, had previously placed a sewer. A retaining wall situated between the defendant's house and a river was undermined by the river so that it moved, pressed on, and damaged the plaintiffs' sewer. In an action by the plaintiffs claiming damages for nuisance and/or negligence,

H **Held:** to build a retaining wall was a normal user of the land and there was no evidence that the defendant knew or should have known of any defect in the wall; the defendant could not by any reasonable diligence have discovered the existence of the sewer, and thus the existence and extent of her duty to the plaintiffs; and, therefore, the plaintiffs were not entitled to recover.

Notes. Considered : *St. Anne's Well Brewery Co. v. Roberts*, [1928] All E.R. Rep. 28. Referred to : *Wilkins v. Leighton*, [1932] All E.R. Rep. 55.

I For natural or reasonable user of land see 24 HALSBURY'S LAWS (2nd Edn.) 43 et seq. and for cases see 36 DIGEST (Repl.) 292 et seq.

Cases referred to :

- (1) *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 36 Digest (Repl.) 282, 334.
- (2) *Barker v. Herbert*, [1911] 2 K.B. 633; 80 L.J.K.B. 1329; 105 L.T. 349; 75 J.P. 481; 27 T.L.R. 488; 9 L.G.R. 1083, C.A. 36 Digest (Repl.) 297, 419.
- (3) *Nichols v. Marsland* (1875), L.R. 10 Exch. 255; 44 L.J.Ex. 134; 33 L.T. 265; 23 W.R. 693; affirmed (1876), 2 Ex.D. 1; 46 L.J.Q.B. 174; 35 L.T. 725; 41 J.P. 500; 25 W.R. 173, C.A.; 36 Digest (Repl.) 297, 421.

- (4) *Tarry v. Ashton* (1876), 1 Q.B.D. 314; 45 L.J.Q.B. 260; 34 L.T. 97; 40 J.P. 439; sub nom. *Terry v. Ashton*, 24 W.R. 581; 26 Digest 433, 1519. **A**
- (5) *Job Edwards, Ltd. v. Birmingham Navigations*, [1924] 1 K.B. 341; 93 L.J.K.B. 261; 130 L.T. 522; 40 T.L.R. 88; 68 Sol. Jo. 501, C.A.; 36 Digest (Repl.) 316, 628.
- (6) *Chadwick v. Trower* (1839), 6 Bing. N.C. 1; 8 Scott, 1; 8 L.J.Ex. 286; 133 E.R. 1, Ex.Ch.; 19 Digest 171, 1193. **B**
- (7) *Humphries v. Cousins* (1877), 2 C.P.D. 239; 46 L.J.Q.B. 438; 36 L.T. 180; 41 J.P. 280; 25 W.R. 371; on appeal 46 L.J.Q.B. at p. 442, C.A.; 36 Digest (Repl.) 288, 361.
- (8) *Lambert v. Bessey* (1860), T. Raym. 421.
- (9) *Quarman v. Burnett* (1840), 6 M. & W. 499; 9 L.J.Ex. 308; 4 Jur. 969; 151 E.R. 509; 34 Digest 126, 966. **C**
- (10) *Hardman v. North-Eastern Rail. Co.* (1878), 42 J.P. 388 C.A.; 44 Digest 59, 433.
- (11) *Firth v. Bowling Iron Co.* (1878), 3 C.P.D. 254; 47 L.J.Q.B. 358; 38 L.T. 568; 42 J.P. 470; 26 W.R. 558; 7 Digest 289, 169.

Action tried by BRANSON, J., without a jury.

The plaintiffs, the Ilford Urban District Council, brought an action against the two defendants in respect of damage done to a main sewer. At the conclusion of the plaintiffs' case the judge ruled that there was no case against the first defendant, and the action proceeded against the second defendant. **D**

The facts, as stated by BRANSON, J., in his judgment, were as follows: In 1900-1901 the plaintiffs laid the sewer, which passed under the River Roding and under premises known as No. 1, High Road, Ilford, which include land abutting on the river. At that time the premises were owned by Mrs. Beal, who died on Aug. 20, 1905, and left them to her husband, Edmund Beal, who, on June 29, 1918, conveyed them to Mrs. Judd. The answers to the usual requisitions upon title did not disclose the existence of the sewer. Neither Mrs. Judd nor any of her servants were aware of its existence. When the sewer was laid Mrs. Beal claimed compensation in respect of its compulsory passage through her land, and was awarded and paid £80. In 1902 the authorities decided to rebuild and widen Ilford Bridge, which abutted on the property of Mrs. Beal, and to divert the Aldersbrook, a tributary of the Roding, which had hitherto joined the Roding just below, and was then made to join it just above that property. In July, 1903, Mrs. Beal received as compensation from the Essex County Council £200 in respect of the diversion of the Aldersbrook and £500 in respect of the alteration of the bridge. In 1903 an unusually severe flood swept away an old retaining wall which had previously stood between the garden of No. 1 and the river, and in 1904 a new retaining wall was erected by Mrs. Beal a few feet on the landward side of the old wall and across the plaintiff's sewer. The new wall was a concrete wall built on the advice of a competent surveyor who, however, was not a civil engineer. It was not carried as far below the bed of the river as the best engineering practice would dictate, and it lacked a concrete toe or apron, the provision of which would have prevented the river from undermining the wall as soon as it was in fact undermined, and it lacked weeping holes to drain off water which might get behind it, either from the river or from rain. In spite, however, of these deficiencies the wall stood until September, 1919, and did not present to anyone who saw it any definite indications that it was in danger of collapsing. The plaintiffs' engineer knew of the existence of the wall and that it passed over the plaintiffs' sewer. It could easily be seen from Ilford Bridge, against which it abutted, and it never occurred to the engineer that it was likely to damage the sewer. On Sept. 17, 1919, trouble at the plaintiffs' pumping station indicated that the sewer was broken, and steps were taken to find out where the break had occurred. The information at the disposal of the plaintiffs' engineer did not enable him to locate the sewer in the first instance, and it was at first looked for some distance away from the place which it in fact occupied. **E**
F
G
H
I

A When it was discovered and the ground above it opened up, it was found that the river had completely undermined the concrete wall, which had moved forward a foot or two from its original position under the thrust of the wet earth behind it, and also leant forward a little, so that its outer bottom corner had pressed upon the sewer which crossed diagonally beneath it and had broken in the cast-iron pipe of which the sewer consisted, and had penetrated it to the extent of some 6½ in.

B *Montgomery, K.C., and Tindal Atkinson for the plaintiffs.*

Craig Henderson, K.C., and Ridsdale for the defendant Beal.

Rayner Goddard, K.C., and J. Ewart Walker for the defendant Judd.

Cur. adv. vult.

C Feb. 12. **BRANSON, J.**, read the following judgment.—This is an action by the plaintiffs, in whom are vested the main sewers in the urban district of Ilford, for damage done to the Ilford main Roding sewer. There were originally two defendants, but at the close of the plaintiffs' case I held that there was no case made against the defendant Beal, and with him, therefore, I have nothing more to do. The other defendant is Mrs. Judd, and the issue which I have to determine is whether or not she is liable to make good to the plaintiffs the damage which has been sustained by their sewer. If so, the question as to the amount of such damage will be settled elsewhere. [His Lordship then stated the facts as set out above, and continued]: It is contended for the plaintiffs that in these circumstances the defendant Judd is liable to the plaintiffs to 'make good the damage to the sewer. In the statement of claim the case is first put upon negligence in maintaining the wall in an improper condition, but in his argument to me counsel for the plaintiffs did not rely upon negligence of the defendant as giving him any cause of action in the circumstances of the case, and consequently I say no more about that view of the case. The next alternative pleaded was that the wall was a nuisance maintained by the defendant upon the premises. Counsel for the plaintiffs did not put his case strictly upon nuisance, but as an action upon the case. The plaintiffs' sewer, he says, was lawfully upon the defendant's property, and has there been injured by the moving of the defendant's wall, and that is enough to establish the defendant's liability, unless the defendant can show that the movement was caused by the act of God or the interference of a third person, and that the injury was done before the defendant had reasonable opportunity of discovering and stopping the movement so caused. The problem may, I think, in the circumstances of the present case, be stated as follows: It being conceded that if the plaintiffs' sewer had been laid on the surface of the defendant's land, the defendant would have been bound to take care that her wall was not allowed to fall upon it or move against it so as to inflict damage upon it, does the fact that it was buried 8 ft. or 9 ft. deep, and that she had not discovered, and could not by the exercise of any reasonable care have discovered, its existence or whereabouts, make any difference to her liability? The law certainly imposes upon an occupier of land a very serious burden if he has at his peril to insure that nothing done or omitted by him upon his land shall injure something buried beneath it, of which he did not know, and could not reasonably be expected to know, and I am not prepared to hold that such is the law, unless there is authority which compels me to do so. To my mind, however, the weight of authority is to the contrary of this proposition. I The contention for the plaintiffs before me is the same as that of the plaintiff in *Barker v. Herbert* (2), with the minimum amount of modification rendered necessary by the Court of Appeal in that case. There the defendant had an area abutting on the highway. He had properly fenced it, but some boys playing football had broken the railing, and the plaintiff, a child, fell into the area and was hurt. The jury found that at the time of the accident the area was a nuisance but that the defendant did not know, and could not, by the exercise of reasonable diligence, have known of it before the accident happened. VAUGHAN WILLIAMS, L.J., laid down the law as follows ([1911] 2 K.B. at p. 853):

"In my opinion there is no such absolute responsibility as that contended for imposed upon a person who has property adjoining a highway, even although a portion of that property may be an area, which, if unprotected by a fence or railing of some sort, would constitute a danger to those using the highway. In my judgment there can be no liability on the part of the possessor of land in such a case, unless it is shown either that he himself or some person for whose action he is responsible created that danger which constitutes a nuisance to the highway, or that he has neglected for an undue time after he became, or if he has used reasonable care, ought to have become, aware of it, to abate or prevent the danger or nuisance."

FARWELL, L.J., draws the distinction between the absolute duty owed to others by one who is making an abnormal use of land (*Nichols v. Marsland* (3), and *Rylands v. Fletcher* (1)), and that owed by those whose use of land is merely normal. There can be no question that in the present case the use of the land by erecting a retaining wall upon it is a merely normal use, and the principle illustrated by such cases as *Nichols v. Marsland* (3) and *Rylands v. Fletcher* (1) can have no application to it. But it is contended that *Barker v. Herbert* (2) was decided as it was, not because the defendant did not know and could not by the exercise of reasonable diligence have found out the danger in time to remedy it, but because the danger arose from the act of a third party; and there was no intervention of a third party in the present case. In my view this contention is unsound. It was the absence of knowledge in the defendant, an absence of knowledge not due to any neglect of duty, which was the ratio decidendi of the Court of Appeal. I think this appears clearly from the judgments delivered, and especially from the language used by FLETCHER MOULTON, L.J., and by FARWELL, L.J. And this view is confirmed, in my opinion, by a consideration of the earlier authorities.

It is said in COMYNS' DIGEST (Action upon the case for misfeasance) (B) that an action upon the case does not lie where a man has not sufficient notice of his duty. The authority cited by COMYNS in support of his statement is 2 Inst. 130, where it is laid down that no action will lie against a sheriff by a juror whom he has returned, notwithstanding that the juror showed him a charter of exemption, unless the juror had also shown him his writ de allocando, for the sheriff cannot make a judgment of the validity of the charter, and therefore had not sufficient notice that the juror was exempt. That case is somewhat remote from the present, but the principle stated by COMYNS receives support from the judgment of BLACKBURN, J., in *Tarry v. Ashton* (4). That case arose out of the fall of a heavy lamp which projected over a public highway from premises in the occupation of the defendant. The learned judge, whilst laying down the law to be that if the defendant either knew the lamp was defective or omitted to discharge the duty of inspecting it from time to time, a duty which arose from his knowledge that in the nature of things the lamp must in course of time get out of order and become a danger, he would be liable, continues:

"If he did investigate, and there was a latent defect which he could not discover, I doubt whether he would be liable."

BLACKBURN, J.'s, judgment in *Tarry v. Ashton* (4) was approved by FARWELL, L.J., in *Barker v. Herbert* (2). Each of the last two cases cited was one in which the defendant had knowledge of a danger to be guarded against. In the one he had an area adjoining a highway which he knew would be a nuisance if left unfenced or allowed to become unfenced. In the other the defendant had erected over the highway a heavy lamp, which must in time become a danger if left without proper attention. Yet in the one case it was held, and in the other suggested, that lack of knowledge not due to default prevented liability from attaching to the defendant. It is plain also, in my opinion, that the standard of duty required when there exists the danger of the creation of a public nuisance is higher than where,

A as in this case, only a private nuisance would be created : see *Job Edwards, Ltd. v. Birmingham Navigations* (5).

In *Chadwick v. Trower* (6) the Exchequer Chamber had to deal with the effect of absence of knowledge on the liability of one adjoining owner to another. PARKE, B., delivering the judgment of the court, said :

B "The question is whether the law imposes upon the defendant an obligation to take such care in pulling down his vaults and walls as that the adjoining vault shall not be injured. Supposing that to be so where the party is cognisant of the existence of the vault, we are all of opinion that no such obligation can arise where there is no averment that the defendant had notice of its existence, for one degree of care would be required where no vault exists, but the soil is left in its natural and solid state ; another, where there is a vault ; and C another and still greater degree of care would be required where the adjoining vault is of a weak and fragile construction. How is the defendant to ascertain the precise degree of care and caution the law requires of him, if he has no notice of the existence or of the nature of the structure? We think no such obligation as that alleged exists in the absence of notice."

D The defendant might well ask the same question in the present case. How could she ascertain the precise degree of care which the law required of her ? She did not know of the existence of the sewer ; she could not, by any means short of a general excavation of the property to a depth of 8 ft. or 9 ft., ascertain either where it crossed her wall, and thus the point at which, and at which alone, her duty arose, or the nature of the structure, and thus the extent of care required to E prevent damage to it.

As against these authorities, counsel for the plaintiffs relies chiefly upon *Humphries v. Cousins* (7). In that case the defendant was held liable to an adjoining owner for damage caused on the latter's premises by the escape of sewage from a drain on the defendant's premises of the existence of which the defendant was unaware. The sewage came on to the defendant's premises in a drain which F received his sewage, left his premises, and then, bending round, re-entered them. It was from a defect in that part of the drain which re-entered the defendant's premises that the leakage arose, and it is not clear from the report whether the defendant's ignorance was limited to ignorance of the re-entering of the drain or whether it extended to the presence of the drain at all. If the court proceeded, as I think it must have done, upon the view that the defendant knew, or ought G to have known, that sewage was coming upon his land, or, at all events, that his own sewage was being carried away by a drain, then the decision is an instance of the application of the law laid down in *Rylands v. Fletcher* (1), namely, that a man who collects upon his land that which, if it escapes therefrom, will probably damage his neighbour, is bound to keep it there at his peril, or see to its disposal H in such a manner as will prevent it injuring other people. So regarded, the case of *Humphries v. Cousins* (7) does not support the proposition contended for by counsel for the plaintiffs. Otherwise the case cannot, in my opinion, be reconciled with the decision of the Court of Appeal in *Barker v. Herbert* (2) or *Chadwick v. Trower* (6).

I The next case relied upon for the plaintiffs was *Lambert v. Bessey* (8). The case itself was a case of false imprisonment, but it was quoted to me for the instances given of liability arising in respect of unintentional damage. In my opinion, the case has no bearing upon the present one. All the instances given are of acts done negligently, and accidental only in the sense that the results produced were not intended, and they were given to show the different effect upon civil and criminal liability of the absence of mens rea. Similarly, in *Quarman v. Burnett* (9), the passage cited to me lays down no law applicable to the present case : PARKE, B., is there drawing the distinction between what "may be" the law in regard to real property and what the law is with regard to the user of personal property,

which was at issue in that case. *Hardman v. North-Eastern Rail. Co.* (10) does not assist. There the defendants had negligently and improperly raised a heap of earth upon and against the plaintiff's wall, and, of course, were held liable for damage caused by the water which, in consequence of that negligence and improper act, had percolated through the plaintiff's wall. *Firth v. Bowling Iron Co.* (11) was also relied upon for the plaintiffs. That case, however, proceeded upon the facts (stated in the judgment) that

"the nature of the wire was known to the defendants, that parts of it should fall upon the plaintiff's land was a natural result of the decay of the wire, and the pieces being hidden in the grass were naturally liable to be swallowed by the cattle grazing there."

I cannot find that *Firth v. Bowling Iron Co.* (11) is any authority for saying that if the defendants had not known that cattle or any other animals which could possibly be damaged by their wire were likely to be grazing near their wire, the defendants would nevertheless have been liable, and that case is therefore no authority in the present one.

This disposes of all the cases which were cited to me in support of the principle contended for by the plaintiffs. Though no doubt there are to be found in some of them dicta and some isolated sentences which appear to lend some colour to the plaintiffs' contention, the decisions do not, in my opinion, really support it at all. The law is, I think, correctly stated in the passage I have cited from COMYNS' DIGEST, and the plaintiffs' action must therefore fail by reason of the fact that the defendant did not discover, and could not by the exercise of any diligence in the circumstances reasonably have discovered, the existence of the sewer, and thus the existence and extent of her duty to the plaintiffs. A faint effort was made at the very end of the case to suggest that there lay upon the defendant some statutory obligation towards the Commissioners of Sewers, and that that fact made some difference in the case. All I need say upon this head is that the point was not pleaded or fought. I was not even referred to the statute in question, and it would, therefore, be improper for me to discuss the matter in my judgment. The defendant raised a second and alternative defence to the action, with which I need not deal, as I have come to a conclusion in her favour upon the first, but I propose to state the facts with regard to it in case they may become important hereafter. The defendant does not occupy the land under which the sewer runs; it was let by one of her predecessors in title on a weekly tenancy without any obligation towards the tenants to repair, and the same tenants are still in possession. The rents have been raised by virtue of the power contained in the Increase of Rent and Mortgage Interest (Restriction) Act, 1920, though not to the full extent of permitted increase. The defendant contends that any cause of action which the plaintiffs may have is confined to a cause of action against the occupiers. The plaintiffs contended that, though that might be so where the occupier holds the land for a term of years, it was not the case where the land was occupied by weekly tenants, and where, by increasing the rent, the landlord had brought upon himself a statutory duty to repair. The point was not thoroughly argued, and, as it is unnecessary for me to express an opinion upon it, I prefer not to do so. The result is that the action fails, and must be dismissed with costs.

Judgment for defendant.

Solicitors: *Sharpe, Pritchard & Co.*, for *A. Partington*, Ilford; *Richardson & Bradley*, for *P. G. Robinson*, Ilford; *Torr & Co.*

[Reported by T. R. FITZWALTER BUTLER, Esq., Barrister-at-Law.]

PHILLIMORE v. LANE

[KING'S BENCH DIVISION (Rowlatt, J.), April 27, 1925]

[Reported 133 L.T. 268; 41 T.L.R. 469; 69 Sol. Jo. 542]

Landlord and Tenant—Furnished letting—Covenant to deliver up premises in same condition as when let—Covenant to make good damage by tenant, his family and “others”—Damage by burglars—Liability of tenant—Construction of covenant—Ejusdem generis rule.

The tenant of a furnished house covenanted “to deliver up at the expiration of the tenancy possession of the house, furniture, and effects in as good state and order as the same were at the date of the agreement, reasonable wear and tear . . . being allowed for, and damage by fire, storm, and tempest excepted.” By a second covenant the tenant covenanted “to make good . . . all damage to the premises and to make good . . . or replace all . . . effects . . . lost, damaged, or destroyed by the defendant, his family, his servants, or others during the tenancy.” During the tenancy the premises were broken into by burglars and damage was done.

Held: the first covenant imposed an absolute obligation on the tenant in respect of any damage due to a cause which was not expressly excluded; the second covenant was not intended to limit the generality of the obligation imposed by the first, but merely amplified that obligation; and, therefore, the tenant was liable for the damage done by the burglars.

SEMBLE: a covenant such as the second would probably not be construed in accordance with the ejusdem generis rule and “others” would, therefore, include burglars.

Action tried by ROWLATT, J., without a jury.

The plaintiff was the owner of a house at Radlett, Herts., which she let to the defendant, together with the use of the furniture and effects, for a period of twenty-six weeks from April 24, 1923. The tenant agreed (inter alia) “to keep the premises in good and substantial repair” and

“to deliver up at the expiration of the tenancy full and entire possession of the house, furniture, and effects to the plaintiff or her agent in as good state and order as the same were in at the date of the agreement, reasonable wear and tear and use being allowed for, and damage by fire, storm, and tempest excepted.”

By further covenants the defendant agreed

“to make good, and repair, or pay for all damage to the premises, and to make good, pay for, or replace all articles of furniture and effects which might be broken, lost, damaged, or destroyed by the defendant, his family, his servants or others during the tenancy”

and

“not to move any of the articles of furniture and effects from the premises, and to leave the same at the end of the tenancy in the several rooms and premises described in the inventory.”

The plaintiff alleged in his statement of claim that the defendant had committed breaches of the covenants for delivery of the premises in good order at the expiration of the tenancy and for making good damage and replacing effects lost, damaged, or destroyed during the tenancy. The particulars of his claim showed damage amounting to £127 5s. 6d. The defendant, by his defence, admitted the agreement and the occupation of the premises; but he said that burglars broke into the premises during the tenancy on the night of Aug. 3, 1923, and that the damage was done by the burglars without any negligence on his part. He denied that the

damage was the result of any act or default of himself or of any person or persons for whom he was responsible, and said that therefore he was not liable under the agreement. A

Eustace Hills, K.C., and *Wrottesley* for the plaintiff.

Neilson, K.C., and *Fortune* for the defendant.

ROWLATT, J., after referring to the facts, continued. By leaving the premises in the charge of a caretaker, the defendant did not commit any breach of his obligation. There was nothing in the contract which compelled him to reside on the premises during the whole of the tenancy. I have seen the caretaker and his wife here in the witness-box, and I cannot say that they were unsuitable people for the defendant to employ for such a purpose. With regard to the burglary, no police report has been tendered in evidence, and the evidence that has been called here does not make it very clear how the burglars effected an entry into the premises, but I am satisfied that it was not owing to any negligence on the part of the defendant. In these circumstances, the only question before me is what is the true construction of the agreement. The first covenant imposes upon the defendant the obligation of delivering up the premises in as good order as they were at the date of the agreement, subject only to the exception of fire, storm, and tempest. That imposes upon him an absolute obligation for anything not within the exception. It is, however, argued that the second covenant under which the defendant renders himself liable to make good damage due to himself, his family, and others, limits the obligation imposed by the first covenant. I am by no means sure that the word "others" should be construed according to the ejusdem generis rule, and would not include burglars. But, however that may be, I am of opinion that the second covenant was not intended to limit the generality of the obligation imposed by the first. It merely amplifies that obligation, and its purpose was to render the limits of that obligation more clear. On the general obligation, therefore, the defendant is liable. There remains one subsidiary point in relation to a chest and some other articles, which the landlord had left locked up on the premises. The defendant was entitled to have the benefit of these in so far as they gave the rooms a well-furnished appearance by remaining on the premises, although he had no right to the use of their contents, and the obligation to return in good order at the end of the tenancy applied to these things also. For these reasons, therefore, there must be judgment for the plaintiff for the amount claimed, and costs. B C D E F

Judgment for plaintiff.

Solicitors: *Nicholson, Freeland & Shepherd*; *William Webb & Sons*.

[Reported by T. R. F. BUTLER, ESQ., Barrister-at-Law.]

UNION OF SOVIET REPUBLICS v. BELAIEW

[KING'S BENCH DIVISION (BRANSON, J.), October 23, 1925]

[Reported 134 L.T. 64; 42 T.L.R. 21]

Constitutional Law—Foreign sovereign State—Claim against—Counterclaim—Need to be confined to matters immediately connected with claim.

The plaintiffs, the government of Soviet Russia, claimed from the defendant as owners certain documents which had come into the possession of the defendant as president of the Russian Government Committee, a body set up during the 1914–1918 war to buy supplies in Great Britain for the Russian Government, and had been retained by him. There were pending against the defendant as president of the committee certain actions arising out of claims against the committee in respect of goods supplied and other transactions, and the defendant sought in the present action to counterclaim for an indemnity against any liability which might be found to be his in any of those other actions.

Held: although, when a sovereign State is plaintiff, a counterclaim can be maintained against it to enable complete justice to be done between the parties, the counterclaim must be confined to matters immediately connected with the claim; the indemnity claimed by the defendant was not in respect of any liability incurred by him in acting as custodian of the documents; and, therefore, the counterclaim failed, while the action succeeded.

Notes. As to claims against foreign sovereigns and States see 7 HALSBURY'S LAWS (3rd Edn.) 265–267, and for cases see 1 DIGEST 45 et seq.

Cases referred to:

- (1) *South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord*, [1898] 1 Ch. 190; 77 L.T. 555; 46 W.R. 151; 14 T.L.R. 65; 42 Sol. Jo. 66; Digest Supp.
- (2) *U.S.A. v. McRae* (1867), 3 Ch. App. 79; 37 L.J.Ch. 129; 17 L.T. 428; 16 W.R. 377, C.A.; 1 Digest 48, 383.
- (3) *Strousberg v. Costa Rica Republic* (1880), 44 L.T. 199; 29 W.R. 125, C.A.; 1 Digest 48, 389.
- (4) *Rothschild v. Queen of Portugal* (1839), 3 Y. & C. Ex. 594; 160 E.R. 838; 1 Digest 46, 368.
- (5) *Duke of Brunswick v. King of Hanover* (1844), 6 Beav. 1; 13 L.J.Ch. 107; affirmed (1848), 2 H.L. Cas. 1; 9 E.R. 993, H.L.; 1 Digest 50, 403.

Action tried by BRANSON, J., without a jury.

The plaintiffs, the Union of Soviet Republics, claimed (a) a declaration that all official books, records, and documents of State in the possession of the defendant were their property, and that they were entitled to the sole and exclusive possession of all such books, records, and documents; (b) an order for delivery up by the defendant of the documents to M. Rakovski, the plaintiffs' chargé d'affaires in Great Britain, or his duly authorised agent; (c) an injunction to restrain the defendant from parting with or otherwise dealing with the documents save by handing them over to M. Rakovski. The defendant did not admit that the plaintiffs were a duly recognised foreign sovereign State. He denied that he had ever been in possession of or detained any official documents which were the public property of the plaintiffs. He did not admit that the plaintiffs were the lawful successors of the Russian Imperial government, or of the Russian provisional government and contended that, if he were found to be in possession of any documents to which the plaintiffs were entitled, M. Rakovski could not give an effective receipt for them. He further contended that no order should be made in favour of the plaintiffs until after judgment in three other actions, or without providing that the plaintiffs should indemnify the defendant in respect of the expense to which he had been or might be put in respect of those actions, in which he, with others, was sued as a member

of the Russian Government Committee in London. He counterclaimed for an indemnity against any liability of his in these three other actions, and for all necessary accounts and inquiries. The plaintiffs in reply contended that such a counterclaim could not be set up against a foreign sovereign State.

The Russian Government Committee was set up in London in 1916 by the Imperial Russian government and was continued by its lawful successor, the Russian provisional government. The documents claimed in this action were the property of these governments. In June, 1918, pursuant to an agreement with the British government, the Russian Government Committee ceased to function, and the documents were handed over to the custody of a board of trustees appointed by the chargé d'affaires of the Russian Provisional government. Of this board the defendant was a member, and, subsequently, president.

Singleton, K.C., and *Harold Murphy*, for the plaintiffs, referred to *South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord* (1); *WESTLAKE ON PRIVATE INTERNATIONAL LAW* (6th Edn.), pp. 259-260.

Cyril King, for the defendant, referred to *BOWSTEAD ON AGENCY* (5th Edn.), p. 234; *U.S.A. v. McRae* (2); *Strousberg v. Costa Rica Republic* (3); *Rothschild v. Queen of Portugal* (4).

BRANSON, J.—This action raises some peculiar points. It is not now denied, nor can it be denied, that the plaintiffs, the Union of Soviet Republics, are a sovereign State recognised as such by His Majesty's government. Nor is it denied that the documents are the property of the sovereign State or that M. Rakovski is entitled to receive them on its behalf. It follows that the plaintiffs are entitled to succeed subject to two matters. It is said (i) that the defendant is entitled to a lien on these papers until he has received an indemnity in respect of certain actions in which he has been made a defendant, and (ii) that his claim to indemnity can be made a defence or that the courts should allow a counterclaim of this nature in the present action.

During the early part of the war of 1914-1918 General Harmonius was sent over to this country to place contracts and purchase supplies for the Imperial Russian government, and the plaintiff, Colonel Belaiew, came over to help him. In Dec., 1916, the department to which General Harmonius was attached was reorganised, and the Russian Government Committee carried on the work of obtaining supplies. In June, 1918, owing to the events which had taken place in Russia, it was arranged that the Russian Government Committee should cease to function and it was accordingly dissolved, and the question arose how its books and documents should be preserved. It was arranged that they should be held by trustees, who would allow access to them by all authorised persons, it being necessary, as Colonel Belaiew pointed out in his evidence, to see that the money in the hands of the committee had been properly expended and that the contracts which it had made had been performed. In 1920 a number of actions—those in respect of which the indemnity was claimed—were commenced against this Russian Government Committee, such actions bearing the general resemblance that the plaintiffs in them claimed to be entitled to sums of money standing to the credit of the Russian Government Committee with Messrs. Baring Bros. Quite naturally and properly, Colonel Belaiew had to defend those actions and may have incurred costs in so doing, and it is an indemnity in respect of those costs that he claims.

It is said on behalf of the plaintiffs that, as they are a sovereign State, it is not possible to set up a counterclaim of this sort against them. The question whether that is so depends first on the exact principle which governs the law as to counterclaiming against a sovereign State. I think that the principle has been very clearly laid down by *NORTH, J.*, in *South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord* (1), where he cited the judgment of *JAMES, L.J.*, in *Strousberg v. Costa Rica Republic* (3). In that case *JAMES, L.J.*, put the law as much in favour of the defendant as any judge has yet done. He said:

A "It is a violation of the respect due to a foreign Sovereign or State to issue the
process of our courts against such Sovereign or State. There is but one excep-
tion, if it can be called an exception, to the rule, and that is where a foreign
Sovereign or State comes into the courts of this country for the purpose of
obtaining some remedy ; then by way of defence to that proceeding, the person
sued here may file a cross-claim against that Sovereign or State for enabling
B complete justice to be done between them. The defendant in that case is, in
fact, only giving to the foreign Sovereign's attorney or solicitor notice of the
proceedings—for that is, in substance, what it comes to—so as to bring in
whatever defence or counterclaim there might be as a set-off."

C It is said in this case that in order to allow complete justice to be done I should
allow the counterclaim. I cannot do so. I may be allowed to express the opinion
that it should be unnecessary. Be that as it may, Colonel Belaiew is holding these
documents belonging to the plaintiffs. If I allowed the counterclaim I would be
enforcing a claim in respect of liabilities which Colonel Belaiew may have incurred,
not as custodian of the documents, but as agent of the sovereign State for quite
different purposes. That brings the case within the words of NORTH, J., in the
D *South Africa Case* (1) citing the judgment of LORD LANGDALE in *Duke of Brunswick*
v. *King of Hanover* (5) (6 Beav. at p. 38) :

"There is no case to show that because he may be plaintiff in the courts of this
country for one matter, he may therefore be made a defendant in the courts of
this country for another and quite a different matter."

E I can find no case which goes so far as I am asked to go in this case in bringing
in matters not immediately connected with the claim. A case which is in favour
of the defendant is *U.S.A. v. McRae* (2), which illustrates the line between the
cases in which a defendant can, and those in which he cannot, counterclaim. If
the indemnity which Colonel Belaiew is seeking in this case had been an indemnity
in respect of some liability incurred in and about the custody of these documents
it would have been a clear case on the other side of the line, but I think that I
F would be extending the doctrine farther than it had ever been carried if I were to
allow this claim. I do not think that the point taken by counsel for the defendant,
that the defendant is entitled to this indemnity by way of defence on the basis of
lien, is a good one. An agent's lien is limited to liabilities incurred in the capacity
in which the subject-matter comes into his possession. In my view, the plaintiffs
are entitled to succeed, and there must be judgment for them, with costs.

G *Judgment for plaintiffs.*

Solicitors : *Ellis & Fairbairn ; Stephenson, Harwood & Tatham.*

[*Reported by T. R. FITZWALTER BUTLER, Barrister-at-Law.*]

SHARPE v. SOUTHERN RAIL. CO.

[COURT OF APPEAL (Bankes, Scrutton and Atkin, L.JJ.), June 22, 23, 1925]

[Reported [1925] 2 K.B. 811; 94 L.J.K.B. 913; 133 L.T. 693;

69 Sol. Jo. 775]

Railway—Negligence—Passenger injured while alighting from train—No invitation to alight—Duty of passenger not to alight without invitation and to exercise reasonable care—Duty of railway company not to give invitation until alighting safe—Duty of company to warn passenger of danger.

A plaintiff who complains of having suffered injury when alighting from a railway train at a station must establish negligence on the part of the railway company, and the evidence in support of this allegation is generally directed to establishing that an invitation was given to the plaintiff to alight from the train in circumstances which made it negligent on the part of the company to give it. The application of the law to any case must depend on the particular facts of that case, but in the absence of abnormal circumstances, such as an accident, a passenger is under a duty not to attempt to alight from a train unless he receives an invitation, express or implied (as in the case of a train stopping alongside the platform of a station in the normal way), to do so. A railway company has a duty not to give a passenger an invitation to alight until the carriage in which the passenger has been travelling has arrived at a position in which the passenger, exercising reasonable care, may safely alight. It is always the duty of the passenger, having received the invitation to alight, to exercise reasonable care in doing so proportionate to any difficulty in which he finds himself. It is manifest that there is no special duty cast on a railway company to give a warning of danger, e.g., where part of the train has stopped where there is no adjacent platform, which will be sufficient for, e.g., a drunken man or a man asleep. The warning which the company must give is one which is a reasonable warning to persons who are in the normal condition of passengers, or who ought to be, at any rate, on arrival at the station at which they intend to get out, sufficiently alert to know that they have arrived at that station and to receive any reasonable warning that the company's servants may give them in reference to alighting.

A train in which the plaintiff was a passenger arrived at G. while it was still daylight. By reason of the length of the train the rear coach, in which the plaintiff was travelling, stopped short of the platform. A porter called out to the passengers to keep their seats as the train was to be moved further along the platform, but the plaintiff, being asleep, did not hear him. He woke up suddenly, and got out hurriedly without looking to see what he was likely to tread on. There was a drop of 5 ft. from the floor of the plaintiff's compartment to the ground, with the result that he fell and was injured.

Held: there was no evidence of negligence on the part of the company; even if there was, it was abundantly clear upon the evidence that the company's negligence was not the cause of the accident, and that the plaintiff, in getting out without looking to see where he was going, was the cause of his own injury; and, therefore, he had been guilty of contributory negligence, and the defendants were not liable to him.

London, Tilbury, and Southend Rail. Co. v. Glasscock (1), (1903), 19 T.L.R. 305, distinguished on the facts.

Notes. The common law rule which regarded contributory negligence as a complete defence was abolished by the Law Reform (Contributory Negligence) Act, 1945, which provided for the apportionment of liability in the case of such negligence, but the case is included in these Reports for the pronouncements on the liability of railway companies (now British Transport Commission: see Transport Act, 1947) and passengers respectively in the circumstances in question.

A Applied: *Baker v. Longhurst & Sons, Ltd.*, [1932] All E.R. Rep. 102.

As to the degree of care necessary for carriers of passengers see 4 HALSBURY'S LAWS (3rd Edn.) 174 et seq., and *ibid.* 2nd Edn. vol. 23, pp. 684, 685. For cases see 8 DIGEST (Repl.) 86 et seq.

Cases referred to:

- B** (1) *London, Tilbury, and Southend Rail. Co. v. Glasscock* (1903), 19 T.L.R. 305, H.L.; 8 Digest (Repl.) 88, 599.
- (2) *Dublin, Wicklow and Wexford Rail. Co. v. Slattery* (1878), 3 App. Cas. 1155; 39 L.T. 365; 43 J.P. 68; 27 W.R. 191, H.L.; Digest (Repl.) 97, 645.
- (3) *Wakelin v. London and South-Western Rail. Co.* (1886), 12 App. Cas. 41; 56 L.J.Q.B. 229; 55 L.T. 709; 51 J.P. 404; 35 W.R. 141; 3 T.L.R. 233, H.L.; 36 Digest (Repl.) 130, 667.
- C** (4) *Bridges v. North London Rail. Co.* (1874), L.R. 7 H.L. 213; 43 L.J.Q.B. 151; 30 L.T. 844; 38 J.P. 644; 23 W.R. 62, H.L.; 8 Digest (Repl.) 87, 587.
- (5) *Praeger v. Bristol and Exeter Rail. Co.* (1871), 24 L.T. 105, Ex.Ch.; 8 Digest (Repl.) 89, 600.
- (6) *Cockle v. London and South-Eastern Rail. Co.* (1872), L.R. 7 C.P. 321; 41 L.J.C.P. 140; 27 L.T. 320; 20 W.R. 754, Ex.Ch.; 8 Digest (Repl.) 89, 601.
- D**

Appeal by the defendants from the verdict and judgment at a trial before HORRIDGE, J., and a jury.

The plaintiff claimed from the defendant company damages for injury sustained by him while a passenger on the company's railway, the injury being alleged to be due to the negligence of the company in inviting the plaintiff to alight at a place where it was dangerous to do so. The facts appear fully from the judgments. At the trial, HORRIDGE, J., directed the jury that the act of stopping a train at a station was, in the absence of a proper warning, an invitation to those passengers whose destination it was to alight, and, as it appeared from the regulations of the company that it was the duty of a porter to shout the warning along the permanent way alongside each coach of an overlapping train, and the porter in this case had contented himself with shouting only from the end of the platform, he left it to the jury to say whether the warning was sufficient. He also left it to them to say whether the plaintiff was guilty of a want of reasonable care in getting out without first looking to see where he was going. The jury found that the defendants were negligent and that the plaintiff was not, and awarded the plaintiff £1,500 damages. The defendants appealed upon the ground that there was no evidence on which the jury could find negligence on the part of the defendants, or absence of contributory negligence on the part of the plaintiff, and that the judge ought to have withdrawn the case from the jury on both issues.

Schiller, K.C., and *S. O. Henn Collins*, for the defendants.

J. B. Matthews, K.C., and *J. B. Melville*, for the plaintiff.

H **BANKES, L.J.**—This is one of a class of cases of which there are many in the books, and it arises where a passenger has had the misfortune to meet with an accident as the result of alighting from a railway train when the carriage in which the passenger is travelling has overshot or not reached the platform, or has arrived at a part of the platform which is either sloping or in some instances hollowed out and not of the same level as the rest of the platform. In all those cases very well-known rules of law apply, but the difficulty always is in applying those rules to the particular facts of the case.

I The two leading rules are these: First of all, a plaintiff who complains of having suffered injury in such circumstances must establish that there was some evidence of negligence on the part of the railway company, and the evidence, is generally directed to endeavouring to establish that an invitation was given to the passenger to alight at that stop in circumstances which made it negligent on the part of the company to give it. On the other hand, the railway company, in many cases, after denying

that there was any negligence of that kind, set up a case that, even if they were negligent, the passenger, by the exercise of reasonable care on his part, could have avoided the negligence complained of. It is in the application of these two rules that the difficulties have occurred which have led to the discussions which have taken place, and the judgments which have been given in the number of cases to which our attention has been called. I think, myself, that it would be dangerous to attempt to lay down anything like a rule of universal application because I wish to insist upon the view that the application of the law to any particular case must depend upon the particular facts of that case, but I do think that it may, perhaps, clear the ground if one considers, first, what the duty of a passenger obviously must be in relation to alighting when he has booked his journey and is a passenger from, we will say for illustration, London to Guildford. It seems to me to be obvious that in normal circumstances—and I am only speaking of a normal journey—a passenger is under a duty not to alight, or attempt to alight, unless he has received an invitation to do so. Nobody would suggest that a passenger would be justified in attempting to get out of a train at any point at which it drew up in the course of the journey without some invitation to do so, except in abnormal circumstances, such as an accident or something of that kind, when he has obviously a duty to do so in his own interest, but that is another matter. I am speaking of a normal journey and of a train which stops at a station and, unless there is an invitation to alight, either express or implied, on the part of the railway company, it seems to me that the passenger is under a duty not to attempt to do so. I need not discuss what an express invitation to alight is, but in a great many cases the difficult and crucial question has been: What amounts to an invitation to alight in the particular circumstances of each case? Was there or was there not an implied invitation to alight in those circumstances? No such question arises here because the case for the railway company is not only that there was no invitation to alight, but that there was an express prohibition against alighting, and, therefore, it is not necessary to consider the kind of question that arises in so many of these cases as to what amounts to an implied invitation to alight.

So much with regard to the duty of the passenger not to alight. The next point is this: Assuming the passenger ought not to attempt to alight until he has received the invitation to do so, what is the duty of the railway company in respect to the giving of the invitation? Is it express or implied? It seems to me that the duty is clear, namely, not to give the invitation to alight until the carriage in which the passenger has been travelling has arrived at a position in which, exercising reasonable care, the passenger may safely alight. In reference to that last question, there arises the further question: What, in the circumstances, having received the invitation, is the duty of the passenger? It seems to me to be obvious that the duty of the passenger is to use reasonable care in alighting after having received the invitation to do so. Supposing that view of the position is accurate, one has to apply that view to the particular circumstances of this case. The facts, so far as the plaintiff is concerned, are not in dispute, because he says that he was a passenger by this train which ran without stopping at intermediate stations, from Waterloo to Guildford. The train, as made up, consisted really of two trains which ran as one until it reached Guildford and was of greater length than could be accommodated at the Guildford platform. The train, as so made up, had been run in this way for a very considerable time, and it was part of the duty of one of the porters to station himself in such a position at the back of the train as to be able to warn all passengers in the part of the train which had not drawn up at the platform, to keep their seats and the train would then pull up to enable them to alight. It is quite true, as counsel for the plaintiff says, that the porter's duty as between himself and his employers, was to walk the full length of the carriages which had not reached the platform, but it seems to me really not to be material, that, as between himself and his employers, he did not do what his duty as a porter was. We are here considering the duty as between the

A railway company, his employers, and the passengers, and the duty as between the railway company and the passengers was to give reasonable notice to every passenger that he or she should not alight until the carriage reached the platform. It seems to me that when you are considering that duty it is quite immaterial whether the porter stood upon the ramp, or whether he stood at the guard's van at the end, or whether he stood in the middle, so long as he gave what was a reasonable notification to every person in these carriages that they should stay where they were until the train drew up. That is my view of the duty as between the railway company and the passenger. It is manifest that there is no special duty cast upon a railway company to give a warning which will be sufficient for either a drunken man or a man asleep. There cannot be any duty upon a railway company to give a further warning than would be a reasonable warning to persons who are in the normal condition of passengers travelling, or who ought to be, at any rate, upon arrival at the station at which they are intending to get out, sufficiently alert to know that they have arrived at the station and to receive any reasonable warning that the railway company's servants might give them in reference to alighting.

That being the position of things, the plaintiff's case is that, unfortunately, he went to sleep and slept very soundly. There were in the compartment with him three other passengers, and when the train arrived at Guildford his carriage did not reach the platform. The three passengers got out, and the last one realised that the rails upon which he had to jump were very slippery and in a loud voice gave notice to the plaintiff that the rails were slippery. Counsel says, and, perhaps, rightly, that it was that shouting that woke the plaintiff, but, waking from a deep sleep, he did not realise that it was the shouting which woke him and did not remember having heard it. He was so sound asleep that he did not notice the train stopping. He did not notice the door being opened or the three passengers get out. He did not notice the last man saying to him in a loudish voice : "Take care, the rails are slippery," and he did not hear what was said by the porter : "Keep your seats." Asked what he did, he said : "When I woke up the train was stopped. The passengers had left the compartment and the door was standing open. I gathered my papers and luggage and stepped from the train." Asked whether he looked, he says : "There was nothing to prevent me seeing where I was ; there was plenty of light ; there was enough light to see the ramp of the platform if I had looked for it. If I had looked I could have seen that the train was not drawn up at the platform." If the duty of a passenger upon receiving an invitation to alight is to take reasonable care as to how he alights, it seems to me manifest upon this evidence that the plaintiff did not take reasonable care, and did not take the care which, even assuming the railway company to have been negligent, was care by the exercise of which he could have avoided the accident.

It is said that the learned judge ought to have ruled at the conclusion of the plaintiff's case that there was no case to go to the jury upon the ground that upon the plaintiff's own showing he was guilty of an act of negligence which contributed to the accident and of a want of care the exercise of which would have avoided the result of any negligence on the part of the defendants. It is now also said that the learned judge ought not to have left the case to the jury at all, because there was no evidence upon which any reasonable jury could act, of an invitation by the railway company to alight at all at the time when the plaintiff did alight. The only difficulty that I have felt in reference to the first application to stop the case is by reason of the decision in *London, Tilbury and Southend Rail. Co. v. Glasscock* (1). In reference to that I wish to say, on the question of the degree of care which it is necessary that a passenger should take in alighting after receiving an invitation to alight, that it must depend upon the circumstances of each case. I do not suggest for a moment that a passenger is justified in shutting his eyes and then walking out of a carriage upon a platform, but I do realise that the degree of care which a passenger should take in reference to looking where he is going must and does depend very largely upon the circumstances of each case. Let me just

give an illustration. Take a passenger on the Underground Railway who travels every day between two stations, say, the Temple and Victoria. He knows, as a fact, that the carriages and the platforms of those two stations are so made that practically they are on a level when the train arrives at a standstill. A passenger, in those circumstances, is not justified in shutting his eyes and walking out, because he may walk into a box, or a passenger, or all sorts of things, but it seems to me that he is justified in not looking down to see where the platform is, because by experience—it may be of days or weeks or years—he knows exactly where it is. To use the language that was used by the learned lords justices in *Glasscock's Case* (1), he is entitled to consider that the platform is in a normal condition. I think that is what is meant by the language of these judgments, to which I will call attention in a moment. The position of a passenger when he arrives at a wayside station with which he is quite unfamiliar is entirely different, because he has no previous knowledge of the distance from the floor of the carriage to the ground, and his first duty, as it seems to me, before alighting is to see how far it is from where he stands to the ground, because, until he has ascertained that, no man can safely step into space. One knows what happens if one comes downstairs or goes upstairs. You think there is either one step more than there is, or one step less than there is, and how dangerous it is when you suddenly find that there is one step more or one step less than you thought. For a man to suggest that he is justified in stepping out of a railway carriage without knowing whether the platform is level with the floor of the carriage, or whether it is 1 ft. or 2 ft. or 3 ft. or possibly 4 ft. below the point from which he starts, seems to me to be an impossible proposition, and I say, therefore, that the plaintiff was not in the position of Mrs. Glasscock in the *Glasscock Case* (1), but was in that of a man who knew nothing at all about the part of Guildford Station at which this train would presumably draw up, or would have drawn up, if it had drawn up at the platform, and I cannot see that he is in a position to say that the decision in *Glasscock's Case* (1) is any protection to him. The reason I say that is this. It is quite true that in *Glasscock's Case* the jury were asked: Could the plaintiff have avoided injury by looking before she stepped off the footboard?—(A.) Yes.—Did the plaintiff look before she stepped down?—(A.) No.—Was it negligence of the plaintiff to step down without looking? And the jury said, No. It was upon that question that the decision of the lords justices turned—whether or not there was evidence upon which the jury were entitled to say that there was no negligence on the plaintiff's part in not looking before she stepped down. COLLINS, M.R., begins by saying that he thinks the case is very near the line, and he continues thus:

“Was there any evidence fit to be left to the jury on the question of negligence. It seems to me that there clearly was evidence fit to be left to the jury. This lady is shown to have been thoroughly familiar with the conditions of the Shoburness station. She had been in it often. It is perfectly possible for people to travel every day on a railway and arrive at a station without knowing where exactly the platform ends and where it narrows off, or recedes from the train. The two things are perfectly compatible, but the fact that she went every day to the station is, I think, important on this point. That she would know it was a terminus, and she would know also that the object of the train in drawing up at that terminus was that she should get out; and from her habit of knowledge of what the railway company did, she would under the circumstances, being in a train which came to a final standpoint, be in the same condition as any person who not being familiar with it, heard the name of a station called out when the train stopped, and so might be treated as having an invitation to alight. Under the circumstances here she is in the same position as if there had been an invitation given to her to alight. That being so, what was the condition of the platform on which she alighted? It was in such a condition as to render it an act of negligence on the part of the company to

A invite her to alight when the platform was in that condition, or at all events, to make it negligent for them to ask her to alight."

Then he speaks about the condition of the platform being normal. ROMER, L.J., also points out that this lady did look out ; she looked out only to such an extent that she saw other passengers getting out ; she did not look where she was going to step, and the reason for her not looking there was, as the lord justice points out, B that she was entitled to consider that the platform was in its normal condition, that is to say, that it was what she had known it on previous occasions by experience to be, namely, with a certain distance between the floor of the carriage and the surface of the platform. ROMER, L.J., says :

C "She looked out. She must have looked out. She says herself she saw the platform, that is to say, she could see she was at the terminus. She saw other passengers alighting, and they were alighting before she descended. She was not guilty of such wilful blindness as has been attempted to be made out on the part of the respondents. As I have said, she must have used a certain amount of observation ; and I do not think that there was sufficient here to justify the jury in finding, if they thought fit to do so, as they have, but there was a representation to the plaintiff that the platform was there in its normal condition."

What I think is meant by the lords justices throughout that case is the same as I have been endeavouring to indicate by my illustration of the passenger on the Underground Railway. There is an invitation to alight, an invitation to persons who have full knowledge of the particular station, who have a right to assume, if they are invited to alight at that station, that it will be in a condition in which they know it normally to be, namely, with a certain distance between the carriage and the platform, and in those circumstances it is open to a jury to say that they may step out, and it is not negligent on their part to step out without looking down in the first instance to ascertain what the jury say they are to be treated as knowing, namely, the distance between the floor of the carriage and the surface of the platform. There is nothing of that kind here. This unfortunate plaintiff is not in the position of the plaintiff in the *Glasscock Case* (1), and I do not think myself that there was any evidence which justified the jury in saying that the plaintiff was not negligent in not looking out, or that his accident could not be avoided by the exercise of reasonable care on his part, even assuming that there was an invitation to alight. I go further, and I think, if it were necessary to say so, G that the second point is a good point because, although I agree that, in certain circumstances it may be a question for a jury how far a witness is a witness of truth, or how far the evidence may be exaggerated, and matters of that kind, yet when you have got a body of evidence, which is not suggested is evidence of people who come wilfully to make statements that are not true, but about whom it is suggested that they may be exaggerating, giving full credit for all exaggeration, it seems to me that there was no evidence upon which any jury could reasonably come to the conclusion that a warning was not given, and such a warning as any reasonable person was entitled to receive, a warning given by the porter wherever he stood, in such a tone of voice that it must have reached any person who was awake in any one of those carriages. Given those facts, it does appear to me that there was no evidence fit to submit to the jury of an invitation to alight, and if it was the duty of the plaintiff to remain where he was until he received an invitation, either express or implied, he had no right to attempt to get out. In his case there is no question of any implied invitation, because he was fast asleep and had not the remotest notion whether the train had stopped there five minutes, or ten minutes, or two minutes, or one minute, or only just sufficient time to enable the other people to get out, or while they got out, but, unfortunately for the plaintiff, he woke at this critical moment and thinking, as people might naturally think, unless they were in a great hurry to tumble out at once, that he would be left

behind, he, unfortunately for him, did not take the reasonable precaution of looking before he leapt, and he suffered this injury. In my opinion, on both these grounds, the case ought to have been withdrawn from the jury. A

SCRUTTON, L.J.—I have carefully read through the judge's notes, and the shorthand notes of the evidence in this case, and I have listened to counsel's recital of other cases in which this sort of question has arisen, and I have read some of the reports myself. I have come to two conclusions: (i) that at the end of the plaintiff's case the judge ought to have withdrawn this case from the jury; and (ii) still more that at the end of the defendants' case the judge ought to have done so. B

It is not much good quoting cases with other facts unless you clearly understand what are the facts of the case you have got to decide. The facts of this case were these. The plaintiff was living at some place beyond Guildford, and occasionally he travelled through Guildford on his way to London. Upon this particular occasion he came down by a train during what are generally called the London "rush hours," when trains are long and usually crowded. He came by a train he had only travelled by once or twice before, which split into two parts at Guildford, one part going on to Portsmouth and the other going somewhere else—a long train. On previous occasions upon which he had travelled by it he had been in the first portion of the train and had got out at Guildford platform. The train was, in fact, as it always was, too long for the platform, so that when it arrived at Guildford part of the train was not opposite the platform at the rear of the train. What, theoretically, should be done was that a porter should be stationed at the back of the train to call out to the people in the rear carriages: "Keep your seats; the train will move up in a minute or two." "Half a minute" is, I think, the phrase used. Unfortunately, the plaintiff went to sleep. He woke up suddenly to find himself with the door open and the passengers who had been in the carriage out of the carriage, and, not unnaturally, according to his own account, he was a little flustered. The first thing he had to do was to find out where he was, because it was quite possible, as he had been to sleep, that he had slept through Guildford and got to some other station. The time was half-past five, within a quarter of an hour of sunset, in October; the plaintiff looked out, and from his familiarity with Guildford station he knew that he was in its neighbourhood. He says: "I recognised the lights on the platform and also the big indistinct buildings, and so forth." Then he gave his own account exactly of what happened. He was asked: "There was nothing, as I gather, to prevent your seeing exactly where you were? (A.) No. (Q.) There was plenty of light? (A.) Yes." "Was there enough light to see the lamp of the station if you looked for it?" (A.) "Yes. There was enough light to see the light of the station if I had looked for it." "Now just tell me this. It follows that if you had looked you would have seen that the train was not drawn up at the platform? (A.) Yes." "You have heard the suggestion which I make, that you were aware that the compartment in which you were travelling was not at the platform. You agree? (A.) No, I was not aware of it." There being plenty of light to see if he had looked, without looking he walks out of the carriage. Unfortunately there is a 5 ft. drop, which he would have seen if he had looked, there being plenty of light to see. He fell and broke his leg, and now claims damages from the company. That is the whole of the plaintiff's case; there was no other evidence, and it seems to me, with great respect to the learned judge, to be quite clear that upon that evidence the plaintiff should have been non-suited upon the ground that the accident was caused by his own fault in getting out of a carriage in broad daylight with a 5 ft. drop without looking where he was going. C D E F G H I

I take the law to be as stated by LORD HATHERLEY in *Dublin, Wicklow, and Wexford Rail. Co. v. Slattery* (2), as approved by LORD WATSON in *Wakelin v. London and South-Western Rail. Co.* (3):

"If such contributory negligence be admitted by the plaintiff, or be proved by the plaintiff's witnesses, while establishing negligence against the defendants, I

A do not think there is anything left for the jury to decide, there being no contest of fact."

Taking the plaintiff's evidence as given to be true, it seems to me to have been impossible for any reasonable jury upon that evidence to find a verdict against the company. I doubt whether the mere fact of stopping, and of the door of the compartment being open, is any evidence of invitation by the company, but certainly the invitation is not to get out without reasonable care ; it is not an invitation to get out with your eyes shut or without looking where you are going. If it is an invitation at all it is an invitation to get out with reasonable care, and to get out in broad daylight, when he could see what was there if he had looked for it, but he did not look, appears to be absolutely conclusive evidence that the plaintiff caused the accident by his own fault. The learned judge did not stop the case, and the defendants' evidence was called. A porter was called, who said that it was his duty to be at the end of the train to call out, and he did call out five or six times, either from the ramp or somewhere near the ramp : "Keep your seats, we will pull up in a minute or two," or "half a minute." Another porter who was coming by the rear of the train passed the guard's van heard the first porter call out, as he says, several times in a loud, clear voice. Still more important, I think, there was a passenger who had nothing whatever to do with the railway company, but was said to be a retired solicitor who had resided in Guildford for some thirty or forty years, obviously a man of some position, who was called. He was in the carriage next to the plaintiff's, and he said that he went to the window when the train stopped, and saw that they were not opposite the platform. And he said, looking out of the window, that he heard the porter call out quite distinctly : "Keep your seats ; the train will move up in a minute," that he saw three passengers get out of the carriage next to him in the way that people constantly do when they are habitués, that the third of them turned round and said to somebody behind him : "Take care how you get down, as the rail is slippery," and that then the plaintiff got out and fell on the line. Again, when that evidence had been given, it seems to me to be beyond any possibility of the jury could find any invitation on the part of the company ; so far from invitation there is a warning which should have been sufficient for any reasonable person. The daylight is proved, the warning is proved, and at the end of the defendants' case it appears to me that the case against the plaintiff had been strengthened and that there was no material upon which the jury could find for the plaintiff. That being so, I do not think it is very profitable to discuss what judges and juries have found in other cases, where the facts were different, and to inquire what would have been the case if he had got out in a tunnel, which he did not ; if he had got out on a curved platform, which he did not ; or if he had got out because a porter called out the name of the station, which he did not.

The only case which has given me any trouble is *Glasscock's Case* (1). We have had the advantage of reading the exact verbatim Court of Appeal judgments in the records in the House of Lords, and I notice that the Master of the Rolls begins his judgment by saying that the case is near the line, with which I agree, and from which it follows that a very small fact would put it the other side of the line. The facts were that the plaintiff got out, not on the platform, but on the sloping part of the platform called the ramp, that the station in question was a terminal station, that a number of other people were getting out and she saw that, that she was very familiar with the station, and, therefore, knew the ordinary distance from the carriage to the platform, and that there was no warning to her not to get out at all. On those facts the jury found that if she had looked she would not have had the accident, but that it was not negligent on her part not to look. That must be based on her knowledge of the ordinary height and distance between the platform and the carriage. That case seems to me to turn on facts which are not present in the case we are now considering.

I should like to say this about the matter generally, without reference to any particular case. I think there is a duty on a railway company to provide at the place where passengers alight a suitable means of alighting, and when through any unforeseen circumstances or cause the train stops at a place which is not the usual place for alighting, the railway company ought either to warn the passenger not to alight, or if they mean him to alight, either to provide him with suitable means of alighting or warn him of any danger which he would not, by ordinary care, notice, for instance in the tunnel in *Bridges v. North London Rail. Co.* (4), where there was a platform along part of the way, and, when the platform stopped, there was a heap of rubbish which might have looked like a platform. Again, in a case where the platform has a curve which does not fit the railway carriage, so that while at some part of the platform the railway carriage is next to the platform, at other parts it is a couple of feet away, obviously some sort of warning is necessary of what is dangerously like a trap ; but while that was the duty of the railway company there are several things which must be said to alleviate the burden on them. In the first place, I think the stopping of a train cannot be evidence in itself alone of invitation to alight. Trains stop for signals at places where there are no stations at all. Nobody has ever suggested that the stopping of a train for a signal is an invitation to alight, and for the reason that a passenger wishing to alight is expected to use his eyes and see that he is not at a station, and, therefore, the stopping is not with the intention that he should alight. Again, it seems to me that mere negligence of the railway company in some respect may not cause the damage complained of in alighting. Suppose a train through the negligence of an engine driver does not stop at all at a station but runs through it at full speed. If some stupid passenger attempts to get out because he sees the signboard "Guildford" nobody would say that his getting out of the train in full motion was the necessary reasonable consequence of the negligence of the engine driver in not stopping. While there is the duty on the railway company which I have stated, it seems to me there is also the duty on the passenger to use such reasonable care in alighting as is proportionate to the difficulty in which he finds himself, and when in broad daylight, with every opportunity of seeing, he walks straight out of a carriage to a drop of 5 ft. which he should have seen if he had looked, it seems to me impossible to hold that the railway company should be liable for that which is clearly the default of the passenger not using reasonable care. For these reasons it seems to me that the learned judge was wrong, first of all, in not stopping the case at the end of the plaintiff's evidence, and, secondly, in not stopping the case at the end of the defendants' evidence, and, therefore, the verdict and judgment must be set aside and judgment entered for the company.

ATKIN, L.J.—I agree, and I think when the whole of the evidence is considered, that this was a reasonably plain case in which the plaintiff failed to establish a cause of action against the defendants. I am inclined to agree with part of the argument on behalf of the plaintiff to the effect that there was a special duty laid upon the company in the circumstances of this case in that as a matter of practice they habitually dispatched from Waterloo this train consisting of two portions which was to stop at Guildford and necessarily was too long for the Guildford platform. The result was that when the train arrived at Guildford station part of the passengers would be invited to alight, and part of the passengers—namely, those in the carriages which did not reach the platform—would not be included or intended to be included in invitation to alight. I think it was obviously the duty of the railway company to prevent the passengers in these rear coaches from being misled by their position and to take steps to see that the stoppage of the train, which involved an invitation to some of the passengers in the first coaches, was not an invitation to them, and, therefore, if they had omitted to give a notice to the passengers in the last coaches that they were not to alight, I think that there would be evidence of negligence on the part of the railway company in omitting

A to take a reasonable precaution for the protection of those passengers. But I think when the evidence is examined as a whole, the uncontradicted evidence is that the defendants did take all reasonable precautions. They had appointed a porter whose duty it was, when the train arrived, to give precisely that warning to the passengers in the rear coaches that I have referred to ; it was his duty to warn them to keep their seats and to let them know that their coaches would eventually be moved on. That would be sufficient unless the servant deputed to perform those duties did not in fact perform them, but the evidence seems again to me to be uncontradicted that the porter in this case did perform the necessary duty, because he did in fact give a warning which was sufficient for all the passengers in the train. We have the evidence of the passenger who was in the next compartment to the plaintiff's, that he heard the warning, that it was loud and clear and was sufficient. That evidence is not contradicted by anybody, and, indeed, it could not be contradicted by the plaintiff because he was asleep. The reason why he did not hear the warning was because he was asleep, and nobody suggests that the warning need be such a warning as to awaken a sleeping passenger. In those circumstances it appears to me that the verdict of the jury in this case was really against the weight of any evidence there was as to breach of duty, and, more than that, it seems to me in the particular circumstances of this case, that there was really no evidence that the plaintiff's injury arose out of the breach of duty by the defendants if there was one, because there was no evidence that if the defendants had given a further and better warning, the plaintiff would have heard it. The evidence seems to me to be exactly to the contrary, namely, that he would not because he slept through the stopping of the train and through the opening of the door and the noise that necessarily accompanies the passing out of passengers who were in the same compartment on to the line.

But that in itself does not dispose of the case, nor is it the only matter that disposes of the case, because I agree with what has just been said, that when the plaintiff had given his evidence, he had proved conclusively that the accident to himself was due, not to the negligence of the defendants, but to his own lack of care in not looking where he was going, and when that is proved, and the facts are not in dispute, it appears to me that there was no evidence to go to the jury and that the duty of the learned judge was to non-suit. I do not wish to add anything to what has been said by the other members of the court as to the duty of the passengers, where there is an invitation to alight, to take some care to see where he is going to. That is a duty which was expressly reserved both in *Praeger v. Bristol and Exeter Rail. Co.* (5) and *Cockle v. South-Eastern Rail. Co.* (6), and in the opinion of the learned judges advising the House of Lords in *Bridges v. The North London Rail. Co.* (4). I think I may especially refer to the opinion of POLLOCK, B., in that case. The only case that causes me any difficulty at all about the matter is the *Glasscock Case* (1). That, undoubtedly, as reported, does present some difficulties because there the jury had found that the plaintiff could have avoided injury by looking before she stepped out, but that it was not negligent of her to step out without looking. The Court of Appeal had reversed the judgment of the learned judges who gave the judgment, and the House of Lords upheld the view taken by the Court of Appeal, and both the Court of Appeal and the House of Lords said that the finding of the jury should be supported. For the purpose of estimating the true legal value of that case, it is necessary to consider the facts very closely. I do not propose to go into them again as they have already been dealt with. I think it is a most material fact that in that case the plaintiff had travelled over and over again to this station ; that her train had always been drawn up at a part of the platform where she could at once proceed on a level from the carriage to the platform ; and that on the occasion in question she was misled by the train being drawn up, not at a place where there was no platform at all, but where there was a sloping platform, namely, the ramp. What COLLINS, M.R.,

said in that case seems to me to be of importance in estimating the legal value of the case, and I read it from the verbatim report of the judgment. He said: A

“The question is, was there a want of reasonable care in doing what she did? ‘Reasonable’ is a good deal a question for the jury if there are any facts to be ascertained and decided one way or the other on which they are to build their conclusion, whether she was or was not reasonably careful. The facts are these: That she was accustomed to come to this station; that she was enabled to assume that the time for her to get out had arrived; and, I think also, that she was entitled to assume that the conditions were normal and that to get out where she was safe. COCKBURN, C.J., in one of the cases cited by Mr. Bankes, *Cockle’s Case* (6), says this (L.R. 7 C.P., at p. 234): B

‘Still the purpose always is to bring all the carriages, if possible, to a level with the platform, and therefore a railway traveller is entitled to expect that when he steps out he will step on to the platform.’ C

Reasonable care is always a question of special circumstances, and what would be reasonable in one set of circumstances need not necessarily be reasonable in another. For instance, where the danger is obvious, where a person is going to cross a line which he knows is traversed by trains running to and fro, the degree of care that is reasonable under those circumstances in looking up and down to see whether a train is coming, is very different from the degree of care exacted from a person who is not going to encounter a known risk at all, but who is entitled to expect and assume that there is no risk at all. Those facts were before the jury; and having regard to what they knew of the plaintiff’s experience of this platform, drawing, as they did draw, undoubtedly the inference that she thought things were normal, and got out under those conditions, they thought that did not fasten upon her the responsibility of looking, not where she went in the sense of jumping on to a man walking in front, as Mr. Colam puts it, but not looking down and picking her steps in doing an ordinary act which she had done over and over again before and which involved no special care.” F

Those were the very special circumstances in that case, and I am bound to say that when they are investigated closely, that case loses any value as a legal authority, and must be treated for the future as a case which turned entirely on its special facts. Relieved from the burden of that case as laying down any proposition of law that would guide us in this case, it appears to me that the result is inevitable that in this case the plaintiff omitted to take what was the most ordinary precaution of looking, in daylight, where he was going and, under those circumstances, inasmuch as the accident was caused by his own lack of care, he cannot recover from the railway company, and therefore the appeal must be allowed and judgment entered for the defendants. G

Appeal allowed. H

Solicitors: *W. Bishop; Button, Fitch, Aylmer & Cooper.*

[Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.]

R. v. THORPE

[COURT OF CRIMINAL APPEAL (Lord Hewart, C.J., Avory and Shearman, JJ.), April 27, 1925]

[Reported 133 L.T. 95; 89 J.P. 143; 41 T.L.R. 468; 69 Sol. Jo. 525; 28 Cox, C.C. 4; 18 Cr. App. Rep. 189]

Criminal Law—Trial—Summing-up—Murder—Defence of accident—Evidence of manslaughter—Duty of judge to leave question of manslaughter to jury—Inconsistency with defence raised.

Where a prisoner is charged with murder, and there is evidence on which a verdict of manslaughter could be found, it is the duty of the judge to leave to the jury the question whether the crime committed has or has not been reduced to manslaughter, even though that defence has not been raised and even though that defence is inconsistent with the defence actually raised.

R. v. Hopper (1), [1915] 2 K.B. 431, approved.

Notes. Considered: R. v. Waddingham (1936), 80 Sol. Jo. 325. Followed: R. v. Gauthier (1943), 29 Cr. App. Rep. 113.

As to the judge's summing-up see 10 HALSBURY'S LAWS (3rd Edn.) 423-425, and for cases see 14 DIGEST (Repl.) 330 et seq.

Cases referred to:

- (1) R. v. Hopper, [1915] 2 K.B. 431; 84 L.J.K.B. 1371; 113 L.T. 381; 79 J.P. 335; 31 T.L.R. 360; 59 Sol. Jo. 478; 25 Cox, C.C. 34; 11 Cr. App. Rep. 136. C.C.A.; 14 Digest (Repl.) 334, 3232.
- (2) R. v. Clinton (1917), 12 Cr. App. Rep. 215, C.C.A.; 14 Digest (Repl.) 337, 3290.
- (3) R. v. Robinson (1922), 16 Cr. App. Rep. 140, C.C.A.; 14 Digest (Repl.) 337, 3291.

Application for leave to appeal against a conviction at Leeds Assizes of murder.

The applicant killed a man by stabbing. At the trial the defence of accident was put forward, and the defence of manslaughter was not raised or suggested. BRANSON, J., in summing up the case to the jury told them it was a case either of conviction of murder or acquittal. The applicant sought leave to appeal on the ground of misdirection.

Frankland for the applicant.—There was here abundant evidence of provocation, and the judge should have told the jury it was open to them to bring in a verdict of manslaughter. It is immaterial that this defence was not raised or was inconsistent with the defence actually raised.

Mitchell-Innes, K.C., and Charlesworth, for the Crown.—There was here no evidence of provocation, and not only was the defence of manslaughter not raised, but it could not have been raised on the evidence.

The judgment of the court was delivered by

LORD HEWART, C.J.—In this case the real ground of appeal is that, although the defence did not raise the question of manslaughter and although a defence of manslaughter would have been inconsistent with the defence which was actually raised, the judge ought nevertheless to have left to the jury the question whether the crime committed by the applicant amounted only to manslaughter.

The facts are as follows. A young man named Musgrove, twenty-three years of age, was a musician and teacher of music and he played the piano at two Bradford public-houses, at one during the daytime and at the other in the evening. He was a married man with two children, but was living apart from his wife, and indeed the moralist might observe that the principal figures in this case had married and subsequently separated. The applicant was twenty-one years of age, and lived with her mother, who had divorced her husband. At the age of eighteen

the applicant became the mother of a child, and left her husband shortly afterwards. She subsequently returned to him, but later left him again and met Musgrove a few months before Christmas, 1924. About Christmas in that year she learned that Musgrove was a married man living apart from his wife. Intimacy took place between the applicant and Musgrove. On the afternoon of Jan. 9 of this year the applicant and Musgrove were seen in a street and they appeared to be quarrelling. On the same night she informed a man that she intended to "knife" Musgrove. At 5 p.m. on Jan. 10 she called at a butcher's shop and a knife was found to be missing after her departure. On the same evening she told a barman that she was going to "do it on" Musgrove, because she loved him. She told a friend also that she intended "to do someone in" and made a similar statement to two women in a public-house. Later she was seen walking along the street a few paces in front of Musgrove. She was heard to say: "I am not going to be humbugged by you any more," and was seen to take something out of her handbag and to turn round and stab the man. On being arrested she said that she had brought the knife with her to frighten him.

In these circumstances was it the duty of the judge to leave to the jury the defence of manslaughter as a possible alternative? He was not asked to do so, and that defence was not so much as suggested. It was, moreover, inconsistent with the defence which was in fact put forward. But it is said that there were materials here, which, if disengaged from the remainder of the applicant's evidence, might have offered a foundation for a defence of manslaughter. The law with reference to this matter is stated in the judgment of this court in *R. v. Hopper* (1). It is to be observed that in that case, although counsel for the defence relied substantially on the defence of accident, he clearly indicated to the jury that, in the event of their not accepting the theory as to accident, he would invite them to find that the crime was manslaughter and not murder. LORD READING, C.J., said in his judgment ([1915] 2 K.B. at p. 434):

"It was not in our opinion correct to say that there was no alternative but to find accident or murder. There was sufficient evidence to justify the jury, if they accepted a certain view of the facts and circumstances, to find a verdict of manslaughter. It is not for us to say whether they would have found such a verdict, but the question is whether it should have been left open to them to find it if they thought fit."

He then stated the principle as follows (*ibid.* at p. 435):

"We do not assent to the suggestion that as the defence throughout the trial was accident, the judge was justified in not putting the question as to manslaughter. Whatever the line of defence adopted by counsel at the trial of a prisoner, we are of opinion that it is for the judge to put such questions as appear to him properly to arise upon the evidence even although counsel may not have raised some question himself."

That principle is not in the smallest degree in conflict with the judgments in cases such as *R. v. Clinton* (2) and *R. v. Robinson* (3). If there is no evidence on which a verdict of manslaughter can properly be found it is the duty of the judge not to leave to the jury the question of manslaughter, but if there is evidence, then it is the duty of the judge to leave the question although it has not been raised by the defence and is inconsistent with the defence actually raised.

In the present case the evidence on which it is suggested that the judge on his own motion should have left to the jury the defence of manslaughter was a mere fraction of the evidence of the applicant. It was the evidence that, although no blow was struck, words of reproach, accompanied by pushing and jostling, were uttered by Musgrove to the applicant. It is the duty of the judge to put to the jury such questions as appear to him properly to arise on the evidence. In other words, in a case such as *R. v. Hopper* (1) he should put the alternative defence

A of manslaughter, if there is evidence on which the jury can reasonably reduce the crime from murder to manslaughter. In that case the court was clearly of opinion that there was sufficient evidence to justify the jury in finding a verdict of manslaughter, if they accepted a certain view of the facts and circumstances. But can it be said that that is the case here? In our opinion, it cannot truly be said. The prosecution have accepted the position that if there had been a formal submission to the judge that, on the evidence, the defence of manslaughter ought to be left to the jury, he would have been entitled to say that there was no evidence on which the jury could properly arrive at such a verdict. In our opinion, the judge would have rightly made that ruling, had there been a submission of that kind. There being here no evidence which would have justified the jury in finding a verdict of manslaughter, there was no duty on the part of the judge

C to leave to the jury that defence, and the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Registrar of Court of Criminal Appeal; Director of Public Prosecutions.*

[*Reported by T. R. FITZWALTER BUTLER, Esq., Barrister-at-Law.*]

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SUTTLE AND OTHERS v. CRESSWELL

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Sankey, JJ.), November 10, 11, 1925]

F

[Reported [1926] 1 K.B. 264; 95 L.J.K.B. 367; 134 L.T. 144;
90 J.P. 3; 42 T.L.R. 75; 23 L.G.R. 695; 28 Cox, C.C. 94]

Gaming—Ready money football betting—Publication of coupons in newspaper Ready Money Football Betting Act, 1920 (10 & 11 Geo. 5, c. 52), s. 2.

G

The appellants were the proprietors of a weekly newspaper which announced a "free football competition" and contained a coupon in connection therewith giving particulars of ten future football matches and a column for the competitors to fill in their forecast of the results, a prize of £150 being offered for a correct forecast of all the results and a prize of £100 for a correct forecast of nine results. No money was to be sent with the coupons, but purchasers paid 6d. for each copy of the newspaper. The appellants having been summoned for unlawfully publishing a coupon of a ready money football betting business contrary to the Ready Money Football Betting Act, 1920, s. 1, the justices found that the majority of the persons who bought the newspaper did so for the sake of the coupon, and they convicted the appellants.

H

Held: in view of the above-mentioned finding of the justices, which there was evidence to support, the appellants were rightly convicted.

I

R. v. Stoddart (1), [1901] 1 K.B. 177, applied.

Notes. Applied: *Turf Publishers v. Davies*, [1927] W.N. 190. Explained: *Leng (Sheffield Telegraph) v. Sillitoe*, [1929] 1 K.B. 366. Considered: *Barker v. Sillitoe*, [1931] All E.R. Rep. 395.

As to ready money football betting see 18 HALSBURY'S LAWS (3rd Edn.) 198, 199, and as to coupon competitions see *ibid.* 205, 206. For cases see 25 DIGEST 449, 450, 463, 464. For Ready Money Football Betting Act, 1920, see 10 HALSBURY'S STATUTES (2nd Edn.) 780.

Cases referred to :

- (1) *R. v. Stoddart*, [1901] 1 K.B. 177; 70 L.J.Q.B. 189; 83 L.T. 538; 64 J.P. 774; 49 W.R. 173; 17 T.L.R. 55; 45 Sol. Jo. 61; 19 Cox, C.C. 587, C.C.R.; 25 Digest 463, 498.
- (2) *Carlill v. Carbolic Smoke Ball Co.*, [1892] 2 Q.B. 484; 61 L.J.Q.B. 696; 56 J.P. 665; 8 T.L.R. 680; 36 Sol. Jo. 628; affirmed, [1893] 1 Q.B. 256; 62 L.J.Q.B. 257; 67 L.T. 837; 57 J.P. 325; 41 W.R. 210; 9 T.L.R. 124; 4 R. 176, C.A.; 25 Digest 894, 2.
- (3) *Hawke v. Hulton & Co.* (1905), 22 T.L.R. 169; 50 Sol. Jo. 158, D.C.; 25 Digest 464, 501.
- (4) *Caminada v. Hulton* (1891), 60 L.J.M.C. 116; 64 L.T. 572; 55 J.P. 727; 17 Cox, C.C. 307; sub nom. *R. v. Hulton*, 39 W.R. 540; 7 T.L.R. 491, D.C.; 25 Digest 463, 496.
- (5) *Stoddart v. Sagar, Sagar v. Stoddart*, [1895] 2 Q.B. 474; 64 L.J.M.C. 234; 73 L.T. 215; 59 J.P. 598; 44 W.R. 287; 11 T.L.R. 568; 39 Sol. Jo. 710; 18 Cox, C.C. 165; 15 R. 579, D.C.; 25 Digest 463, 497.
- (6) *Strang v. Brown*, 1923 S.C. (J.) 74; 25 Digest 464, *d.*

Case Stated by justices for the borough of Ipswich, before whom the appellants, Bertie Suttle, Charles Theobald, Alfred Gage, and Spencer Wright, were convicted on April 30, 1925, on two informations preferred by Detective Inspector Cresswell, the respondent, for unlawfully publishing or causing to be published a coupon of a ready money football betting business called the "Premier Sporting Times," contrary to the Ready Money Football Betting Act, 1920.

Upon the hearing of the informations, the following facts were proved or admitted : (a) The "Premier Sporting Times" was a paper published regularly every week through the year; its price was 6d., and it had an extensive circulation. (b) The weekly circulation of the paper during the winter months was 32,000 to 33,000, but during the summer months, when the paper contained racing news only, its weekly circulation was from 8,000 to 9,000. (c) The appellants were the proprietors of the paper, and were responsible for the publishing of it on March 23, 1925, and March 28, 1925. (d) The issues of March 23, 1925, and March 28, 1925, each consisted of an eight-side pamphlet or paper, 9 in. by 5½ in., and each contained racing notes on pages 1 and 2, football notes on page 3, racing hints and selections on pages 4 and 5, a football article on page 6, the weekly skill contest and free football competition with coupon on page 7, and (in the publication of March 28) the results of certain football matches and information regarding a free accident insurance for footballers on page 8. (e) Each coupon contained particulars of ten football matches to be played on a future date, with columns for the competitor to enter his forecast of the results of the matches. A prize of £150 was offered for a correct forecast of the results of all the matches, and a prize of £100 for a correct forecast of the results of nine of the matches. No money was to be sent with the coupons. (f) Competitions which were on exactly similar lines to those contained in the "Premier Sporting Times," and for which large prizes were offered, were to be found in many newspapers which were published daily for the price of one penny and contained in addition all the general news to be found in an ordinary daily newspaper.

On behalf of the appellants it was contended that upon the facts nothing in the nature of betting or of a betting business was disclosed, but that the appellants were merely conducting a competition for the benefit of their readers. It was further contended that there was no evidence upon which the court could decide that the purchasers of the paper paid their money, not for the paper itself, but in order to get the benefit of the coupon. On behalf of the respondent it was contended that the purchasers of the paper paid their sixpences mainly for the coupon, that the transaction amounted to betting, and that the appellants had circulated coupons of a ready money football betting business within the meaning of the Act. The justices'

A attention was directed to the following decisions: *Carlill v. Carbolic Smoke Ball Co.* (2), *Hawke v. Hulton & Co.* (3), *Caminada v. Hulton* (4), *Stoddart v. Sagar* (5), *R. v. Stoddart* (1), *Strang v. Brown* (6). After having heard the evidence, the justices were of opinion that the "Premier Sporting Times" was purchased by the vast majority of purchasers for the football coupon; that the publication, circulation, and purchase thereof constituted a ready money football betting transaction; and that the same was published in connection with a ready money football betting business. Accordingly, they convicted the appellants as above stated.

C. E. Rochford for the appellants.

Richard O'Sullivan for the respondent.

C **LORD HEWART, C.J.**—In my opinion, it is clear that this appeal ought to be dismissed. A ready money football betting business is defined in s. 2 of the Act in these terms:

" 'Ready money football betting business' shall mean any business or agency for the making of ready money bets or wagers, or for the receipt of any money or valuable thing as the consideration for a bet or wager in connection with any football game."

D The appellants contended that nothing in the nature of a betting business was disclosed, but that they were carrying on a business for the benefit of their customers. It is perfectly obvious that upon the facts it was equally reasonable to say—I should say far more reasonable—that the appellants were simply carrying on a betting business for the benefit of themselves. Stress has been laid by counsel for the appellants on a series of cases, especially *Caminada v. Hulton*. With regard to that case, it is enough to say that it was clearly distinguished by the Court for Crown Cases Reserved in *R. v. Stoddart* (1), where LORD ALVERSTONE said:

F "The case of *Caminada v. Hulton* (4) is distinguishable on the ground that *prima facie* the consideration for which the purchaser of the newspaper paid his money was the newspaper itself, and there was no finding that it was in fact paid for the purpose of getting the benefit of the coupon."

G Those observations are applicable a fortiori to the distinction between *Caminada v. Hulton* (4) and the present case. Here this small pamphlet was sold at 6d., and the justices were of opinion, as they could not fail to be, that the purchasers bought it for the sake of the coupon. In *Stoddart v. Sagar* (5) the question was whether there was evidence to support the alderman's findings and the court declined to send the case back to be considered.

A case with far more bearing on the present matter is *R. v. Stoddart* (1), to which reference has already been made. In that case

H "the defendant was the occupier of an office and the proprietor of a newspaper published weekly at that office. Each number of the paper contained a notice of what was called a 'coupon competition'—that is to say, of a promise by the defendant to pay a certain specified sum of money to such persons as should correctly guess the result of a certain horse race then shortly about to be run, and should write their guesses upon certain forms called 'coupons,' which were issued with each number of the newspaper, and should return the coupons so filled up to the defendant's office together with the sum of one penny in respect of each guess made. A large number of persons every week sent in to the defendant's office coupons filled up as aforesaid, accompanied by remittances of money."

I On those facts the defendant was convicted of betting. LORD ALVERSTONE, C.J., said:

"I am not able to see the distinction . . . between the transaction with which we have to deal and ordinary betting. The person who pays the extra pence

does so because the person to whom the money is paid comes under a promise to pay a certain sum if the horse named by the person sending in the coupons wins the race. That seems to me to fulfil all the conditions which go to make up a bet."

WILLS, J., uses words to the same effect: "This is about as clear a case of betting pure and simple as can well be conceived."

Reference has also been made to the Scottish case of *Strang v. Brown* (6), in which the facts were very similar to those in the present case. LORD HUNTER said in that case:

"You have a very large number of people in populous parts of Scotland subscribing their twopences. They are not doing that for anything of value in the paper they are getting, but in the expectation that if they are correct in naming the winners of a certain number of football matches, and, further, if they are successful in indicating the number of points by which the successful teams will win, they will receive a large sum in return. Strang collects all the money himself. But if you consider any particular individual, Strang has, in fact, made a promise to that individual that a sum largely in excess of the twopence will be given, if that person is successful in naming the winners and predicting the result of the game. I cannot see that that is anything other than a bet. It is a promise by Strang to pay upon the occurrence of an uncertain event. And therefore I think that the sheriff substitute was justified in reaching the conclusion which he did reach that it was a ready money football betting business that was being conducted by Strang."

We have also been referred to *Hawke v. Hulton & Co.* (3), an important case where the limitations of *Caminada v. Hulton* (4) were pointed out. In *Hawke v. Hulton & Co.* (3) the matter was remitted to the justices.

In the present case counsel for the appellants proposes, not without ingenuity, to examine the transaction at the last moment when the proprietors have collected all the sixpences, and it is argued that because it is then clear that they are bound to make a profit in any event there is no bet. If that were so, the promoters of schemes of this kind would be, if I may use Burke's expression, "on velvet." That, however, is not the moment at which the true nature of this transaction is to be analysed. The transaction is complete as soon as the first purchaser pays his sixpence. From that moment the proprietors run the risk of having to pay the prize, and they take their chance. The argument for the defence would apply equally to any bookmaker who had so contrived to make his book that in any event he must be in pocket. In the present case, on the facts before them, the justices came to the conclusion, as they were bound to do, that

"the 'Premier Sporting Times' was purchased by the vast majority of purchasers for the football coupon; that the publication, circulation and purchase thereof constituted a ready money football betting transaction; and that the same was published in connection with a ready money football betting business."

It is a typical case of the mischief against which this Act is directed, and for these reasons the appeal must, I think, be dismissed.

AYORY, J.—I agree that this appeal should be dismissed. It is worth noticing that this conviction is under an Act which, as its title shows, is intended

"to prevent the writing, printing, publishing or circulating in the United Kingdom of advertisements, circulars, or coupons of any ready money football betting business."

It is obvious that it does not relate merely to the ordinary betting slips, and when one looks at the definition of a ready money football betting business in s. 2 it is clear that it covers both parts of s. 1 of the Betting Act, 1853:

A "No house, office, room or other place shall be opened, kept, or used for the purpose of the owner, occupier or keeper thereof or any person using the same, or any person procured or employed by or acting for on on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business thereof, betting with persons resorting thereto ; or for the purpose of any money or
B valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid as or for the consideration for any assurance, undertaking, promise or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race or other race, fight, game, sport, or exercise . . ."

C Counsel for the appellants has strenuously argued that this does not amount to a ready money football betting business, and the only way in which he can get rid of *R. v. Stoddart* (1) is by saying that that case was under the second part of s. 1 of the Betting Act, 1853. Of the five judges in that case, two had no doubt that the transaction amounted to ready money betting, and the other three possibly expressed no opinion on it, but they all agreed that the case fell within the second
D part of the section. It is clear that this Act which we are now construing applies both to the first part and also to the second part of the old section. That being so, *R. v. Stoddart* (1) is a direct authority. As the justices have found that the vast majority of the purchasers bought this paper for the sake of the coupon, *R. v. Stoddart* (1) is an authority that that is enough to bring it within the definition. I concur with all that my Lord has said on *Caminada v. Hulton* (4) and *Stoddart v. Sagar* (5), only adding that in *Stoddart v. Sagar* (5) WRIGHT, J., said :

E "No doubt it is possible that under certain circumstances such a competition as this may be a betting transaction, for a case can be suggested where the facts might be so found as to show that it was. For instance, if it were found that a place was used for the purpose of money being received as the consideration for a promise to pay money on an event or contingency of or
F relating to a race, that might amount to a finding that the contract was a wagering contract, and the Betting Act might be held applicable."

Here we have the very thing at which the Act is aimed, and I agree that the appeal should be dismissed.

G **SANKEY, J.**—I agree. I attach considerable importance to the title of the Act—"an Act to prevent the writing, printing, publishing, or circulating in the United Kingdom of advertisements, circulars, or coupons or of any ready money football betting business."

H The first section, which imposes the penalty, follows those words. Section 2 is a definition of a ready money football betting business, and I think the words used point to a state of things quite different from ordinary street betting. What we
I have to decide is whether there was any evidence to support the findings of the justices. We have a number of facts—the price and size of the paper, and the time of publication, for example—which they were entitled to take into consideration. I agree with my Lord that this is a typical case, and with my Lord and AVORY, J., in what they have said as to *Caminada v. Hulton* (4) and *R. v. Stoddart* (1).

Appeal dismissed.

Solicitors: Shirley W. Woolmer; Field, Roscoe & Co., for Aldous & Gotelee, Ipswich.

[Reported by J. F. WALKER, Esq., Barrister-at-Law.]

A

SMITH v. SMITH

[KING'S BENCH DIVISION (Bankes and Scrutton, L.JJ., sitting as additional judges),
March 24, 25, 1925]

[Reported [1925] 2 K.B. 144; 94 L.J.K.B. 813; 133 L.T. 345]

County Court—Jurisdiction—Ancillary jurisdiction—Action for money claim and declaration as to future payments—Declaration involving payments exceeding limit of county court jurisdiction—Jurisdiction to make declaration—Supreme Court of Judicature Act, 1873 (36 & 37 Vict., c. 66), s. 89—County Courts Act, 1888 (51 & 52 Vict., c. 43), s. 56.

Section 89 of the Supreme Court of Judicature Act, 1873, which conferred on a county court an ancillary jurisdiction to grant "as regards all causes of action within its jurisdiction . . . such relief, redress or remedy . . . in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice," **held**, not to extend, but merely to complete, the ordinary jurisdiction of the county court, and, therefore, the county court judge had no power, in an action in which the plaintiff recovered £40 for breach of a contract to pay him a pension of £240 a year payable at the rate of £20 a month, further to grant the plaintiff a declaration that the defendant was liable to pay the pension to the plaintiff during his (the plaintiff's) lifetime, which might involve payment of a sum in excess of the jurisdiction of the county court.

Notes. The County Courts Act, 1888, was repealed by the County Courts Act, 1934, which is now replaced by the County Courts Act, 1959. By s. 39 of the latter Act, a county court has jurisdiction to hear and determine any action founded on contract or on tort where the sum claimed is not more than £400. By s. 74 of the Act of 1959 a county court has a general ancillary jurisdiction to grant such relief, redress or remedy as ought to be granted or given in a like case by the High Court "and in as full and ample a manner."

Referred to: *Humber Conservancy Board v. Federated Coal and Shipping Co.*, [1928] 1 K.B. 492.

As to county court jurisdiction see 9 HALSBURY'S LAWS (3rd Edn.) 141 et seq., and for cases see 13 DIGEST (Repl.) 381 et seq.

Cases referred to:

- (1) *R. v. Cheshire County Court Judge and United Society of Boilermakers, Ex parte Malone*, [1921] 2 K.B. 694; 90 L.J.K.B. 772; 125 L.T. 588; 65 Sol. Jo. 552; sub nom. *R. v. Parsons, Ex parte Malone*, 37 T.L.R. 546, C.A.; 13 Digest (Repl.) 381, 104.
- (2) *Ex parte Martin* (1879), 4 Q.B.D. 212; 27 W.R. 431; sub nom. *R. v. Harington*, 48 L.J.Q.B. 300; affirmed sub nom. *Martin v. Bannister*, 4 Q.B.D. 491; 28 W.R. 143; sub nom. *R. v. Harington*, 48 L.J.Q.B. 677; 43 J.P. 829, C.A.; 13 Digest (Repl.) 381, 100.
- (3) *Davey v. Robinson*, [1923] 1 K.B. 563; 92 L.J.K.B. 336; 128 L.T. 513; 39 T.L.R. 163; 67 Sol. Jo. 246. C.A.; 13 Digest (Repl.) 409, 359.
- (4) *Simpson v. Crowle*, [1921] 3 K.B. 243; 90 L.J.K.B. 878; 125 L.T. 607; 37 T.L.R. 658, D.C.; 13 Digest (Repl.) 382, 105.

Appeal from the Mayor's and City of London Court.

The plaintiff was a salesman and buyer employed by Benjamin Smith & Co., a firm of corn merchants, in which firm the defendant became sole partner in 1916. The plaintiff alleged that, at an interview between him and the defendant in December, 1916, the defendant agreed to pay the plaintiff a retiring pension of £240 per annum for life, payable by monthly instalments of £20. The defendant denied having made this agreement, and stated that he had agreed only to pay the plaintiff a voluntary allowance while the business continued, and that the

A business had been closed owing to losses. The plaintiff, who retired in August, 1917, brought an action to recover £40, being two months' arrears of the pension under the alleged agreement, and further claimed a declaration that the defendant was liable to pay to the plaintiff during the plaintiff's lifetime a pension at the rate of £240 per annum by monthly instalments of £20. The county court judge gave judgment in favour of the plaintiff for the £40 claimed, and made the declaration asked for. The defendant appealed.

By the Supreme Court of Judicature Act, 1873, s. 89 [repealed by Supreme Court of Judicature (Consolidation) Act, 1925] :

"Every inferior court which now has or which may after the passing of this Act have jurisdiction in equity, or at law and in equity, and in Admiralty, respectively, shall, as regards all causes of action within its jurisdiction for the time being, have power to grant, and shall grant in any proceeding before such court, such relief, redress or remedy, or combination of remedies, . . . in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice."

By the County Courts Act, 1888, s. 56 (as amended by the County Courts Act, 1903) :

"All personal actions, where the debt, demand, or damage claimed is not more than £100, whether on balance of account or otherwise, may be commenced in the court. . . ."

Miller, K.C., and Trapnell, for the defendant, cited *R. v. Cheshire County Court Judge and United Society of Boilermakers, Ex parte Malone* (1).

Horton-Smith, for the plaintiff, referred to *Ex parte Martin* (2), *Davey v. Robinson* (3) and *Simpson v. Crowle* (4).

BANKES, L.J.—This appeal raises two distinct questions, one of which is an important question of jurisdiction. The objection is taken that the county court judge had no jurisdiction to entertain the claim for a declaration, and that the judgment, in so far as it granted a declaration, is bad and must be set aside. That question seems to me perfectly plain, both from the statutes and the authorities. Two statutes have to be considered, the first being s. 56 of the County Courts Act, 1888, which defines the jurisdiction of the county court in personal actions, and the second, s. 89 of the Supreme Court of Judicature Act, 1873. In my opinion, the governing words of the latter section are those which indicate that its operation is directed to causes of action within the jurisdiction of the inferior court for the time being, and that the relief contemplated is not relief extending the jurisdiction of the inferior court, but relief completing and rendering more effective any jurisdiction which it has independently. I should be content to base my decision on the words of this section, which, in my opinion, indicate quite clearly that the section does not extend, but merely completes, the jurisdiction.

Counsel for the plaintiff has cited two cases, the first of which he contends is strongly in his favour. That is *Ex parte Martin* (2), but I cannot adopt the same view of its effect. In that case the plaintiff claimed £5 damages in respect of a nuisance, and at the same time claimed an injunction. He got judgment for £5, and then asked for the injunction, the object of the injunction being to render more effective the judgment he had already recovered. What the court said, in effect, was: We will give you £5 damages, and we will see to it that you shall not have occasion again to come here for a further £5, because we have jurisdiction to prevent the defendant from doing an unlawful act and one for which he has to pay £5. I will refer to certain passages from the judgments. In the Divisional Court, POLLOCK, B., said (4 Q.B.D. at p. 215) :

"A plaintiff, it was argued, may claim only a small sum of £5 or £10 for damages, but the injunction may have an effect on the value of the defendant's property to an extent far beyond that sum. The plaintiff's answer is that

he has nothing to do with the effect it may have on the defendant's property ; his damages are limited to the sum he claims."

The plaintiff said in effect that he did not wish to come again for another £5, and he asked for an injunction to make the judgment for £5 as effective as possible. In the Court of Appeal BRAMWELL, L.J., said (4 Q.B.D. at p. 491) :

"I am not sure that the county court would have jurisdiction if the only cause of action were apprehended damage. But if there has been actual damage, there is but one cause of action for which there are two remedies ; damages and an injunction."

BRETT, L.J., said (*ibid.* at p. 492) :

"As soon as it is admitted that an injunction is not a cause of action but a remedy the power of the county court to grant an injunction becomes clear."

COTTON, L.J., makes the point abundantly clear, when he says (*ibid.* at p. 493) :

"That the granting of an injunction was merely an additional remedy, and not a new cause of action, is shown by the fact that the Court of Chancery would give no damages, but only granted an injunction."

With regard to the other case cited, *R. v. Cheshire County Court Judge and United Society of Boilermakers, Ex parte Malone* (1), I quite agree that opinions there expressed by some members of the court were obiter dicta, because the point there under discussion was not the same point as that raised in the present case. Reference must be made to the facts of that case to explain the introduction of the expression "ancillary." The action was for a declaration merely, without any other claim. The issue before the court was whether the county court had jurisdiction to deal with any such claim. In discussing the matter, the Master of the Rolls says more than once that the right which the county court has under s. 89 of the Judicature Act, 1873, is ancillary, that is to say, supplemental. It is an additional remedy, which makes more effective a remedy for the one cause of action. Undoubtedly, LORD STERNDAL, M.R., expressed very clearly his opinion as to the argument referring to the construction which should be placed upon s. 89 of the Judicature Act. He said ([1921] 2 K.B. at p. 701) :

"It entirely ignores the limited jurisdiction of the county court. It is not at all difficult to suppose cases in which declarations of right might be asked for in this way, which might actually involve many thousands of pounds in money ; and if such a case as that could be got into the county court simply by leaving out the technical claim for damages, the limit of the county court jurisdiction might be entirely abolished whenever there was a right to ask for a declaration. I think that is wrong and cannot be done."

It may be true that that is obiter dictum, but it is an expression of opinion by a very learned judge, and it is entirely in accordance with the decision in *Ex parte Martin* (2).

Applying those principles and those decisions to the present case, it appears to me perfectly plain that there are in this claim two distinct causes of action. The one is a cause of action to recover two months' arrears of pension due on May 31, 1924, and to establish that it was only necessary to prove an agreement covering that period. But the plaintiff further asks for a declaration that the defendant is not only liable in respect of that period, but that he is further liable to pay that amount monthly for the whole of the plaintiff's lifetime. It seems difficult to follow the suggestion that this is not a separate and distinct cause of action. It is not an additional relief or remedy, or one that makes more effective the plaintiff's remedy in respect of the first cause of action. It is asking for something essentially different, and something that gives rise to an entirely different cause of action. It may be that the two claims will be proved by the same agreement, but that does not prevent their being separate causes of action. For these reasons I think

A the appeal must be allowed in so far as it asks for the setting aside of the declaration contained in the judgment. With regard to the second point, I hold that the county court judge was justified in coming to the conclusion, upon the facts as he found them, that there was an agreement by the defendant to pay the plaintiff £240 per annum during the plaintiff's life by equal monthly instalments of £20. The judgment for the plaintiff for £40 must, therefore, stand.

B **SCRUTTON, L.J.**—I agree. I think that there was ample evidence on which the county court judge could find that there was an agreement by the defendant to pay the plaintiff a retiring allowance of £240 a year by monthly instalments. On that ground the plaintiff was entitled to judgment for £40, which he claimed as two months' arrears under that allowance.

C Now comes a much larger question. The county court judge did not confine his decision to the claim of £20 per month for two months, but proceeded further to make a declaration that the defendant was liable to pay to the plaintiff a pension at the rate of £240 per annum by monthly instalments of £20. In other words, he found a liability on the part of the defendant of £240 a year, which may exist for some years, and may, therefore, amount to over £1,000. Had he jurisdiction to do that? There is no doubt that in the High Court, under the special High Court rules, such a declaration could be made, apart from any money claim, but a county court judge is a judge of limited jurisdiction, in that he cannot adjudicate upon money claims exceeding £100, and I fail to understand, when he cannot adjudicate upon money claims exceeding £100, how he can hold that a defendant is liable to pay £240 a year for the lifetime of a plaintiff. In my opinion, the judge clearly exceeded his jurisdiction when he made a declaration that that was a liability on the part of the defendant. I do not propose to consider whether the expressions used by LORD STERNDALÉ, M.R., in *R. v. Cheshire County Court Judge and United Society of Boilermakers, Ex parte Malone* (1) were obiter dicta or not. It appears that LORD STERNDALÉ himself thought they were not, because he gave two reasons for his decision. One was that, as there was no money claim, nothing could be done in respect of such a claim. The other he expressed in the first part of his judgment which has been read by BANKES, L.J. (sup.). Again he said ([1921] 2 K.B. at p. 703):

E "A claim for such a declaration as this cannot be brought in the county court without anything to limit the money result of it, so as to disregard the limit of the jurisdiction of the county court altogether. As I have pointed out it would be possible by simply omitting a claim for damages to bring into a county court an action for a declaration which might involve a money result of many thousands of pounds. I do not think that that can be done."

G In my opinion, when the learned county court judge made this declaration that the defendant is liable to pay during the plaintiff's lifetime an annual pension at the rate of £240 per annum, he was involving the payment of money which was beyond the limit of the county court jurisdiction of £100. Whether LORD STERNDALÉ's reasons in *R. v. Cheshire County Court Judge and United Society of Boilermakers, Ex parte Malone* (1) were obiter or not, I entirely agree with them as applied to the present case, and they seem to me to show that the county court judge exceeded his jurisdiction. I think, therefore, that the declaration should be struck out of the judgment. The judge has included in his judgment a declaration which exceeds the jurisdiction that he could exercise under the Act.

Appeal allowed in part.

Solicitors: Keene, Marsland, Bryden & Besant; Ravenscroft, Woodward & Co.

[Reported by T. R. FITZWALTER BUTLER, ESQ., Barrister-at-Law.]

ROCHESTER AND CHATHAM JOINT SEWERAGE BOARD v. CLINCH

[CHANCERY DIVISION (Astbury, J.), July 16, 17, 1925]

[Reported [1925] Ch. 753; 95 L.J.Ch. 49; 134 L.T. 139]

Agriculture—Agricultural holding—Notice to quit—Holding vested in two owners—Notice to quit given by both owners—Subsequent sale to tenant by one owner of his part of holding—Agricultural Holdings Act, 1923 (13 & 14 Geo. 5, c. 9), s. 26.

On May 20, 1912, T. let a farm to C. from year to year from Oct. 11, 1911, at an annual rent of £150. On Dec. 23, 1914, T. conveyed part of the farm to the plaintiffs, subject to and with the benefit of the tenancy agreement. T. died on Jan. 4, 1919, and C. continued to pay the whole rent to T.'s executors as he had previously paid it to T. By a notice to quit dated Oct. 10, 1923, T.'s executors and the plaintiffs jointly gave C. notice to quit the whole holding on Oct. 11, 1924. By an agreement dated Oct. 1, 1924, T.'s executors agreed to sell their part of the farm to C., and it was conveyed to him on April 17, 1925. C. refused to give up possession to the plaintiffs of their part of the holding.

Held: as the contract to sell a part of the farm was not made by the persons who gave the notice to quit the entire holding, but only by some of them, s. 26 of the Agricultural Holdings Act, 1923, did not apply, and, therefore, the notice to quit was not null and void as respected the part of the farm owned by the plaintiffs and an order would be made against C. for possession of that part.

Notes. The Agricultural Holdings Act, 1923, was repealed by the Agricultural Holdings Act, 1948, of which now see s. 30.

As to notices to quit agricultural holdings see 1 HALSBURY'S LAWS (3rd Edn.) 280 et seq., and for cases see 2 DIGEST (Repl.) 8 et seq. For Agricultural Holdings Act, 1948, see 28 HALSBURY'S STATUTES (2nd Edn.) 25.

Cases referred to :

- (1) *Blay v. Dadswell*, [1922], 1 K.B. 632; 91 L.J.K.B. 739; 127 L.T. 6; 91 L.J.K.B. 739; 127 L.T. 6; 66 Sol. Jo. 439; 20 L.G.R. 221; 86 J.P. Jo. 65, C.A.; 2 Digest (Repl.) 14, 58.
- (2) *Robinson v. Nesbitt* (1920), 64 Sol. Jo. 291; 2 Digest (Repl.) 14, 55.
- (3) *Re Bebington's Tenancy*, *Bebington v. Wildman*, [1921] 1 Ch. 559; 90 L.J.Ch. 269; 124 L.T. 661; 37 T.L.R. 409; 65 Sol. Jo. 343; 31 Digest (Repl.) 500, 6256.

Witness Action.

By a tenancy agreement, dated May 20, 1912, and made between Betsy Tuff, of the one part, and Ernest Clinch, of the other part, a farm known as Motney Hills Farm, situate at Rainham, in the county of Kent, containing 165 acres, was let to Ernest Clinch upon a yearly tenancy from Oct. 11, 1911, until twelve months' notice to quit should be given by either party in writing, such notice to be given on or before Oct. 11, in any year and the twelve months to expire on Oct. 11 in the year following, at an annual rent of £150. By an indenture dated Dec. 23, 1914, and made between Betsy Tuff, of the one part, and the Rochester and Chatham Joint Sewerage Board (hereinafter called "the board"), of the other part, certain pieces of land in the parish of Rainham containing sixty-four acres, which formed part of Motney Hills Farm and hereinafter referred to as "Blackacre," were conveyed to the Board in fee simple. The board was constituted by the Rochester and Chatham Joint Sewerage Order, 1914, confirmed by the Provisional Orders Confirmation (No. 17) Act, 1914, for the purpose (inter alia) of acquiring the lands conveyed by the indenture of Dec. 23, 1914, and for the construction of sewage

works thereon. Betsy Tuff died on Jan. 4, 1919, having by her will, which was duly proved in the Principal Probate Registry on May 14, 1919, appointed George Henry Court, Henry Tuff and Ernest Matthew Medway her executors. Clinch continued to pay the whole rent to the executors, as he had paid it to Betsy Tuff in her lifetime. The rent fell into arrear after Oct. 11, 1922. By a notice to quit dated Oct. 10, 1923, and signed by Rochester, Patey & Co., the solicitors and agents of the executors of Betsy Tuff, on their behalf, and by Walter Cuckney, the agent of the board, on behalf of the board, and duly served on Ernest Clinch on or before the morning of Oct. 11, 1923, Ernest Clinch was required to quit and deliver up possession on Oct. 11, 1924, of the whole of Motney Hills Farm comprised in the tenancy agreement of May 20, 1912. On Oct. 1, 1924, Ernest Clinch entered into an agreement in writing with the executors of Betsy Tuff for the sale to him in fee simple of the portion of Motney Hills Farm which had not been conveyed to the board by the indenture of Dec. 23, 1914, hereinafter referred to as "Whiteacre." This agreement was carried out by a conveyance dated April 17, 1925. Ernest Clinch refused to deliver up possession of Blackacre, and contended that the notice to quit had become null and void by reason of the agreement of Oct. 1, 1924 for the sale of part of the holding comprised in the notice to quit, such agreement being made while the notice was current and unexpired, under s. 26 of the Agricultural Holdings Act, 1923. The board then brought this action against Clinch for a declaration that the tenancy agreement of May 20, 1912, was duly determined by the notice to quit, and for recovery of possession of the lands comprised in the conveyance of Dec. 23, 1914.

By Agricultural Holdings Act, 1923, s. 26 :

"On the making of any contract for sale of a holding, or any part of a holding, held by a tenant from year to year, any then current and unexpired notice to determine the tenancy of the holding given to the tenant either before or after the commencement of this Act shall, if the contract for sale is made by the person by whom the notice to quit was given, be null and void, unless the tenant has, after Aug. 19, 1919, and prior to such contract for sale, by writing agreed that such notice shall be valid."

Archer, K.C., and *W. A. Jolly*, for the plaintiffs, referred to *Blay v. Dadswell* (1).

W. J. Whittaker, for the defendant, referred to *Robinson v. Nesbit* (2), *Re Bebington's Tenancy*, *Bebington v. Wildman* (3).

ASTBURY, J., stated the facts, and continued : It is admitted that the notice to quit was valid in its inception, so that it is unnecessary to consider the terms of the tenancy agreement. The sole question is as to the effect of s. 26 (1) of the Agricultural Holdings Act, 1923. This is a consolidation Act, and s. 26 (1) replaces similar provisions in the 1919 and 1920 Acts, which I need not consider. No one has been able to tell me the object of these provisions, and it is difficult to appreciate the particular risks against which the legislature wished to protect the agricultural tenant. Counsel for the defendant points out that s. 26 (1) relates to a contract for sale of the whole "or any part" of a year to year holding. In the present case the notice was given by both sets of reversioners, and, as was essential for its validity, it was a notice to quit the entire holding. Neither set of reversioners could by themselves give that notice. The concurrence of both was required in order to give the requisite notice as to the entire holding. The difficulties in the section are numerous, but here I have only to deal with one aspect. After a perfectly valid notice to quit the entire holding given by both sets of reversioners, the reversioners of Whiteacre contracted to sell Whiteacre to the defendant. The sole question is whether that contract nullified the perfectly valid notice to quit the entire holding. In my view, as applied to a contract to sell part of a holding, the section provides that on the making of any contract for the sale of any part of a holding held by a tenant from year to year, any then current and unexpired notice to determine the tenancy of the entire holding shall, if the contract for sale of the part is made by the person or persons by whom the notice to quit the entire holding was given, be null and void.

It do not see how it is possible to construe the section otherwise, and, if so, it clearly does not apply in the present case. The contract to sell part of the holding was made by the reversioners of that part. It was not made by the persons by whom the notice to quit the entire holding was given, but only by some of them, and in those circumstances the section has no application. There will, therefore, be a declaration that the tenancy agreement was duly determined, and an order for possession of Blackacre.

Solicitors: *Gibson & Weldon*, for *Edward B. Lee*, Chatham; *Paterson, Candler & Sykes*, agents for *Ellis & Ellis*, Maidstone.

[Reported by E. K. CORRIE, Esq., Barrister-at-Law.]

R. v. HATTON

[COURT OF CRIMINAL APPEAL (Lord Hewart, C.J., Avory and Branson, JJ.), July 13, 1925]

[Reported [1925] 2 K.B. 322; 94 L.J.K.B. 863; 133 L.T. 735; 89 J.P. 164; 41 T.L.R. 637; 16 Cr. App. Rep. 29; 28 Cox, C.C. 43]

Children and Young Persons—Assault on—Wilful assault in manner likely to cause unnecessary suffering or injury to health—Evidence—Direction to jury—Children Act, 1908 (8 Edw. 7, c. 67), s. 12 (1).

The words "wilfully assaults" in s. 12 (1) of the Children Act, 1908, are qualified by the later words "in a manner likely to cause unnecessary suffering or injury to health," and they contemplate something more than an ordinary assault. A jury ought to receive careful direction as to the meaning of the words.

Notes. Section 12 (1) of the Children Act, 1908, has been replaced by s. 1 (1) of the Children and Young Persons Act, 1933; see 12 HALSBURY'S STATUTES (2nd Edn.) 974.

Referred to: *R. v. Mitchell* (1952), 36 Cr. App. Rep. 79.

As to cruelty to children see 10 HALSBURY'S LAWS (3rd Edn.) 759-763, and for cases, see 28 DIGEST (Repl.) 721.

Appeal against conviction and sentence at the County of London Quarter Sessions.

The appellant was convicted under s. 12 (1) of the Children Act, 1908, of wilfully assaulting his step-daughter a child aged twelve, in a manner likely to cause her unnecessary suffering or injury to her health, and was sentenced to six months' imprisonment. The evidence showed that the appellant had committed an indecent act, not against the child, but in her presence, that she had screamed, and that he had put his hand over her mouth to prevent her screaming. The deputy chairman, in directing the jury, had said:

"There can, in this case, be no dispute that if the facts are anything like those sworn to, the prisoner did commit an assault upon the child likely to cause her unnecessary suffering or injury to her health. Therefore, the only question you need seriously consider is whether it has been proved that the prisoner committed this offence."

The jury found the prisoner guilty, and he appealed against conviction and sentence, on the grounds (a) that the evidence disclosed no assault within the meaning of s. 12 (1) of the Act of 1908; (b) that the deputy chairman had failed to direct the jury to look for corroboration of the child's evidence.

By s. 12 (1) :

"If any person over the age of sixteen years, who has the custody, charge, or care of any child or young person, wilfully assaults, ill-treats, neglects, abandons, or exposes such child or young person, or causes or procures such child or young person to be assaulted, ill-treated, neglected, abandoned, or exposed in a manner likely to cause such child or young person unnecessary suffering or injury to his health . . . that person shall be guilty of a misdemeanour. . . ."

Sells for the appellant.

Julian Fuller for the Crown.

The judgment of the court was delivered by

LORD HEWART, C.J.—This appellant was tried at the London Sessions upon an indictment under s. 12 of the Children Act, 1908, for that he being a person over the age of sixteen years, who had the custody of a child, wilfully assaulted such child in a manner likely to cause such child unnecessary suffering or injury to health. At the first trial the jury disagreed, and upon a second trial the appellant was convicted and sentenced to six months' imprisonment. He appeals against conviction and sentence.

The child was the daughter of the appellant's wife by her first husband, and swore that on April 9 her mother went out about eight o'clock in the evening, the appellant came in about ten minutes later, and she gave him tea in the kitchen. When he had finished his tea he followed her into the scullery, turned the light out, went back into the kitchen, and called her to him. She then went into the kitchen, whereupon the appellant closed the door and committed an indecent act, not against the child, but in her presence. She commenced to scream, and the appellant put his hand over her mouth to prevent her screaming. The learned deputy chairman, in summing-up the case, began with these words :

"The prisoner is charged with assaulting a child of whom he had the custody in a manner likely to cause such child unnecessary suffering or injury to health. There can, in this case, be no dispute that if the facts are anything like those sworn to, the prisoner did so assault her, and, therefore, the only question you need seriously consider is whether it has been proved that the prisoner committed this offence."

That was all the direction the jury were given upon the question of law.

It is not denied that, under the above section, the opening words are just as much qualified by the last words as the intermediate words are. Therefore, the words of the section, which are said to apply to this case, leaving out the intermediate words, read as follows :

"If any person over the age of sixteen years, who has the custody, charge, or care of any child or young person, wilfully assaults . . . such child or young person . . . in a manner likely to cause such child or young person unnecessary suffering or injury to his health . . . that person shall be guilty of a misdemeanour. . . ."

It is apparent, if one looks at the sentence provided by the section, namely, imprisonment, with or without hard labour, for any term not exceeding two years, that something more than an ordinary assault is contemplated by the section; it must be a wilful assault, likely to cause unnecessary suffering or injury to health. It was extremely important in the present case that the jury should be directed as to the meaning of the section. The assault relied upon by the prosecution consisted only in the appellant having put his hand over the child's mouth to prevent her from screaming. That was the assault which the evidence was intended to support, but it is quite obvious, when one looks at the case as a whole, that there might easily be in the mind of the jury a reflection that what was done in the presence of the child, if it was done, was likely to cause, if not suffering, at any rate no little agitation of

mind, astonishment, and disgust. That was not the assault; in order that the defendant might be convicted under this section it was necessary to show that there was a wilful assault in a manner likely to cause unnecessary suffering. In other words, the summing-up might easily convey to the jury the impression that the real point was something other than it actually was.

That is enough to dispose of the present matter, but, in view of the relationship of certain persons who were witnesses in the case it was pre-eminently a case in which it was desirable that a clear direction should be given as to the necessity for the corroboration of the evidence given by a child of tender age. No such warning is to be found from first to last. On the contrary, the passages which are relied on as approaching to a warning are more open to the construction that they might well convey to the jury the idea that such corroboration was not necessary. There are other points, but suffice it to say that on these grounds the conviction is unsatisfactory and should be quashed. The appeal, therefore, is allowed.

Conviction quashed.

Solicitors: *Registrar of the Court of Criminal Appeal; Director of Public Prosecutions.*

[Reported by T. R. F. BUTLER, Esq., Barrister-at-Law.]

Re SOUTHERDEN (DECEASED), ADAMS AND ANOTHER v. SOUTHERDEN

[COURT OF APPEAL (Sir Ernest Pollock, M.R., Warrington and Atkin, L.JJ.), June 19, 1925]

[Reported [1925] P. 177; 95 L.J.P. 1; 133 L.T. 505; 41 T.L.R. 593; 69 Sol. Jo. 723]

Will—Revocation—Dependent relative revocation—Existence and fulfilment of condition question of fact—Need to prove that truth of fact condition of revocation.

The revocation of a will grounded upon an assumption of fact which is false takes effect unless, as a matter of construction, the truth of the fact is a condition of the revocation. In other words, the revocation is contingent on the fact being true. It is a question of fact whether there was a condition, and, if so, whether it has been fulfilled.

A testator made a will by which he left the whole of his property to his wife. Later he destroyed the will, believing that, if he died intestate, all his property would go to his wife, as he intended it should.

Held: the assumption on which the testator had destroyed the will was untrue, and, therefore, the destruction was not done *animo revocandi*, and the executors of the will were entitled to probate of a copy of it.

Notes. Considered: *In the Estate of Botting, Botting v. Botting*, [1951] 2 All E.R. 997. Referred to: *In the Goods of Hope Brown*, [1942] P. 136.

As to conditional revocation of a will see 34 HALSBURY'S LAWS (2nd Edn.) 88 et seq., and for cases see 44 DIGEST 360–365. For Wills Act, 1837, see 26 HALSBURY'S STATUTES (2nd Edn.) 1326.

Cases referred to:

(1) *Clarkson v. Clarkson* (1862), 2 Sw. & Tr. 497; 31 L.J.P.M. & A. 143; 6 L.T. 506; 26 J.P. 631; 10 W.R. 781; 164 E.R. 1090; 44 Digest 354, 1854.

- (2) *Powell v. Powell* (1866), L.R. 1 P. & D. 209; 35 L.J.P. & M. 100; 14 L.T. 800; 44 Digest 361, 1944.
- (3) *Perrott v. Perrott* (1811), 14 East. 423; 104 E.R. 665; 44 Digest 526, 3441.
- (4) *Beardsley v. Lacey* (1897), 67 L.J.P. 35; 78 L.J. 25; 14 T.L.R. 140; 44 Digest 354, 1858.
- (5) *Re Faris, Goddard v. Overend* (No. 2), [1911] 1 I.R. 469; 44 Digest 321, n.
- (6) *In the Goods of Applebee* (1828), 1 Hag. Ecc. 143; 162 E.R. 536; 44 Digest 363, 1960.
- (7) *In the Goods of Eeles* (1862), 2 Sw. & Tr. 600; 32 L.J.P. & A. 4; 7 L.T. 338; 27 J.P. 9; 11 W.R. 31; 164 E.R. 1130; 44 Digest 363, 1962.
- (8) *In the Goods of de Bode* (1847), 5 Notes of Cases, 189; 44 Digest 352, 1831.
- (9) *Dixon v. Treasury Solicitor*, [1905] P. 42; 74 L.J.P. 33; 92 L.T. 427; 21 T.L.R. 145; 44 Digest 363, 1963.

Appeal from an order of HORRIDGE, J., reported 132 L.T. 346.

On Sept. 25, 1921, the testator, John Reginald Southerden, executed a will, he and his wife then contemplating a visit to America. By it he devised and bequeathed the whole of his property to his wife if she should survive him, and made certain dispositions in the event of his wife predeceasing him. Upon their return from America the testator was sitting with his wife one evening about Nov. 20 or 21 and going through certain papers, when he took one out of his pocket and placed it on his desk. His wife asked what it was, and he replied that it was the will he had made before going to America. He went on to say: "It is no good now. We have returned safely, and it is all yours. We might just as well burn it," His wife assented, and he put the will in the fire. The testator died in 1923, leaving the freehold house in which he lived the value of which, subject to a mortgage, was about £1,500. The plaintiffs, who were the executors of the destroyed will, propounded a copy of it for probate, alleging that it had been effectually revoked. The defendant, who was the testator's father and claimed as heir-at-law, opposed the probate and contended that the testator died intestate. HORRIDGE, J., held that the case was one of "dependent relative revocation," i.e., the revocation was dependent on the testator's belief in the truth of a fact which was false, and he pronounced for probate of the contents of the will. The defendant appealed.

W. O. Willis, K.C., and *C. G. Talbot-Ponsonby*, for the defendant.

Bayford, K.C., and *J. Bucknill*, for the respondent, referred to *Clarkson v. Clarkson* (1), *Powell v. Powell* (2), *Perrott v. Perrott* (3), *Beardsley v. Lacey* (4), and *Re Faris, Goddard v. Overend* (5).

Willis, K.C., in reply, referred to *In the Goods of Appelbee* (6), *In the Goods of Eeles* (7), and *In the Goods of de Bode* (8).

SIR ERNEST POLLOCK, M.R.—This case raises an interesting point of law which has been well argued. It is an appeal from a judgment of HORRIDGE, J., given in proceedings in which the executors of the late J. R. Southerden propounded a will made on Sept. 25, 1921. The testator died on Sept. 28, 1923, and when he died the will was not in being, because he had burnt it. It was said by the executors that, although he had burnt it, they were nevertheless entitled to set it up.

There is no dispute as to its terms. He had married in 1901, and partly from his own, and partly from his wife's resources had purchased a house, which represented the whole of his estate. After payment off of a mortgage upon the house, it was estimated that the estate would be worth about £1,500. There was no substantial personal estate which would be subject to the will. In the course of his married life, the deceased had again and again stated that all the property of which he died possessed would go to his wife. He had not made any will, because he was content to believe that if he died intestate, all his property would go to his wife. In 1921 he and his wife made a voyage to America and back. Before he started it occurred to him that if the vessel went down and both he and his wife were drowned, some

provision would be necessary to meet that contingency, and he made the will in order to meet it. After his return, according to the evidence of his widow, which the learned judge accepted, when looking through some papers, he took up one, being his will, and said to his wife: "This is no good now; we have returned safely, and it is all yours. We might as well burn it." She assented, and he burnt it. The learned judge said he had had a great volume of evidence both before and after the destruction of the will, showing that the testator still wanted his wife to have everything. The effect of the will was to give everything he possessed to the wife, but if she did not survive him, it was to pass to his father and his mother-in-law. The learned judge was satisfied that he destroyed the will under the impression that the whole property would all go to the widow under an intestacy, which, of course, was incorrect, and that, therefore, the revocation was of no use, and the original will stood. It was argued, however, by the defendant that the destruction of the will was absolute, that the testator intended to die intestate, that he made this will before he went to America, but on his return put it into the fire as spent, and that he then reverted to his original ambition to die intestate. By the Wills Act, 1837, s. 20, a will cannot be revoked, except by another will or document executed with the same formalities as a will, or by burning, tearing or otherwise destroying it by the testator or by some other person in his presence and by his direction with the intention of revoking the same. The judge has on the materials before him come to the conclusion that the testator destroyed his will under an impression which was wrong. There are a number of cases to show that where the revocation is based on a condition which is not fulfilled, the intended revocation does not take effect.

The Rt. Hon. R. E. MEREDITH, the Master of the Rolls in Ireland, in *Re Faris, Goddard v. Overend* (No. 2) (5), said, adopting a statement of the law in THEOBALD ON WILLS:

"The true view may be that a revocation grounded on an assumption of fact which is false takes effect unless as a matter of construction the truth of the fact is a condition of the revocation, or in other words the revocation is contingent on the fact being true. . . . The true view, in my opinion, is the view so clearly stated by MR. THEOBALD."

I desire definitely to adopt that statement of MEREDITH, M.R., and MR. THEOBALD. We are told, and there is no doubt good ground for saying, that the Wills Act, 1837, is this respect only affirmed the pre-existing law. SIR FRANCIS JEUNE, P., in *Beardsley v. Lacey* (4) said:

"The Wills Act only expresses the law as it stood before; that there may be a physical act of destruction, but that unless it is performed *animo revocandi* it does not have the effect of revoking the document destroyed."

The matter had been considered in a much earlier case. In *Perrott v. Perrott* (3) LORD ELLENBOROUGH, in giving the judgment of the court, said (14 East, at p. 439):

"This, then, raises the question whether such a mistake clearly evidenced by what passed at the time of cancellation, annuls the cancellation, and entitled us to act as if the *animus cancellandi* or *revocandi* were altogether wanting, and we are of opinion that it does. Mrs. Territt mistook either the contents of her will, which would be a mistake in fact, or its legal operation, which would be a mistake in law, and in either case we think the mistake annulled the cancellation."

In *Powell v. Powell* (2) SIR J. P. WILDE said (L.R. 1 P. & D., at p. 213):

"In both cases the act is referable not to any abstract intention to revoke, but to an intention to validate another paper; and as in neither case is the sole condition upon which revocation was intended fulfilled, in neither is the *animus revocandi* present."

If a still later case is desired, *Dixon v. Treasury Solicitor* (9) makes it quite clear that the learned judge GORELL BARNES, J., accepted the law to the same effect,

because he left these questions to the jury : (i) whether the testator cut the signature off the will with the intention of revoking the will ; or (ii) whether the testator cut the signature off the will with the intention that the will should be revoked conditionally on his executing a fresh will. In the present case the learned judge was justified in the conclusion he came to on the facts, and in holding that the revocation of the will was conditional only, and that the condition was not fulfilled. It is impossible to lay down a rule applicable to all cases. It is a question of fact whether the condition is applicable, and if so, whether it has been fulfilled. If not, there was no intention to revoke, and, therefore, no revocation within s. 20 of the Wills Act, 1837. The appeal fails and must be dismissed.

WARRINGTON, L.J.—The judge has admitted to probate the contents of a document which had been destroyed, and the question is whether he was justified in so doing. [His Lordship read s. 20 of the Wills Act, 1837.] The authorities, in my opinion, clearly establish that the mere destruction of a document is an equivocal act and has no effect unless the destruction is effected with an intention to revoke it. The court has still to ascertain with what intention the document was destroyed. It is also established that if the truth of a particular fact is a condition of the destruction, and the fact turns out not to be true, there is no revocation. A good summary of the law on the point is to be found in the Irish case of *Re Faris, Goddard v. Overend* (5). The passage already cited by the Master of the Rolls expresses the true state of the law both as regards questions of construction, and also cases where one has to ascertain whether the destruction was contingent on a certain state of facts being true. If that be the true state of the law, the only question is, what is the true inference to be drawn from the facts of this case. In the present case the fact on the assumption of the truth of which the testator destroyed his will was that his wife would take the whole of the property. That assumption was untrue. If contingent on the truth of that fact, the destruction would have no effect. The judge had drawn that inference, and there was abundant evidence to enable him to do so. It was strenuously contended that the intention of the testator was to die intestate, and that any mistake as to the effect of an intestacy did not alter that intention. I think that argument is founded on a fallacy. In my opinion, the intention of the testator in destroying the document was to give his wife the entirety of the property, and he believed that, if he died intestate, that would be the result.

ATKIN, L.J.—I agree. The case is of some importance as being the first in which the Court of Appeal has been called upon to express an opinion on the question of a conditional revocation. The case depends on the Wills Act, 1837, and, to my mind, it would not, therefore, be proper to determine it upon cases decided before that Act. [His Lordship referred to ss. 18, 19, and 20 of the Wills Act, 1837.] The court has to consider whether it was the intention of the testator to revoke, i.e., to put an end to the operation of a document which up to that time was believed to be an effective document. To put a will in the fire simply is only destroying a piece of paper : *Clarkson v. Clarkson* (1) ; *Beardsley v. Lacey* (4). The true answer to the question in the present case is that there was, in fact, no intention to revoke the will at all. There has been brought into existence in recent years a doctrine which has been described as "dependent relative revocation." The question in each case is : Had the testator the intention of revoking his will? The intention may be conditional, and if the revocation is subject to a condition which is not fulfilled, the revocation does not take effect. Cases of dependent relative revocation are mostly cases where the testator supposed that, if he destroyed his will, his property would pass under some other document. But the condition is not necessarily limited to the existence of some other document. The revocation may be conditional on the existence or future existence of some fact. If that is proved full effect can be given to the Wills Act. You must prove that there was in fact a condition. It is a question of fact in each case. With great respect to the learned judge, I should not myself be satisfied with saying that the testator was under a misapprehension of

fact. He may have been so, but the misapprehension may not have been conditional. Whether it was or not is a question of fact in each case. It is obvious that the testator was under the belief that on an intestacy the whole of the property would pass to his wife. The words "It is no good" clearly do not mean "This will is no longer operative." They mean: "This document is no longer necessary because the law will do all I desire, viz., give you all my property." I think the true inference of fact is that when the testator destroyed his will in the presence of his wife he did it on the condition that the wife would take the whole of the property. That condition was not fulfilled, and, therefore, the revocation was not operative. I also adopt every word of the passage from THEOBALD ON WILLS quoted by MEREDITH, M.R., in *Re Faris, Goddard v. Overend* (No. 2) (5). A statement to the same effect will be found in HALSBURY'S LAWS OF ENGLAND (2nd Edn.), vol. 34, p. 88. The decision of the learned judge was right and the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Brash, Wheeler, Chambers & Co.; W. W. Young, Sons & Ward.*

[Reported by H. LANGFORD LEWIS, Esq., Barrister-at-Law.]

R. v. BALDWIN

[COURT OF CRIMINAL APPEAL (Lord Hewart, C.J., Rowlatt and Swift, JJ.), March 16, 1925]

[Reported 133 L.T. 191; 89 J.P. 116; 69 Sol. Jo. 429; 28 Cox, C.C. 17; 18 Cr. App. Rep. 175]

Criminal Law—Evidence—Cross-examination of prisoner as to character—Questions put by prosecution to elicit answers amounting to imputations on prosecution—Propriety—Evidence by prisoner as to respectability, not amounting to actual evidence of good character—Criminal Evidence Act, 1898 (61 & 62 Vict., c. 36) s. 1 (f) (ii).

It is not right for counsel for the prosecution to ask questions of a prisoner in cross-examination with the object of eliciting from him answers which amount to evidence of his good character or imputations on the character of the prosecutor or the witnesses for the prosecution and so render the prisoner liable to be cross-examined as to his character.

A defending counsel should refrain from putting questions to a prisoner who is giving evidence on his own behalf the answers to which, while not amounting to actual evidence of good character, would suggest that he was a respectable person, as the giving of such evidence might render the prisoner liable to cross-examination as to character.

Notes. Section 5 of the Criminal Law Amendment Act, 1885, has been replaced by s. 6 of the Sexual Offences Act, 1956: see 36 HALSBURY'S STATUTES (2nd Edn) 219. Considered: *R. v. Eidinow* (1932), 23 Cr. App. Rep. 145.

Referred to: *R. v. Coulson* (1927), 20 Cr. App. Rep. 106.

As to the cross-examination of an accused person as to character see 10 HALSBURY'S LAWS (3rd Edn.) 449-454, and for cases, see 14 DIGEST (Repl.) 511 et seq.

Case referred to:

(1) *R. v. Beecham*, [1921] 3 K.B. 464; 90 L.J.K.B. 1370; 85 J.P. 276; 37 T.L.R. 932; 65 Sol. Jo. 768; 16 Cr. App. Rep. 26, C.C.A.; 14 Digest (Repl.) 512, 4955.

Appeal from a conviction at Manchester Assizes.

The defendant was convicted, under s. 5 of the Criminal Law Amendment Act, 1885, of unlawful carnal knowledge of a girl between thirteen and sixteen years of age, and was sentenced to four months' imprisonment. During his examination-in-chief his counsel, without leading actual evidence of good character, asked questions tending to show that he was a respectable married workman with a family, but the prosecution did not seek to give evidence of bad character on this ground. The appellant in cross-examination was asked questions of the following type: "Can you suggest any reason why the girl should invent this story?" "Do you regard her story as blackmail?" "Do you agree that she is trying to shield some boy?" Counsel for the prosecution took the view that the answers to these questions rendered "the nature and conduct of the defence such as to involve imputations on the character of the prosecutrix or the witnesses for the prosecution," and obtained leave from the court to examine the accused as to his bad moral character. The appellant appealed against both conviction and sentence.

Granville Sharpe for the appellant.

Goldie for the Crown.

The judgment of the Court was delivered by

LORD HEWART, C.J.—The appellant was charged with having had unlawful carnal knowledge on three occasions of a young girl named Maggie Prescoll, who was born on Sept. 20, 1910. It is not necessary to enter into the history of the case. There came a time when the appellant at the trial gave evidence on his own behalf. He said that he had only a very slight acquaintance with the child before an interview on Dec. 15, 1924, at which her mother told him that Maggie was pregnant and asked him what he was going to do about it. He said that he then denied that he had had anything to do with her. Mrs. Baldwin's evidence was to the same effect. When the appellant was being cross-examined, this passage in the evidence occurred. Counsel for the prosecution asked: "The girl says that until the beginning of the year she never knew you, but that then you used, quite naturally and properly, to say good night to her. Is that wrong?"—"I have only spoken to that girl twice in my life." Then comes this question: "Then can you suggest any reason at all why this girl should invent this story against you? Has she got any particular 'down' on you?" "I do not know—not without it is regarding getting some money off me and my parents." "To put it plainly, you regard her story then as blackmail?"—"Certainly, sir." "I took down very carefully what my learned friend said to Maggie in putting questions. Do you agree that what she is doing is trying to shield some boy and not telling the truth with regard to you?" "Yes." "In other words, she is an immoral girl, is that it?" "Yes." Counsel continued: "Are you a particularly moral man yourself?" "Yes." Counsel then said: "I submit that I am entitled now to pursue a certain line of cross-examination." Counsel on the other side said: "Because my case is that this girl is untruthful?" The judge said: "I think so." Thereupon there followed cross-examination to show that the appellant was paying money under the terms of a bastardy order.

Some other questions have been mooted on this appeal. But this is without doubt the real question. The Criminal Evidence Act, 1898, s. 1, para. (f) provides:

"A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless . . . (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution. . . ."

It seems quite clear in the present case that certain questions were asked at the beginning of the evidence-in-chief of the prisoner which it is difficult to suppose were likely to produce any other effect than to indicate at least to the jury that the defendant was a person of good character, a respectable married workman with a family, and one not in the least likely to commit the sort of offence with which he was then being charged. The questions were: "Baldwin, what age are you?" "Thirty-two, sir." "You are a married man?" "Yes." "What are you?" A joiner." When questions of that kind are asked, no matter what degree of ingenuity they may be thought to display, the client on whose behalf they are asked is put in great peril, and it would not be in the least surprising if, in such circumstances, some learned judge were to say: "As counsel for the defendant has thought it right to elicit the fact that this man is a married man with children, counsel for the prosecution may elicit the fact, if he believes it to be a fact, that he is also a person who is the father of illegitimate children." There cannot be licence to the defence if there is to be strictness for the prosecution. But counsel for the prosecution has frankly admitted that it was on no such ground that he cross-examined the appellant on character. He put the questions to which attention has been directed on the ground that, apart from what the appellant had said in answer to any questions, the nature and conduct of the defence was such as to involve imputations on the character of the prosecutrix and the witnesses for the prosecution. He did not put them in order to provoke imputations and so prepare the way for cross-examination as to character. It is not necessary to say that counsel's assurances upon this point are to be accepted. The fact remains that these questions were put, and that, whatever else might have been done, or whatever arguments might have been adduced, the judge admitted this cross-examination. The law on this matter is perfectly clear. One would have thought that it did not need a decision. It cannot be right for the counsel for the Crown to ask questions for the purpose of eliciting answers which may be of such a kind as to involve the accused person inadvertently in the mischief provided for in this part of the statute. That was made quite plain, for example, in *R. v. Beecham* (1). In that case it was said in the judgment of the court:

"With regard to the cross-examination, we are bound to say that we cannot approve of the manner in which the appellant was led by counsel for the prosecution into making the statement which it was contended amounted to putting his character in issue."

There is a further matter involved here which goes far beyond the present case, and, it may be, beyond criminal cases. One so often hears questions put to witnesses by counsel which are really in the nature of an invitation to an argument. One hears, for instance, such questions as this: "I suggest to you that . . ." or "Is your evidence to be taken as suggesting that . . . ?" If the witness were a prudent person, he would say, with the highest degree of politeness: "What you suggest is no business of mine. I am not here to make any suggestions at all. I am here only to answer relevant questions. What are the conclusions to be drawn from my answers is not for me, and as for suggestions, I venture to leave those to others." An answer of that kind requires, no doubt, some sense and self-restraint and experience, and the mischief of it is that, if made, it might very well prejudice the witness with the jury, because the jury, not being aware of the consequence to which such questions might lead, might easily come to the conclusion—as might be true—that the witness had something to conceal. It is right to remember in all such cases that the witness in the box is an amateur and that counsel who is asking questions is, as a rule, a professional conductor of argument, and it is not right that the wits of the one should be pitted against the wits of the other in the field of suggestion and controversy. What is wanted from the witness is answers to questions of fact. One even hears questions such as: "Do you ask the jury then to believe . . . ?" The witness may very well reply: "I am asking the jury

nothing ; my business is to tell whatever is relevant that I know and that I am asked to tell, and therefore my answer to your question and to all such questions is: 'No, I do not'." But in practice, both in civil and in criminal cases, one finds this line of cross-examination employed. It is a mischievous line, and it is never more mischievous than when it has the effect of inducing a witness inadvertently or, it may be, even in a mood of irritation, to make the kind of attack that, under s. 1 of the statute, lets in certain other evidence which, but for that attack, would not be admissible. These matters are not to be ignored by counsel who appear for the prosecution. They are equally not to be ignored by counsel who appear for the defence, because so often questions are asked which are ingeniously calculated up to the very last point to be consistent with abstention from putting the defendant's character in issue, while undoubtedly the probable, as it is the intended, effect of those questions is to exhibit the man to the jury as a person of good character. Counsel for the defence should refrain from such questions for prudential reasons. Counsel for the prosecution should refrain from them for reasons of fairness, because the Crown has no interest whatever in securing a conviction. Its sole interest is to convict the right man.

In these circumstances, we think that this evidence ought not to have been admitted. We are not satisfied that, if it had been excluded, the jury would inevitably have come to the like conclusion. It follows, therefore, that this appeal must be allowed, and this conviction quashed.

Conviction quashed.

Solicitors: Registrar of the Court of Criminal Appeal ; Director of Public Prosecutions.

[Reported by T. R. FITZWALTER BUTLER, ESQ., Barrister-at-Law.]

R. v. GORDON

[COURT OF CRIMINAL APPEAL (Lord Hewart, C.J., Sankey and Branson, JJ.), June 22, 1925]

[Reported 133 L.T. 734; 89 J.P. 156; 41 T.L.R. 611; 28 Cox, C.C. 41; 19 Cr. App. Rep. 20]

Criminal Law—Incest—Man and woman charged in one indictment—Separate trials—Conviction of man—Subsequent acquittal of woman—Validity of conviction of man—Punishment of Incest Act, 1908 (8 Edw. 7, c. 45), s. 1 (1).

Where a man and woman are charged with incest with each other in separate counts of an indictment, and are separately tried, the conviction of the man can remain valid despite the fact that the woman is acquitted. Knowledge of the relationship may be had and consent given by the one, but not by the other.

Notes. Section 1 (1) and s. 2 of the Punishment of Incest Act, 1908, has been replaced by s. 10 and s. 11 of the Sexual Offences Act, 1956: see 36 HALSBURY'S STATUTES (2nd Edn.) 222.

As to incest see 10 HALSBURY'S LAWS (3rd Edn.) 753-755, and for cases see 15 DIGEST (Repl.) 1024.

Case referred to:

- (1) *R. v. Plummer*, [1902] 2 K.B. 339; 71 L.J.K.B. 805; 86 L.T. 836; 66 J.P. 647; 51 W.R. 137; 18 T.L.R. 659; 46 Sol. Jo. 587; 20 Cox, C.C. 269, C.C.R.; 14 Digest (Repl.) 287, 2623.

Appeal from a conviction at Manchester Assizes.

The appellant was convicted of incest with his sister, and was sentenced to nine months' imprisonment. The first count of the indictment charged him, under s. 1 (1) of the Punishment of Incest Act, 1908, with having committed incest with her, and the second count charged her, under s. 2 of the Act of 1908, with having committed incest with him. The appellant was tried first, and was convicted. The woman was then tried and acquitted. The appellant appealed against his conviction.

Rymer Young for the appellant.

Ronald Powell for the Crown.

The judgment of the court was delivered by

LORD HEWART, C.J.—This appellant was charged with having committed incest with his sister in the year 1921. There were two counts in the indictment, the first of which charged the appellant with incest with his sister and the second of which charged the sister with incest with the appellant, and there were two separate trials. In the result the appellant was convicted and his sister acquitted.

It has been argued that the conviction of the appellant cannot co-exist with the acquittal of his sister. The cases cited in support of this proposition deal with the offence of conspiracy, and in particular reference was made to *R. v. Plummer* (1), in which it was held that, on the trial of an indictment charging three persons with conspiring together, if one pleads Guilty and has judgment passed against him and the other two are acquitted, the judgment passed against the one who pleaded Guilty cannot stand. It is to be observed that even in that case, where the charge was one of conspiracy, LORD ALVERSTONE, C.J., said, on behalf of himself and JELF, J., that they concurred with the judgment of WRIGHT and BRUCE, JJ., because they were unable to give satisfactory reasons for adopting a contrary view, and he added ([1902] 2 K.B. at p. 350):

"In so concurring we place great reliance on the fact that there was a joint trial on one indictment charging the three defendants jointly with conspiring together, and not alleging any conspiracy with other or unknown persons."

The present case, however, is not a case of conspiracy. It had to be proved against the appellant (a) that he had had carnal knowledge of the woman, (b) that she was his sister, and (c) that he knew at the material time that she was his sister. There was overwhelming evidence of all these facts. For the woman to be convicted it had to be proved (a) that she had permitted carnal knowledge with the appellant to take place, (b) that the appellant was her brother, and (c) that he was to her knowledge her brother. It is clear that while the evidence may be overwhelming against the male prisoner in a case of incest, the female prisoner may be entitled to an acquittal either on the ground of absence of consent or on the ground that she did not know of the existing relationship. It is easy to think of an example. A brother might go abroad when his sister was very young, and on his return he might have carnal knowledge of her when he knew her to be his sister, but she did not know who he was. Similar considerations apply to the question of consent. In other words, there are fundamental differences in this respect between cases of conspiracy and cases of incest. The court has been asked to apply here, per saltum, the doctrine laid down in conspiracy cases. In the present case there was abundant evidence against the appellant, including admissions made by him on two occasions. In these circumstances the appeal fails, and it cannot be said that the sentence was too severe.

Appeal dismissed.

Solicitors: Registrar of the Court of Criminal Appeal; Director of Public Prosecutions.

[Reported by T. R. FITZWALTER BUTLER, Esq., Barrister-at-Law.]

R. v. HERTFORDSHIRE JUSTICES, Ex parte LARSEN

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Sankey, JJ.), November 10, 1925]

[Reported [1926] 1 K.B. 191; 95 L.J.K.B. 130; 134 L.T. 143;
89 J.P. 205; 45 T.L.R. 77; 28 Cox, C.C. 90]

Criminal Law—Committal for trial—Magistrates equally divided—Right to adjourn case for re-hearing by different Bench—New Bench to consist of odd number of justices—Indictable Offences Act, 1848 (11 & 12 Vict., c. 42), s. 25.

The applicant was charged with the indictable offence of causing grievous bodily harm by the reckless and wanton driving of a motor-car. The justices were equally divided on the question whether he should be committed for trial, and they decided that the case should be adjourned to be re-heard on a later date by a re-constituted Bench. On an application by the applicant for mandamus directing the justices to dismiss the case and discharge him,

Held: under s. 25 of the Indictable Offences Act, 1848, the duty of the justices to discharge the applicant arose only when they had actually reached an opinion that the evidence was not sufficient to put him on trial; they had not reached such an opinion; and, therefore, they were entitled to adjourn the hearing for the purpose of having the Bench re-constituted in such a way that it would consist of an odd number of justices.

Notes. The Indictable Offences Act, 1848, was repealed by the Magistrates' Courts Act, 1952, s. 7 of which has taken the place of s. 25 of the Act of 1848.

As to committal for trial by justices see 10 HALSBURY'S LAWS (3rd Edn.) 365-370, and for cases see 14 DIGEST (Repl.) 214 et seq. For Magistrates' Courts Act, 1952, see 32 HALSBURY'S STATUTES (2nd Edn.) 416.

Cases referred to:

- (1) *R. v. Bodmyn (Inhabitants)* (1750), Burr. S.C.; sub nom. *Bodmin v. Warligen*, 2 Bott. (6th Edn.) 750; 33 Digest 386, 966.
- (2) *R. v. Leicestershire Justices* (1813), 1 M. & S. 442; 105 E.R. 165; 14 Digest (Repl.) 377, 3688.
- (3) *R. v. Ashplant* (1888), 52 J.P. Jo. 474, D.C.; 33 Digest 424, 1371.
- (4) *Ex parte Evans*, [1894] A.C. 16; 63 L.J.M.C. 81; 70 L.T. 45; 58 J.P. 260; 10 T.L.R. 118; 6 R. 82, H.L.; 33 Digest 402, 1127.
- (5) *Kinnis v. Graves* (1898), 67 L.J.Q.B. 583; 78 L.T. 502; 46 W.R. 480; 42 Sol. Jo. 512; 19 Cox, C.C. 42, D.C.; 21 Digest 229, 610.
- (6) *R. (Mulcahy) v. Tipperary Justices*, [1903] 2 I.R. 108; 33 Digest 445, e.
- (7) *Bagg v. Colquhoun*, [1904] 1 K.B. 554; 73 L.J.K.B. 272; 90 L.T. 386; 68 J.P. 159; 52 W.R. 494; 20 Cox, C.C. 605, D.C.; 33 Digest, 346, 560.
- (8) *Cox v. Coleridge* (1882), 1 B. & C. 37; 2 Dow. & Ry. K.B. 86; 1 Dow. & Ry. M.C. 142; 107 E.R. 15; 14 Digest (Repl.) 225, 1876.
- (9) *R. v. Marsh* (1837), 6 Ad. & El. 236; Will. Woll. & Dav. 150; 6 L.J.M.C. 153; 1 J.P. 245; 1 Jur. 38; 112 E.R. 89; 33 Digest 376, 850.
- (10) *R. v. Carden* (1879), 5 Q.B.D. 1; 49 L.J.M.C. 1; 41 L.T. 504; 44 J.P. 137; 28 W.R. 133; 14 Cox, C.C. 359; 14 Digest (Repl.) 225, 1879.

Rule Nisi for a mandamus directing justices for Hertfordshire, sitting at Cheshunt, to discharge the applicant Larsen in pursuance of s. 25 of the Indictable Offences Act, 1848.

The applicant had been charged before the justices under s. 35 of the Offences against the Person Act, 1861, with causing grievous bodily harm by the wanton driving of a motor-car. At the close of the evidence on both sides the justices were equally divided whether the applicant should be committed for trial, and they decided to adjourn the case in order that it might be heard before a re-constituted

Bench. The applicant contended that in the circumstances it was the duty of the justices to discharge him.

Oliver, K.C., and *E. H. Tindal Atkinson*, showed cause.

Sir H. Curtis Bennett, K.C., and *J. A. C. Keeves*, in support of the rule.

The following cases were cited: *Bodmin v. Warlign* (1), *R. v. Leicestershire Justices* (2), *R. v. Ashplant* (3), *Ex parte Evans* (4), *Kinnis v. Graves* (5), *R. v. Tipperary Justices* (6), *Bagg v. Colquhoun* (7), *Cox v. Coleridge* (8), *R. v. Marsh* (9), *R. v. Carden* (10).

LORD HEWART, C.J.—I am clearly of opinion that this rule ought to be discharged. The argument in support of it appears to be based on a misreading of s. 25 of the Indictable Offences Act, 1848. That section does, indeed, lay down a condition subject to which it is the duty of the justices to order the accused, if in custody, to be discharged, but it is important to observe what that condition is. The section provides :

“If the justice or justices of the peace then present shall be of opinion that it [i.e., the evidence] is not sufficient to put such accused party upon his trial.”

In other words, the duty in such circumstances to discharge arises when, and only when, the justices have reached an actual opinion that the evidence is not sufficient. No such duty arises where the justices have not as yet been able to arrive at such an opinion, and where the justices, believing that the matter is worthy of further investigation, propose to adjourn and, if necessary, to re-hear the case. The argument for the rule seems to involve the transposition of certain words in the section, which in the statute reads: “If the . . . justices . . . shall be of opinion that it is not sufficient . . .” As they are proposed to be re-written they would become: “If the justices shall not be of opinion that it is sufficient,” with the result that at some intermediate stage of the proceedings the defendant might call for his discharge because the justices had not yet reached the stage of forming an opinion whether the evidence was sufficient. The conclusion which seems to follow from the express words of the Act is reinforced by the line of decisions to which the court has been referred. It is perfectly obvious that where the justices are sitting as a court of summary jurisdiction to decide whether a person is to be convicted they may adjourn or re-hear, and, if necessary, re-constitute the court for the purpose of the re-hearing. It is said that though it is well that justices sitting as a court of summary jurisdiction should enjoy those extended opportunities of arriving at a final decision, it is wrong that justices should enjoy such opportunities when they are sitting to determine, under the Indictable Offences Act, 1848, whether the accused should be committed for trial. Speaking for myself, it seems to me a fortiori that they should in the latter case enjoy those opportunities.

The authorities are all against the argument for the rule. Attention has been called to *R. v. Ashplant* (3) where MANISTY, J., said, with the full concurrence of the other members of the court, that, if the justices were divided in opinion, the proper course was to dismiss the charge. That decision depended on the particular facts of the case, where there had been a hearing, re-hearing, and again re-hearing. It meant that where the final decision of the justices was that they could not come to a conclusion they ought to discharge the prisoner. It would be idle to apply it to a case where the justices, in effect, said that they had not yet reached a decision and desired to investigate the matter further. It is said that they could not re-constitute the court. Why should it not be re-constituted? It is desirable that it should be re-constituted and in such a way as to consist of an odd number of justices. The rule will be discharged.

AVORY, J.—I am of the same opinion. Apart from the form of the rule it appears that the court is really being asked to order the justices to be of opinion that there was not sufficient evidence to commit for trial. How can we order

justices to be of a particular opinion when in fact they are not of that opinion, or are of the contrary opinion? The form of the rule is that it is directed to ten justices to discharge from custody a person who is not in their custody. Suppose that this rule were moulded to the effect that these ten gentlemen were ordered to hold a sitting and make an order for the discharge of the accused, and suppose that one of them had died in the meantime, and that he was one of those opposed to a committal for trial, the result would be that there would be a majority in favour of committal for trial, yet the court would be asked to order that a majority who were of opinion that there should be a committal should not be of that opinion. I entirely agree with the Lord Chief Justice that there is not only competence, but desirability that the Bench of justices should be constituted either differently or in different numbers. *Bagg v. Colquhoun* (7) is a clear authority for such a re-construction, because there it appears that two justices originally heard the summons. They announced that they were divided in opinion—they decided that it would be more satisfactory that the case should be re-heard with other justices sitting, and they agreed to adjourn till another day when other justices on the rota would be available. The court approved of that course. If this could be done in a case of summary jurisdiction, it is obvious that justices must have the same power when they are holding a preliminary investigation under the Indictable Offences Act, 1848. For these reasons, I agree that the rule ought to be discharged.

SANKEY, J.—I agree. I think that the determination of the rule turns on the true construction of a few words in s. 25 of the Indictable Offences Act, 1848:

“ . . . if the justice or justices of the peace then present shall be of opinion that it is not sufficient to put such accused party upon his trial . . . ”

In this case the justices did not reach such a decision. I see nothing in any of the cases or statutes which prevents the court from adjourning and re-constituting the Bench. It is advisable that the court should consist of an uneven number of justices. I decline to discuss what would be the position if the same result happened on the second hearing beyond saying that I think that this court is not without powers to deal with such a situation.

Rule discharged.

Solicitors : *Passingham & Hill, Hitchin; Cooper & Co.*

[*Reported by J. F. WALKER, ESQ., Barrister-at-Law.*]

**ATTORNEY-GENERAL FOR MANITOBA v.
ATTORNEY-GENERAL FOR CANADA**

[PRIVY COUNCIL (Viscount Cave, L.C., Viscount Haldane, Lord Dunedin, Lord Blanesburgh and Lord Darling), March 3, 5, 24, 1925]

[Reported [1925] A.C. 561; 94 L.J.P.C. 146; 133 L.T. 193;
41 T.L.R. 409; 69 Sol. Jo. 445]

Canada—Manitoba—Provincial statute—Validity—Indirect taxation—Tax on sales of grain for future delivery—Statutes of Manitoba, 1923, c. 17—British North America Act, 1867 (30 & 31 Vict., c. 3) s. 92, head 2.

The Governor-General of Canada referred to the Supreme Court of Canada the questions: (i) Had the legislature of Manitoba authority to enact c. 17 of its statutes of 1923, entitled "An Act to provide for the collection of a tax from persons selling grain for future delivery"; (ii) if the said Act be ultra vires in part only, then in what particulars was it ultra vires?

Held: under s. 92 (2) of the British North America Act, 1867, the statute was ultra vires the provincial legislature since it imposed a tax which was in substance indirect in its nature inasmuch as it would in many transactions be demanded from one person in the expectation that he should indemnify himself at the expense of another.

Notes. Considered: *A.-G. for British Columbia v. Canadian Pacific Rail. Co.*, [1927] A.C. 934. Applied: *A.-G. for Alberta v. Western Canadian Collieries, Ltd.* and *A.-G. for Manitoba*, [1953] 2 All E.R. 965.

As to legislative powers of Canadian provincial legislatures see 5 HALSBURY'S LAWS (3rd Edn.) 495, 496, and for cases, see 8 DIGEST (Repl.) 722 et seq. For British North America Act, 1867, see 6 HALSBURY'S STATUTES (2nd Edn.) 303.

Cases referred to:

- (1) *Cotton v. R.*, [1914] A.C. 176; 83 L.J.P.C. 105; 110 L.T. 276; sub nom. *Cotton v. R.*, *R. v. Cotton*, 30 T.L.R. 71, P.C.; 8 Digest (Repl.) 726; 220.
- (2) *Burland v. R.*, *Alley v. Barthe*, [1922] 1 A.C. 215; 91 L.J.P.C. 81; 126 L.T. 584; sub nom. *Burland v. R.*, *Sharpel v. Barthe*, 38 T.L.R. 131, P.C.; 8 Digest (Repl.) 726, 221.
- (3) *A.-G. for Quebec v. Reed* (1884), 10 App. Cas. 141; 54 L.J.P.C. 12; 52, L.T. 393; 33 W.R. 618, P.C.; 8 Digest (Repl.) 723, 204.
- (4) *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575; 56 L.J.P.C. 87; 57 L.T. 377; 3 T.L.R. 742, P.C.; 8 Digest (Repl.) 725, 214.
- (5) *Brewers and Maltsters' Association of Ontario v. A.-G. for Ontario*, [1897] A.C. 231; 66 L.J.P.C. 34; 76 L.T. 61; 13 T.L.R. 197, P.C. 8 Digest (Repl.) 726, 217.

Appeal by special leave from a decision of the Supreme Court of Canada to which court the Governor-General of Canada had, under s. 60 of the Supreme Court Act, referred two questions relative to the constitutional validity of a taxing statute passed by the legislature of Manitoba. The questions were as follows: (i) had the legislature of Manitoba authority to enact c. 17 of the statute of 1923, entitled "An Act to provide for the collection of a tax from persons selling grain for future delivery"? and (ii) if the said Act be, in the opinion of the court, ultra vires in part only, then in what particular is it ultra vires? The relevant sections of the statute and the nature of the transactions to which it related appear in the judgment of the Judicial Committee. The Supreme Court of Canada answered the first question submitted to them in the negative, that is to say, that the Act was ultra vires, and the Attorney-General of Manitoba appealed.

Tilley, K.C., and Geoffrey Lawrence for the appellants.

Clauson, K.C., and T. Mathew for the respondent, the Attorney-General for Canada.

Lafleur, K.C., for the respondents, the Attorneys-General for Saskatchewan and Alberta.

Mar. 24. **VISCOUNT HALDANE.**—This case comes by way of appeal from the Supreme Court of Canada. To that court the Governor-General of Canada had, under a statutory power, referred two questions relating to the constitutional validity of a taxing statute passed by the legislature of Manitoba. The questions were as follows :

“First, had the legislature of Manitoba authority to enact c. 17 of the statutes of 1923, entitled ‘An Act to provide for the collection of a tax from persons selling grain for future delivery?’ Secondly, if the said Act be, in the opinion of the court, *ultra vires* in part only, then in what particulars is it *ultra vires*?”

Under the British North America Act, 1867, a provincial legislature may exclusively make laws relating to direct taxation within the province for raising revenue for provincial purposes. Such a legislature is given no power to levy a tax which is indirect. The Supreme Court of Canada (consisting of *Idington, Duff, Anglin, Mignault, and Malouin, JJ.*) answered the questions submitted to them in the sense that the Act was *ultra vires*. *Anglin, J.*, however, took no part in the judgment.

To appreciate the question raised, it is necessary to set out the relevant sections of the statute of Manitoba under discussion, the ‘Grain Futures Taxation Act.’ After defining ‘grain’ as meaning wheat, oats, barley, rye and flaxseed, and ‘agreement of sale’ or ‘agreement to sell’ as covering options, calls in, puts and calls, and offers, indemnities and privileges, and ‘exchange’ as including all agencies, boards of trade, bourses, auction or other meeting places, at which grain and other products or merchandise are publicly bought, sold, bid for, offered or exchanged, for future delivery or contracts for such future delivery are made, the statute provides :

“Section 3. That upon every contract of sale of grain for future delivery made at, on or in any exchange or similar institution or place in Manitoba, except as hereinafter provided, the seller or his broker or agent shall pay to His Majesty for the public use of the province a tax computed upon the gross quantities of grain sold or agreed to be sold, as follows : Upon every thousand bushels of flaxseed, 12 cents; upon every thousand bushels of wheat, 6 cents; upon every thousand bushels of oats, barley or rye, 3 cents. Section 4. No such tax shall be payable in any case in which—(a) the seller is the grower of the grain, or (b) either party to the contract is the owner or tenant of the land upon which the grain is to be grown, or (c) the sales are cash sales of grain or other products or merchandise which in good faith are actually intended for immediate or deferred delivery (such transactions for the purposes of this Act to be evidenced by the actual transfer of the tickets, storage or warehouse receipts, bills of lading or lake shippers’ clearance receipts, or other documents of title for grain transferring actual ownership from the vendor to the purchaser in exchange for the price at the maturity of the contract), or (d) the sales are ‘transfer’ or ‘scratch sales’ or ‘pass-outs,’ provided that the purchase and sale are made at the same exchange, on the same day, at the same price, and for the account of the same person, or (e) the sales are made by a broker on account of a principal, and the name of the principal is not disclosed to the buyer, provided the principal sells to the broker the same quantity and the same grade and kind of grain at the same price, on the same day, on the same exchange, the only tax in this case being the tax payable by the principal. Section 5. The tax imposed by this Act shall be a direct tax upon the person actually entering into the contract of sale, whether such person is the principal in the contract or is acting only in the capacity of a broker or agent for some other person and is imposed solely in order to supplement the revenues of this province. Section 6. (1) The tax

hereby imposed shall be payable in cash by the seller, his broker or agent, in each case, and every person liable to pay such tax shall send to the minister, not later than the 10th day of each month, a return showing the particulars of all sales made by him during the preceding calendar month in respect of which any tax is imposed upon him by this Act, accompanied by payment of the total amount of all such taxes."

An agreed statement of facts put in by the Attorneys-General concerned shows the course of business in the sale and disposal of grain to which the Act may apply. From this statement it appears that the ultimate market price for grain in Canada and Western America, the producing countries, is determined in the great importing markets in Great Britain and Europe. This is a "world price," which is but little controlled by the producers, and has to be looked to to cover all the items in cost of production and of transportation. The landowner or farmer who produces the grain sells it to a country elevator manager, or may deliver it to him for warehousing. The purpose is to sell the grain so as to make a profit on the fluctuating world market price. Whoever has to make the sale naturally tries to get the best price of the moment. It may not be wise to sell at once. He accordingly watches the market. But he desires to avoid possible loss from a drop in market price while he is watching his opportunity. To guard against this he "hedges" by selling on the Winnipeg Grain Exchange for future delivery an equivalent quantity of grain. His aim in this is to eliminate the risk which he runs from fluctuations in the general market price while waiting to sell what he actually possesses. This he forwards to a terminal elevator and sells at a suitable moment for cash. He then extinguishes his obligation on the sale of the "future" which he has already made as insurance by purchasing on the Winnipeg exchange an equal quantity for future delivery, thus extinguishing his liabilities as regards the two obligations in the future. These are cancelled out in the books of the clearing house in Winnipeg, and, as he has now sold for cash what he actually held, the risk from fluctuation of price is at an end. There are minor variations and differences in form which affect classes of transactions upon this principle of insurance by future dealing. But the practice does not vary in its substantial aspect, and it is a characteristic one. Obviously, it involves much employment of brokers and mere agents to carry it out, and these, it is agreed, charge any tax on the transaction to the customer as part of the expenses incurred.

The question which arises is whether the tax imposed by the statute is, in the light of these facts, direct or indirect. As to the test to be applied in answering this question, there is now no room for doubt. By successive decisions of this Board the principle as laid down by Mill and other political economists has been judicially adopted as the test for determining whether a tax is or is not direct within the meaning of s. 92 (2) of the British North America Act, 1867. The principle is that a direct tax is one that is demanded from the very person who it is intended or desired should pay it. An indirect tax is that which is demanded from one person in the expectation and with the intention that he shall indemnify himself at the expense of another. Of such taxes excise and customs are given as examples. It does not exclude the operation of the principle, if, as here, by s. 5, the Taxing Act merely expressly declares that the tax is to be a direct one on the person entering into the contract of sale, whether as principal or as broker or agent. For the question of the nature of the tax is one of substance, and does not turn only on the language used by the local legislature which imposes it, but on the provisions of the statute of 1867. In *Cotton v. R.* (1), followed in *Burland v. R.* (2), this Board held that in the case of a provincial succession duty, intended to be collected from a person concerned, it might be, merely with the administration of a testator's estate, who had been obliged by law to make a declaration of the particulars of that estate for taxation to be payable by him personally, and who was naturally entitled to recover the amount paid from the persons succeeding to the estate, the taxation was ultra vires. A probate duty (as distinguished from such a succession duty), paid as the price of services to be rendered by the government and imposed on the person

A claiming probate, might, it was indicated, on the other hand, well be direct taxation. In *A.-G. for Quebec v. Reed* (3) LORD SELBORNE had laid down an analogous application of the same principle. *Bank of Toronto v. Lambe* (4) is another case in which LORD HOBHOUSE, applying the same principle, found the tax to be direct. In *Brewers and Maltsters' Association of Ontario v. A.-G. for Ontario* (5) LORD HERSCHELL, in delivering the opinion of the Board, followed this case on the ground that the licence tax in question was demanded from the very person who it was intended or desired should pay it, as a tax on his licence with no expectation or intention that he should indemnify himself at the expense of any other person.

B On the scope of the taxation imposed by the Act now under consideration there is little room for doubt. The tax is not a licence tax; it is one to be levied upon the contracts made for the sale of grain for future delivery. There is exemption when C the seller under the contract is the grower of the grain, and when either party to the contract is the owner or tenant of the land on which the grain is to be grown, but in nearly every other case the person entering into a contract of sale for future delivery has to pay a tax proportionate to the quantity sold. It is obvious that this liability will extend, not only to brokers and mere agents, but to factors, such as elevator companies, to whom the possession of grain has been entrusted for sale. D The agreed statement says in its conclusion that the grain business has many ramifications, all of which fall within the kind of transaction it describes, but all of which the statement does not attempt to specify. To a large number of these the exemptions may not apply. If, therefore, the statute seeks to impose on the brokers and agents and the miscellaneous group of factors and elevator companies who may E fall within its provisions, a tax which is in reality indirect within the definition which has been established, the task of separating out these cases of such persons and corporations from others in which there is a legitimate imposition of direct taxation, is a matter of such complication that it is impracticable for a court of law to make the exhaustive partition required. In other words, if the statute is ultra vires as regards the first class of cases, it has to be pronounced to be ultra vires altogether. Their Lordships agree with DUFF, J., in his view that if the Act is F inoperative as regards brokers, agents, and others, it is not possible for any court to presume that the legislature intended to pass it in what may prove to be a highly truncated form.

G Turning to the only remaining question, whether the tax is in substance indirect, and bearing in mind that by s. 5 the liability is expressed as if it were to be a personal one, it is impossible to doubt that the tax was imposed in a form which contemplated that someone else than the person on whom it was imposed should pay it. The amount will, in the end, become a charge against the amount of the price which is to come to the seller in the world market, and be paid by someone else than the persons primarily taxed. The class of those taxed obviously includes an indefinite number who would naturally indemnify themselves out of the property of H the owners for whom they were acting. This view makes it unnecessary to consider the further point raised in the judgment of IDINGTON, J., that the taxing Act was passed in violation of the provision in s. 121 of the British North America Act, that all articles of the growth, produce, or manufacture of any one of the provinces shall be admitted free into each of the other provinces. On this point their Lordships refrain from expressing any opinion. The Supreme Court of Canada answered the I first question in the negative and treated the second as not arising. Their Lordships will humbly advise His Majesty that these were the proper answers and that the appeal should be dismissed. In accordance with the usual practice there will be no costs.

Appeal dismissed.

Solicitors: *Blake & Redden; Charles Russell & Co.; Lawrence, Jones & Co.*

[Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.]

LAURIE AND MOREWOOD v. DUDIN & SONS, LTD.

[COURT OF APPEAL (Bankes, Warrington and Scrutton, L.JJ.), Nov. 19, 20, 1925]

[Reported [1926] 1 K.B. 223; 95 L.J.K.B. 191; 134 L.T. 309; 42 T.L.R. 149; 81 Com. Cas. 96]

Sale of Goods—Title—Delivery order—Transmission by buyer to warehouseman—No acknowledgment—Entry in books of receipt of order—Right of buyer to goods—Estoppel—Sale of Goods Act, 1893 (56 & 57 Vict., c. 71), s. 16.

On Feb. 2, 1925, A. & Sons sold to W. 200 quarters of maize, part of a parcel of 618 quarters belonging to them and then lying in the defendants' warehouse, and gave W. a delivery order addressed to the defendants which W. endorsed: "Please hold against our sub-order" and sent to the defendants. On Feb. 18 W. sold the 200 quarters to the plaintiffs and gave them a delivery order which they sent to the defendants on Feb. 19. On neither of the occasions when the defendants received the delivery orders of Feb. 2 and 18 did they make any communication to W. or the plaintiffs or to their messengers who brought the orders; they merely entered in their books the fact that they had received the orders. W. failed to pay A. & Sons for the maize. Thereupon A. & Sons instructed the defendants to stop delivery, and the defendants refused delivery to the plaintiffs. In an action by the plaintiffs for a declaration that they were entitled to the 200 quarters of maize held by the defendants and damages for their detention,

Held: in the absence of any acknowledgment or notification of acceptance by the defendants of the delivery order sent to them by the plaintiffs the defendants were not estopped from denying that they had the 200 quarters of maize in their warehouse at the disposal of the plaintiffs; nor did the entry by the defendants in their books of the receipt of the delivery order amount to a symbolical delivery of the goods by the vendor, for it did not amount to an attornment by the defendants to the plaintiffs.

Whitehouse v. Frost (1), (1810), 12 East. 614, overruled.

Per SCRUTTON, L.J.: (i) The case is covered by s. 16 of the Sale of Goods Act, 1893, which provides: "Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained." There is no doubt that the goods were not ascertained here. (ii) Very little will do to constitute attornment, e.g., the writing of "Accepted" on the order so that the person presenting it or his messenger can see it, or a delivery of part of the goods, or a claim for charges on the person presenting the order.

Notes. Considered: *Wait and James v. Midland Bank* (1926), 31 Com. Cas. 172; *Re Wait*, [1926] All E.R. Rep. 433.

As to attornment of a warehouseman in possession of goods to the buyer of them and consequent estoppel, see 15 HALSBURY'S LAWS (3rd Edn.) 253, 254, and as to contracts for sale of unascertained goods and the effect of the issue of delivery orders, see *ibid.*, (2nd Edn) 75 et seq., 96, 97. For cases, see 3 DIGEST 102–105, 21 DIGEST 328 et seq., 39 DIGEST 522 et seq. For Sale of Goods Act, 1893, see 22 HALSBURY'S STATUTES (2nd Edn.) 1002.

Cases referred to:

- (1) *Whitehouse v. Frost* (1810), 12 East, 614; 104 E.R. 239; 39 Digest 542, 1531.
- (2) *Woodley v. Coventry* (1863), 2 H. & C. 164; 2 New Rep. 35; 32 L.J.Ex. 185; 8 L.T. 249; 9 Jur. N.S. 548; 11 W.R. 599; 159 E.R. 68; 21 Digest 323, 1206.
- (3) *Knights v. Wiffen* (1870), L.R. 5 Q.B. 660; 40 L.J.Q.B. 51; 23 L.T. 610; 19 W.R. 244; 21 Digest 312, 1147.
- (4) *Gillett v. Hill* (1834), 2 Cr. & M. 530; 4 Tyr. 290; 3 L.J.Ex. 145; 149 E.R. 871; 39 Digest 487, 1063.

- A (5) *Harman v. Anderson* (1809), 2 Camp. 243; 170 E.R. 1143; 39 Digest 624, 2207.
 (6) *White v. Wilks* (1813), 5 Taunt. 176; 1 Marsh. 2; 128 E.R. 654; 39 Digest 488, 1069.
 (7) *Austen v. Craven* (1812), 4 Taunt. 644; 128 E.R. 483; 39 Digest 485, 1049.
 (8) *Godts v. Rose* (1855), 17 C.B. 229; 25 L.J.C.P. 61; 26 L.T.O.S. 240; 1 Jur. N.S. 1173; 4 W.R. 129; 139 E.R. 1058; 39 Digest 489, 1076.
 B (9) *Shepherd v. Harrison* (1869), L.R. 4 Q.B. 196; 38 L.J.Q.B. 105; 20 L.T. 24; affirmed L.R. 4 Q.B. 493; 38 L.J.Q.B. 177, Ex.Ch.; affirmed (1871) L.R. 5 H.L. 116; 40 L.J.Q.B. 148; 24 L.T. 857; 20 W.R. 1; 1 Asp. M.L.C. 66, H.L.; 39 Digest 520, 1355.
 (10) *Hayman & Sons v. M'Lintock*, 1907 S.C. 936; 44 Sc.L.R. 691; 15 S.L.T. 63; 39 Digest 485, 1049 xii.

C **Appeal** from an order of SANKEY, J., made in an action in the Commercial List.

The plaintiffs claimed a declaration that they were entitled to possession of 200 quarters of maize held by the defendants, and that the defendants were bound to deliver them in accordance with the plaintiffs' orders. Alternatively, they claimed their value and damages for their detention. The defendants, were warehousemen and wharfingers, and on or about Feb. 2, 1925, J. T. Alcock & Sons had lying at the defendants' wharf a quantity of about 618 quarters of Plate maize. On that day J. T. Alcock & Sons sold to John Wilkes & Sons, Ltd., 200 quarters of the maize, and gave the buyers a delivery order which Messrs. Wilkes endorsed: "Please hold against our sub-order," and sent to the defendants who entered the receipt in their books, but did nothing more. On Feb. 18, Wilkes & Sons sold the said 200 quarters of maize to the plaintiffs and gave them a delivery order in the following terms: "To superintendent or chief officer of Dudin's Wharf, Montreal Granary. Deliver to Messrs. Laurie and Morewood 200 quarters Plate maize ex delivery order lodged. All charges and risk to buyers after Feb. 22, 1925." The plaintiffs sent this order to the defendants who, again, did no more than enter its receipt in their books. As J. Wilkes & Sons had failed to pay J. T. Alcock & Sons for the maize, on Feb. 26 Messrs. Alcock instructed the defendants to stop delivery of the 200 quarters. Following these instructions the defendants received a letter from the plaintiffs, dated Feb. 25, which was in the following terms: "Delivery order Feb. 18, 1925—200 quarters Plate maize ex steamship Harperley, issued in our favour by Messrs. John Wilkes & Sons, Ltd. Will you please let us have a warrant for the above and oblige."

G The defendants replied by a letter of even date, as follows:

"In reply to you letter of the 25th asking for a warrant on the above please note we cannot issue. The sellers of this maize to J. Wilkes & Sons, Ltd. have stopped delivery, and so we must refer you to your sellers."

H The defendants, therefore, refused to give delivery of the maize to the plaintiffs who brought this action and contended that they were entitled to sue in conversion and detainee, because the maize either (a) was their property, or (b) was property of which they were entitled to immediate possession.

I SANKEY, J., rejected the plaintiffs' contentions (i) that the goods were their property because the property passed to them by reason of the fact that they had a delivery order therefor which had been lodged with and not objected to by the defendants and that they became tenants in common of the whole mass of grain lying at the defendants' warehouse, with a right to give instructions for the delivery of the proportion covered by their contract; (ii) that the defendants and Messrs. Alcock were estopped from alleging that the plaintiffs were not the owners; and (iii) that by reason of ss. 25 and 47 of the Sale of Goods Act, 1893, they were entitled to succeed; and, therefore, he gave judgment for the defendants, with costs. The plaintiffs appealed.

Miller, K.C., Le Quesne, K.C., and Trapnell, for the plaintiffs.

Porter, K.C., and Werninck, for the defendants, were not called on to argue.

BANKES, L.J.—This in an appeal from the judgment of **SANKEY, J.**, in which there is really no dispute about the facts. Alcock was the owner of a large quantity of maize which was warehoused with the defendants. Alcock sold 200 quarters of maize to Wilkes. Wilkes sold 200 quarters of maize to the plaintiffs. A delivery order was given by Alcock directed to the superintendent of the defendants' granary, in this form: "Please deliver to bearer for Messrs. John Wilkes & Sons, Ltd., 200 quarters of maize ex steamship Harperley." That was indorsed by Wilkes: "Please hold against our sub-order." When the maize was sold to the plaintiffs on Feb. 18, 1925, Wilkes gave a delivery order in this form: "Deliver to Messrs. Laurie & Morewood 200 quarters Plate maize ex delivery order lodged. All charges and risk to buyers after 22/2/25."

The first delivery order was handed in; the defendants made no acknowledgment at all in reference to it, but they made an entry in their books of the receipt of the order. In due course Alcock anticipated that he would not get paid by Wilkes, and the plaintiffs also anticipated that there might be some difficulty, and so the plaintiffs wrote to the defendants applying for a delivery warrant, but before any warrant was issued Alcock had to put a stop upon the delivery, and the defendants refused either to issue a warrant or to deliver any maize to the plaintiffs.

It was in those circumstances that the action was brought. In the first instance, no case was made that the plaintiffs were entitled to a delivery of this maize by the custom of the trade, but at the trial a case developed, and it was plain that the plaintiffs' main case was that they were entitled to delivery of the maize by a custom of the trade. The custom that they set up was that, where a warehouseman or wharfinger took in a delivery order and within a reasonable time after the receipt of the order (which reasonable time was put at twenty-four hours, I think) he did not receive any notice putting a stop upon the delivery, and as a result he himself took no action, after the expiration of that period the person who claimed delivery under the order was entitled to delivery, and it was too late for the person who issued the order, or the seller, to endeavour to stop the goods. Upon that point a number of witnesses were called before **SANKEY, J.**, and I think counsel for the plaintiffs is justified in saying that their evidence was all to the same effect, and it was very strong. But the point is this: To what exactly was that evidence directed? Was it directed to establishing the course of business adopted by the persons or firms on whose behalf evidence was given being that which they considered the most convenient, and, in the interests of the trade generally, the best to adopt? Or was it evidence amounting to establishing a custom—that is to say, not only evidence as to the way in which a number of well-established and important firms carried on their business in their own interests, but evidence of a custom which was so all-pervading, reasonable, and well known that everybody doing business in this way must be assumed to know the custom and to be bound by it? The learned judge, in a reserved judgment, came to the conclusion that the evidence fell short of establishing a custom. In my opinion, he formed a correct view in reference to the effect and weight of that evidence, and I desire to say that on that part of the case I agree with the conclusion at which he arrived, namely, that the plaintiffs failed to establish a custom.

That, in my opinion, really disposes of the plaintiffs' case, because, apart from the custom, the only substantial ground, in my opinion, upon which the plaintiffs could hope to succeed in this case would be if they could establish that, whatever the facts might be with reference to the passing of the property, the defendants had said or done something which estopped them from denying that they had in their warehouse, at the disposal of the plaintiffs, this quantity of maize. If they could establish that, there is plenty of authority for showing that they would be entitled to succeed. Two cases have been cited to us upon that point. One is *Woodley v. Coventry* (2), and the other is *Knights v. Wiffen* (3), and in both of those cases an order was presented to a wharfinger or warehouseman and accepted in the sense that there was an intimation given to the person presenting it on the faith of which he

A was entitled to act. It was held that if he did act, he was entitled to say that the person who had made that representation to him was estopped from saying that it was not accurate and must not be acted upon. I should like just to cite one sentence from *Woodley v. Coventry* (2) in the judgment of BRAMWELL, B., as indicating the principle upon which that class of case depends. What BRAMWELL, B., says is (2 H. & C. at p. 172) :

B "When the delivery order was presented to the defendants, they might have said, 'We will not accept this order, for there are not 348 barrels of flour in our warehouse of which Clarke has a right to dispose. There is a much larger quantity in the warehouse out of which Clarke has a right to 348 when selected and appropriated to him, but, until that is done, he has no right to any, for they are not his.' But, instead of saying that, the defendants in effect say, 'We recognise a right in Clarke to dispose of 348 barrels,' which could only be upon the supposition that the property in 348 barrels had passed to him."

C
D As I have already pointed out, what happened in the present case was that the delivery order was merely handed in, and there was no acknowledgment by the defendants, and no statement by the defendants that they would act upon it. It is true there was an entry in the books of the receipt of the delivery order, but no intimation was given to the plaintiffs that any such entry had been made. Of course, if the plaintiffs could have established the custom, they would then have been entitled to say: "It is quite true that we received no acknowledgment or acceptance from the defendants, but their silence on the point, after the expiration of a reasonable time, amounts, because of the custom, to an acceptance." But, as I have said, I think the custom was not proved, and the plaintiffs are, therefore, driven to say that the mere taking in—if I may use that expression—of the delivery order, without any acknowledgment or acceptance, coupled with the entry in the books, is sufficient to create an estoppel. In the first instance, I think counsel for the plaintiffs was prepared to agree with me that that was not so, but afterwards he withdrew that and said that he thought perhaps he had assented by my suggestion without sufficient consideration, and it has been argued that there is authority for the proposition that the mere taking in of the order and the entry in the books is sufficient to create an estoppel, and counsel has referred to two cases in support of that proposition. One is *Gillett v. Hill* (4), and the other is *Harman v. Anderson* (5). I think myself that *Gillett v. Hill* (4) is no authority for the proposition, because there the question was submitted to the jury whether or not there had been an acceptance, and a communication of that acceptance, of the delivery order, and upon the facts of that case they found that there had. It is quite true that in the first instance the evidence was only that the delivery order had been handed in and received without comment, but later, a second delivery order had been handed in, in which a request was made for delivery of a smaller number than the full number of sacks—a smaller number because of a statement made by the warehouseman when the first order was handed in that he had not got the full number of sacks. Therefore, on the second occasion, application was made for delivery of five out of the full number of twenty, and that order was accepted and acted upon. The jury had that before them, and the question which came before the court was whether, upon that evidence, the jury were entitled to come to the conclusion at which they did arrive. I think that the language of all the learned judges must be read in reference to those facts, and the nature of the application, and I do not think really that they are of any assistance to us in this particular case. In *Harman v. Anderson* (5) I confess that, except for the fact that that was a case in which there were specific goods, it does seem to me to be difficult to explain the language used by LORD ELLENBOROUGH; and I treat that case as a case in which, again, the language was used in reference to a case dealing with specific goods. I do not think, therefore, that either of those cases is an authority for the proposition that one can create a case of estoppel where all that has happened is that the delivery order

has been handed in and received by the warehouseman without comment of any sort or kind, or communication of any sort or kind, to the person who handed in the order, and the only fact in evidence, in addition to the receipt of the order, is the fact that the receipt is noted, in the ordinary course of business, in the books referred to. A

That disposes of that second point. But then counsel for the plaintiffs raises a third point when he says that, assuming that what happened does not create an estoppel, yet there is authority for the proposition that the entry by the defendants in their books of the receipt of the delivery order amounts to a symbolical delivery of the goods by the original vendor, and that, therefore, as nothing remained to be done by the vendor in reference to those unascertained goods, he is entitled to say that *Whitehouse v. Frost* (1) is an authority for saying that he is entitled to succeed, because nothing more remained to be done as between the original vendor and the original purchaser. That brings one to consider the authority of *Whitehouse v. Frost* (1), and it is quite plain that that case has been adversely commented upon on very many occasions. Personally, I am unable to understand it, unless it be that in that particular case the delivery order was accepted and the fact of the acceptance was communicated. In *White v. Wilks* (6), *Whitehouse v. Frost* (1) and *Austen v. Craven* (7) were referred to. *White v. Wilks* (6) was a case as between vendor and purchaser, and in that case there was a handing over of a delivery order and the acceptance of the delivery order. The headnote of the report says (5 Taunt. 644): B C D

"By a bargain and sale of twenty tons of oil out of a merchant's stock, consisting of several large quantities of oil, in divers cisterns, in divers places, no property passes: there must be a separation of the part sold from the rest of the stock." E

It is plain from that statement that the question in issue in that case was whether there had been a passing of the property. *Whitehouse v. Frost* (1) was referred to, and LORD MANSFIELD, C.J., said this (*ibid.* at p. 177):

"In the case of *Austen v. Craven* (7) this court, in direct opposition to the cases cited [the main case cited in *Austen v. Craven* (7) was *Whitehouse v. Frost* (1)], held that trover would not lie for sugars which had not been specifically separated from the vendor's stock. . . . The objection here is, that no subsequent quantity of oil was sold. The quantity agreed to be sold was mixed with a much larger quantity; and not only that, but it was mixed with several different quantities: how was it to be separated? In the cases where the payment of rent for warehouse room had been an ingredient to make a complete sale, the question has always been on the constructive delivery, and not on the separation of goods from the mass; in all those cases there has been a complete separation of the goods sold; and the only doubt has been whether there was a symbolical delivery." F G

He, therefore, seems to take the case of *Austen v. Craven* (7) as having been decided in direct and complete opposition, as he expresses it, to *Whitehouse v. Frost* (1), and he will not accept the view that there had been, in *Whitehouse v. Frost* (1), anything in the nature of a symbolical delivery. In those circumstances, it seems to me that it is impossible in the present case to accept *Whitehouse v. Frost* (1) as an authority for the proposition that the property had passed, or that, because nothing else remained to be done, in some way or another the plaintiffs are entitled to claim the delivery of the goods from the warehouseman. In my opinion, the authorities cited fail to support the propositions for which counsel for the plaintiffs contended, and I cannot myself see here, apart from the alleged custom, that the plaintiffs have any ground of action which would entitle them to succeed in their claim. Failing the proof of the custom, it seems to me that on all the grounds the view taken by the learned judge was right, and that the appeal fails. H I

WARRINGTON, L.J.—I am of the same opinion and for the same reasons.

A SCRUTTON, L.J.—I can quite see that this case raises questions of considerable importance in the corn trade, and matters have been discussed in the course of the argument which raise further difficult questions, but in the view that I take of the case, when one has carefully examined the facts and the course of the action, the point to be decided ultimately becomes a narrow one.

B Messrs. Alcock had a quantity of maize ex a certain ship, and they put that maize in Messrs. Dudin's warehouse. Then Messrs. Alcock sold to Wilkes 200 quarters of maize, terms net cash. There was no evidence as to what in the trade "terms net cash" means. Sometimes it means payment on a particular day in the month when bills are generally rendered; sometimes it means what it says; and in the absence of any trade evidence as to what day it means for payment one would think that it meant that before Wilkes could get anything, maize or a delivery order or a warrant or anything else, he must pay. There is some ground in the authorities for saying that when one has a transaction like that, though one has *prima facie* done something which goes some way to pass the property, if the purchaser does not pay one may rescind all that one has done. An example of the class of case that I am referring to will be found in *Godts v. Rose* (8). In that case the seller gave an order to the wharf, and the wharfinger's clerk made the usual entry in the book, and gave a warrant or order acknowledging that he held for the purchaser. On it turning out that the purchaser did not pay, and wanted delivery without payment, the whole thing was treated as a nullity, because the purchaser had not paid. Here Wilkes did not pay. He did not pay net cash, and apparently he was in a condition in which it was very likely that he would pay nobody. The plaintiffs were in the unfortunate position that Wilkes owed them a large sum of money, so they set about seeing how to make the best of an unpleasant situation, and it occurred to them that if they bought goods from Wilkes on credit, they might be able to set off the price against the larger sum which he owed them. Therefore they went to Wilkes, bought 200 quarters of maize and got a delivery order. Wilkes sent to the warehouseman the delivery note which Messrs. Alcock had given him, the messenger had handed it in, and the warehouseman had said nothing. But in a column of their books, which is headed: "Landing charges", they had put a note: "Feb. 2 [the date of the delivery order] John Wilkes & Sons, Ltd., 200 quarters of 480 lbs." They added a note: "Feb. 15," the day on which, under the delivery order, the charges would become payable by Wilkes rather than by Messrs. Alcock. On the delivery order there was a note signed by Wilkes: "Please hold against our sub-orders." The warehousemen did not put any note in their books about sub-orders, and took no notice of the endorsement. It does not appear whether they had seen it or not. The plaintiffs, having got their delivery order, sent it to the warehousemen on Feb. 19. Again, the warehousemen said nothing to them; they made no entries in their books at all, and did nothing with regard to that particular delivery order. On Feb. 26, it occurred to the plaintiffs that something better than a delivery order was wanted, because, whatever the Factors Act may say about delivery orders being documents of title, it is common knowledge in the city of London that they are not treated as documents of title, and no bank will advance money upon them. So the plaintiffs wrote for a warrant, but before their letter was received Messrs. Alcock got tired of having given a delivery order without getting any cash, and they sent a stop order to the warehousemen, who thereupon scratched out in their books "John Wilkes & Sons, Ltd.," and put "Stop order put on this D/O." As to that, all that one can say is that, in view of *Godts v. Rose* (8) and *Shepherd v. Harrison* (9) particularly, there may be a nice question as to what the effect of that was, but, at any rate, the stop order was put on by Messrs. Alcock on the ground that they were unpaid vendors who had a lien.

Therefore the plaintiffs did not get their 200 quarters or any 200 quarters, and this action was started.

I take the three grounds of claim which were put forward in order. First of all, the action of detinue for the 200 quarters the property of the plaintiffs, upon which

we have had an argument on their behalf to the effect that, while it is not necessary for the plaintiffs to show that the goods are their property, they are entitled to them on the authority of *Whitehouse v. Frost* (1). I personally have no understood why these old cases are gone into, because it looks to me as if the Sale of Goods Act, 1893, had settled this question, whatever *Whitehouse v. Frost* (1) said. Section 16 of the Sale of Goods Act, 1893, says:

"Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained."

There is no doubt that the goods were not ascertained here. They were 200 quarters, part of the quantity then lying in the defendants' warehouse, but those 200 quarters had never been ascertained. It seems to me that it is no good going into ancient authorities when one has got a statute. I have looked at the Lord President's judgment in the Scottish case of *Hayman & Son v. M'Lintock* (10). There a trustee in bankruptcy was claiming property in a bankrupt's goods which the bankrupt had sold, as against a number of people who had various titles. It is not necessary to sort out all the various people who claimed the bankrupt's goods. Some of them claimed under bills of lading and some of them claimed under other documents, but some claimed under delivery warrants accepted by a warehouseman. It was not an action against the warehouseman, but it was an action against the bankrupt. LORD DUNEDIN was referred to *Whitehouse v. Frost* (1), which was at once answered by the other side: "See LORD MACMORRAN'S NOTE in BELL'S COMMENTARIES, which says that this has been overruled long ago. See BENJAMIN. See LORD BLACKBURN," and nothing more was heard of *Whitehouse v. Frost* (1). The Lord President said (44 Sc.L.R. at p. 698):

"That leaves 424 bags in the hands of the trustees representing the bankrupt, and upon these 424 bags arises a subsequent question with persons of the name of M'Connell and Reid and J. K. Stewart. The question arises out of this, that after the bankrupt had got the flour into the store he entered into a contract sale for certain of those bags in favour of these parties. There is no question as to the contract of sale of the flour lying in the store, but before anything was done in the way of separating the bags there came the bankruptcy. The trustee in the bankruptcy appeals simply to s. 16 of the Sale of Goods Act, 1893, which specially provides that where there is a sale of unascertained goods the property shall not pass until the goods shall have been ascertained. Here nothing was done to ascertain the goods. These flour bags were not separately marked, and although doubtless if the buyer here had gone to the storekeeper and had got him to put aside the sacks, or mark them, or put them into another room, that would have passed the property, yet, as he did none of these things, the property, it seems to me, did not pass. It is not enough merely to get an acknowledgment in general terms that so many of those bags belonging to the bankrupt are held for him."

That seems to me to be merely repeating the language of the Sale of Goods Act, 1893, and as far as the question of property is concerned, it appears to me that the plaintiffs had no claim because the goods were not their property since they had never been ascertained. It do not wish to say any more about *Whitehouse v. Frost* (1) than that it is treated as bad law by MR. BENJAMIN and his editors, LORD BLACKBURN and his editors, and BELL'S COMMENTARIES and its editors, including LORD MACMORRAN. In view of the other cases, and, particularly, in view of the language of the Sale of Goods Act, 1893, I do not see how *Whitehouse v. Frost* (1) can be considered any authority.

That seems to me to dispose of the original claim in the proceedings. There was a second claim made which as of this nature: "Very likely I have not got any property, but you cannot be heard to say that I have not, because I brought you an order to deliver to me so many quarters of maize, you accepted it, and, having accepted it, it is not open to you to say that you have not got them. You told me

- A** that you had got them, and you cannot be allowed to say now, and you are estopped from saying now, that I have not got any goods there, because you have told me that I have." That turns on whether what has taken place is what is called generally in the text-books an attornment to the person who brings the delivery order. As far as the plaintiffs are concerned, nothing happened except that the document was handed in and its receipt entered in the books.
- B** Therefore, one is left with the question whether the mere handing in, and nothing more, amounts to an attornment by the warehouse-keeper, it having to be taken, for the purpose of this argument, that there were in fact no goods then belonging to the people who sold to the plaintiffs in the warehouse-keeper's possession. It was thought that the discussion whether that did amount to an attornment would be strengthened by the practice of the trade, and so during the course of the case, a pleading was
- C** formulated alleging the custom, the relevant part of the custom being: "If the delivery order is sent through the post or by messenger, the person in whose favour it is issued is entitled to assume that the wharfinger will hold and deliver a particular quantity to that person's sub-order, unless the wharfinger forthwith, that is to say, within twenty-four hours, either returns the delivery order, or in any other way intimates that he cannot accept it." That is to say, that you are to assume acceptance
- D** and attornment, unless the wharfinger who has got the order says within twenty-four hours: "I do not accept this." It seems to me to be a perfectly reasonable custom if it can be established, but the learned judge came to the conclusion that no universality or certainty was shown about this custom in view of the rarity with which the event happened, and I do not see my way to interfere with the learned judge who saw the witnesses, heard them cross-examined and heard the way in which they gave their evidence. That shuts out the possibility of saying that there was an attornment by a custom of the trade, and one is then left to the simple and very narrow question: Is it enough to make a warehouseman attorn to the person who presents a delivery order, that, the order being sent by a messenger, it should be received by a clerk and nothing said? I think, myself, that a very little
- E** will do to make attornment. If one writes on the order, in the presence of the messenger "Accepted," so that he sees it; if one makes delivery of part of the goods, as in the case which counsel for the plaintiffs cited us, where five out of the twenty barrels were delivered; if one makes a claim for charges upon the person who has presented the delivery order; if one tells him that one has entered the goods in his favour in one's books. It is very easy to get an attornment, but I do not see my way to get an attornment or recognition out of the fact that when an order
- G** is brought by a messenger and given to a clerk, nothing is done which is communicated to the persons sending the order. To get estoppel, one must get something of which the person who claims the estoppel against one has knowledge, and here the plaintiffs knew nothing, and all that Wilkes knew was that nothing had been said to him for some ten days. I do not think that that is enough to make an attornment.
- H** If that is so, the three grounds upon which this claim is brought all fail—no property in the goods; no facts communicated to the person claiming the estoppel upon which attornment could be inferred; no custom that twenty-four hours' silence amounts to an attornment, proved. I can quite see that the corn trade had better try to get something which will amount to an attornment, and the only thing that I should suggest is—although they know their business very much better than I do—that they should send a fairly intelligent messenger and ask for an answer whether it is accepted, and insist upon getting it. If they use their twenty-four hours in getting the answer, they will very likely get an attornment. For the reasons that I have given, it appears to me that this action, upon the evidence given in this case, and this appeal, fail.
- I**

Appeal dismissed.

Solicitors: Keene, Marsland, Bryden & Besant; Sturton & Sturton.

[Reported by T. W. MORGAN, ESQ., Barrister-at-Law.]

MATHEOS (OWNERS) v. LOUIS DREYFUS & CO.

[HOUSE OF LORDS (Viscount Cave, L.C., Lord Dunedin, Lord Atkinson, Lord Sumner and Lord Buckmaster), February 5, 6, March 13, 1925]

[Reported [1925] A.C. 654; 94 L.J.K.B. 465; 133 L.T. 146; 41 T.L.R. 393; 69 Sol. Jo. 491; 16 Asp. M.L.C. 486; 30 Com. Cas. 241]

Shipping—Demurrage—Exceptions clause—“Detention by frost or ice from B. down to S.”—Inclusion of frost or ice at B. or S.—Alternative means of loading—Physically, not commercially, possible.

Under a charterparty the chartered vessel was ordered from S. to B. to load a full cargo of wheat. Seventeen running days, Sundays and any other recognised holidays excepted, were to be allowed for loading and unloading, and ten days on demurrage over and above the said lay days at £40 per running day. By cl. 11: “Except as herein provided, detention by frost or ice from B. down to S. . . shall not count as lay days.” There were three usual and customary methods of loading grain at B. one of which was at the quay from silos at the docks, and on Dec. 10 the vessel, by order of the charterers, entered the dock at B. to load part of her cargo. On Dec. 12, before the vessel had been able to get alongside the quay and begin loading, the water in the dock became frozen and in consequence it was impossible to move the vessel and she was detained there until the following April. On a claim by the shipowners for demurrage and damages for the detention of the ship, which went to arbitration, the umpire found that it would not have been physically impossible to load the ship in the position in which she had been frozen in, though to do so might have been difficult and expensive,

Held: (i) no question of lay days could arise during the transit voyage of the vessel from S. to B., and, consequently, the effect of the reference to lay days in cl. 11 was that the clause applied to detention by frost or ice at those ports; (ii) with regard to the possibility of the ship being loaded while she was not alongside the quay, the test was whether such an operation was commercially, not physically, possible, and the umpire must be taken to have found that it was not commercially possible; and, therefore, the charterers were protected by cl. 11 and so were not liable to the shipowners for the amount claimed.

Notes. Applied: *Lewis v. Dreyfus* (1926), 31 Com. Cas. 239. Referred to: *Bunge y Born Co. v. Brightman*, post, p. 607; *Minister of Food v. Reardon Smith, Ltd.*, [1951] 2 T.L.R. 1158.

As to exceptions covering delay in loading see 30 HALSBURY'S LAWS (2nd Edn.) 439 et seq., and for cases see 41 DIGEST 435, 436, 457-459.

Cases referred to:

- (1) *Hudson v. Ede* (1868), L.R. 3 Q.B. 412; 8 B. & S. 631; 37 L.J.Q.B. 166; 18 L.T. 764; 16 W.R. 940; 3 Mar. L.C. 114; Ex.Ch.; 41 Digest 458, 2880.
- (2) *Bulman and Dickson v. Fenwick & Co.*, [1894] 1 Q.B. 179; 63 L.J.Q.B. 123; 69 L.T. 651; 42 W.R. 326; 10 T.L.R. 45; 7 Asp. M.L.C. 388; 9 R. 227, C.A.; 41 Digest 439, 2757.
- (3) *The Glendarrock*, [1894] P. 226; 63 L.J.P. 89; 70 L.T. 344; 10 T.L.R. 269; 38 Sol. Jo. 362; 7 Asp. M.L.C. 420; 6 R. 686, C.A.; 41 Digest 414, 2580.
- (4) *The Northumbria*, [1906] P. 292; 75 L.J.P. 101; 95 L.T. 618; 10 Asp. M.L.C. 314, D.C.; 41 Digest 417, 2606.

Appeal by the shipowners from an order of the Court of Appeal (BANKES, SCRUTTON, and SARGANT, L.JJ.), reported 131 L.T. 177, sub nom. *Michalinos & Co. v. Louis Dreyfus & Co.*

By the terms of a charterparty dated Nov. 28, 1921, a steamship was chartered to go to Sulina for orders. Clause 7 of the charterparty provided that seventeen

A running days, Sundays and other recognised holidays excepted, were to be allowed for loading and unloading, and ten days on demurrage over and above the said lay days at £40 per running day, or pro rata. Clause 11 provided that detention by frost or ice from Brail (Braila) down to Sulina should not count as lay days. When the steamship arrived at Sulina she was ordered to proceed to Braila to load a cargo of wheat. She arrived at Braila on Dec. 7, 1921, and entered the dock there by direction of the charterers to load part of her cargo on Dec. 10. She was to have completed the loading of the cargo by coming out of the dock and loading in the river, but on Dec. 12 the dock became frozen over and it became impossible for the ship to be moved. The result was that she had to remain in dock until March 9, 1922, when the Danube became open for navigation, and for a further period during which she could not be loaded owing to the Romanian government having prohibited the export of wheat until March 22. After March 22 her loading was completed and she left Braila on April 5, 1922. The owners, having claimed demurrage and damage for detention, were awarded £4,166 by the arbitrator, who found that, although it would have been physically possible, it was not reasonably practicable to load the vessel while she was lying in the dock. The charterers contended that cl. 11 applied not only to detention by ice caused in transit between Braila and Sulina, but to detention caused in any part of the river between these two points. They also said that, the detention having taken place before they were in default, they were excused; and, further, that, as the ship was detained before the lay days had expired, the owners would have been unable to do anything with her even if they (the charterers) had not been in default, and that, consequently, the owners had not suffered any damage. The Court of Appeal held, reversing the decision of ROWLATT, J., upon the award of the arbitrator which was stated in the form of a Special Case, that cl. 11 must be construed to mean that, if there was ice which prevented the loading and that ice was within the limits specified, that is to say, from Braila down to Sulina, the charterers were entitled to rely upon the fact of ice being in the dock at Braila as a cause of prevention. The shipowners appealed.

W. N. Raeburn, K.C., and S. L. Porter, K.C., for the appellants.

W. A. Jowitt, K.C., and C. T. Le Quesne, K.C., for the respondents.

The House took time for consideration.

March 13. The following opinions were read.

G **VISCOUNT CAVE, L.C.**—This appeal concerns a claim by the owners of the steamship *Matheos* against the charterers of that vessel for demurrage and damages for detention. Under the charterparty, which was dated Nov. 28, 1921, the vessel was to proceed to a port in the Danube and there load from the factors of the freighters a cargo of wheat, and was to proceed to a port in the United Kingdom or on the continent. Seventeen running days (Sundays and certain other days excepted) were to be allowed for loading and unloading, and ten days on demurrage at £40 per day. The charterparty contained the following clause:

(11) Except as herein provided detention by frost or ice from Ibrail down to

Sulina, also detention by quarantine, shall not count as lay days.

I The port selected as the loading port was Ibrail, also known as Braila, on the Danube. On Dec. 7, 1921, the vessel arrived there, and notice of readiness to load was given to the charterers' agents. There were three usual and customary methods of loading grain at Braila—viz: (a) at the quay from silos in the docks; (b) from lighters in midstream at a place called the Baths; and (c) from the river bank by the use of gangways and manual labour. The charterers had sufficient cargo in the docks and in lighters to load the *Matheos*, and the intention was to load a small part of the cargo in the dock and the remainder in mid-river. It was thought desirable to load first the grain in the dock, and accordingly, on Dec. 10, the charterers' agents required the vessel to enter the dock and load the

grain there. At this time a vessel called the *Valkenburg* was loading at the only available quay, and it was arranged that she should be moved and make way for the *Matheos*, which in the meantime was anchored outside and alongside the *Valkenburg*. On Dec. 12 a severe frost set in and the dock became completely frozen over, and from that date until the following March 9 the *Matheos* and all other vessels in the dock remained icebound. On March 9, 1922, the dock became clear of ice and the *Matheos* took her berth alongside the quay, but loading could not immediately begin, as the Romanian government was then holding up the shipment of wheat. On March 22 this prohibition was removed, and loading began and proceeded rapidly. The vessel sailed on April 5, 1922. The time which elapsed from Dec. 7, 1921, when the vessel was ready for loading, until April 5, 1922, when she sailed, exceeded the time allowed for loading by ninety-seven and three-quarter days ; and, accordingly, a claim was made for ten days' demurrage and damages for eighty-seven and three-quarter days' detention, amounting in all to a sum exceeding £4,000. The claim was referred to arbitration, and the arbitrator, on July 11, 1923, made his award, allowing the claim and stating a Case for the opinion of the court. Upon the argument of the Case ROWLATT, J., affirmed the award ; but on appeal to the Court of Appeal that court held that the charterers were protected by cl. 11 of the charterparty, and set aside the award. Hence the present appeal.

Counsel for the shipowners raised a number of contentions, some of which were disposed of during the argument, and the only questions to which I feel it necessary to refer are the following. (i) It was said that, having regard to the words "from Ibrail to Sulina" in cl. 11 of the charterparty, that clause was only intended to have effect in the case of detention by frost or ice during the transit between these ports. This contention, though accepted by the arbitrator, was rejected by ROWLATT, J., and the Court of Appeal, and appears to be quite untenable. The clause refers to lay days, and there could be no question of lay days during the passage of the vessel down the Danube. The effect of the words is to limit or define the operation of the clause as applied in *Hudson v. Ede* (1) so that it should have effect in the event of detention by frost or ice at any place from Ibrail to Sulina, both inclusive. (ii) It was argued that the loading of the ship was not absolutely prevented by the ice, as the ship could have been loaded in the dock by manual labour either from the quay or from lighters lying in the dock, and the time afterwards spent in loading could have been saved. To this it was answered by the charterers that it was commercially impossible for this to be done. This was a question of fact for the arbitrator, and para. 19 of his award is in the following terms :

"No attempt in any way was made to load the *Matheos* at any time between the dates above mentioned, viz., Dec. 12, 1921, and March. 9, 1922, and, although to do so in the position where she was might have been difficult and expensive, I am of the opinion that it would not have been physically impossible to do so by means of chutes and stages and manual labour; one reason admitted by charterers' witnesses for not loading the steamer during this period was that the cargo would probably have become heated in the steamer, and no insurers would have accepted the risk of insurance."

This finding is not as clear as it might have been, but it is undesirable, after the time which has elapsed since the award, to send it back for an amended finding. The paragraph must be construed as it stands, and I agree with the Court of Appeal in construing it as a finding against the commercial possibility of the course suggested. The arbitrator finds that loading by manual labour was physically possible, but difficult and expensive ; and he refers, apparently with assent, to an argument showing that loading would have been useless owing to the heating which would have occurred and the consequent impossibility of effecting an insurance. I think he meant that loading by hand during the frost was in the

A commercial sense impracticable, and certainly there is no finding the other way. This argument, therefore, fails. Counsel also desired to raise an argument as to the effect of the government prohibition against loading, but it was found that the point had been abandoned in the court below, and it could not therefore be pursued. In my opinion, this appeal should be dismissed with costs.

B **LORD DUNEDIN.**—Three questions arise on this appeal, the determination of which will settle whether the judgment complained of is right or should be altered.

The first is whether the words “from Ibrail down to Sulina” make the clause only apply to a transit from the one place to the other, and make the clause inapplicable to what happens at Braila itself. The umpire took this view, but both the learned judge who tried the case and the judges of the Court of Appeal held the opposite. I think they were very clearly right. The clause is as to lay days, and lay days have no place in a transit voyage. The reason of the limitation is clear enough. It was to prevent questions as to detention of cargo by ice far up the river. The clause means detention by ice within the limits specified. The second question, and on this the Court of Appeal has differed from the learned trial judge, is whether the loading in this case was truly prevented by ice so as to cause detention, in view of the fact that the landing places in the river and at the bank would have been available had the vessel gone there. I agree with the Court of Appeal. I think the facts decide the matter. Once it is shown, as it was shown, that the charterer was within his rights in ordering the vessel into the docks, and that having got there the vessel could not get out again because of ice, it seems to me the matter is concluded. It is just the same case as the case of a choice of ports, of which *Bulman and Dickson v. Fenwick & Co.* (2) is an example.

E The third question, and it is this alone which has, in my view, raised any difficulty, is whether, nevertheless, in the circumstances the charterer might not have effected loading or partial loading lying where the vessel was, and thus have at least saved some time of detention. The difficulty arises from the somewhat ambiguously worded finding of the umpire on the point. He says :

F “Although to do so [i.e., to load] in the position where she was might have been difficult and expensive, I am of the opinion that it would not have been physically impossible to do so by means of chutes and stages and manual labour ; one reason admitted by the charterers’ witness for not loading the steamer during this period was that the cargo would probably have become heated in the steamer.”

G Now this finding must be read in the light of the fact that the charterers contended before the umpire, as he himself sets forth, that it was commercially impossible to load the vessel in its position by any way except the usual way by cranes from the berth, and it had been found that she was unable to get to the bank because of the ice. I, therefore, come to two conclusions. First, I agree with the Court of Appeal that in view of the pleading the umpire in putting stress on the word physically must be held to have used it as the antithesis to commercially, and commercial possibility, not physical possibility, is the real question. But, further, I think that, once the proper and usual mode of loading was negatived as rendered impossible by ice, it really fell on the owners to get from the umpire a finding of commercial possibility, seeing that that possibility could only rest on a novel and, so far as we can see, hitherto untried method. It is not as if the alternative method to the usual method, which ex hypothesi is found impracticable, was a usual one. Given impossibility by crane, I do not doubt that it would be incumbent on the charterer to prove impossibility by lighter. But this is quite a different thing, unused, untried, and problematical. In such a case it seems to me the onus shifts, and the owners on whom the shifted onus falls have not discharged it. I agree that the appeal should be dismissed.

LORD SUMNER.—It is found in the Case Stated, and has not been contested, A
that on Dec. 7, 1921, at noon, the Greek steamer *Matheos* was an arrived ship. She was in her designated port of loading according to the charter ; she was in
fact ready to load at any accustomed loading place, as ordered by the charterers' B
agents, and she had given notice that she was so ready. Accordingly, the lay
days from that time were running against the charterers. On Dec. 10 orders C
were given to enter the dock, where grain was stored in silos and to load there at
a quay berth. This is one of three usual and customary ways of loading grain at
Braila. The ship entered the dock without demur. For a vessel of her size only
one quay berth was suitable from which to load at the silos. The charter contained
no express provision for shifting berths, and it was suggested at your Lordships' D
Bar that, in the absence of such a provision, the charterers could only require the
ship to go to a loading place at which they could fulfil their entire obligation to E
load a full and complete cargo. From the findings of fact it appears, incidentally
but still sufficiently clearly, that the *Matheos*, if fully laden, could not have got out
of the dock for want of water on the dock sill. Beyond observing that the charter
authorised the charterers to order the ship to one or two loading places in the
Danube, and did not, therefore, require them to fill the ship at Braila, no opinion
need be expressed on this contention, for, on learning that it had not been raised
before the umpire, so that there had been no opportunity to give evidence as to such
matters as the custom of the port and the power of the captain of a Greek ship
to bind his owners by accepting the charterers' order, counsel for the shipowners
very properly gave up the point. On Dec. 10 another ship the *Valkenburg*, was
already lying at the quay berth in question and loading from the silos, and at that
time of year the river might be expected to freeze very shortly. Indeed, on that
very day the port authorities gave public notice warning lighters and other craft
to seek shelter, and many accordingly entered the dock, even though the still water
there would probably freeze earlier than the running water in the river. Neither of
these circumstances, however, prevented the quay berth in the dock from being
a loading place to which the charterers might lawfully order the *Matheos*. Under
the charter the risk of delay in reaching it was on them, unless they were protected
by some exception, since the lay days had already begun to run, and beyond taking
this risk they were under no obligation to select a loading place advantageous to
the ship. The result was that the *Matheos* only reached a position parallel with
the *Valkenburg* but some yards further out from the quay ; and there she remained
when, on Dec. 12, the dock became frozen over. The *Matheos* was frozen in
until March 9, 1922. The question is whether she was on demurrage or whether,
as against the charterers her lay days were suspended. F
G

The charterers' case is that cl. 11 of the charter applied and protected them, for
detention by ice occurred and such detention is not to count as lay days. It was
for them to give evidence of facts which would bring them within the exception,
and it was for the umpire to state his own conclusions of fact on the evidence before
him. *Primâ facie* the charterers' defence was established, for it was plain that
the *Valkenburg* was frozen into the berth and that the *Matheos* was frozen out of
it ; but of course the charterers could not claim that ice had prevented loading,
if the loading could and should have proceeded notwithstanding the ice. This,
however, does not mean merely that it was physically possible to have put wheat
into the ship, but that it was commercially practicable. There has been some
dispute as to the meaning of the umpire's finding on this question. He recited
the charterers' contention thus : H
I

"It was commercially impossible and or impracticable to load the *Matheos*
while she was in the ice in the dock . . . Moreover, if it had been possible to
load the *Matheos* while so detained in the ice, and if she had been so loaded,
the wheat would have become or would have been in danger of becoming
heated in the hold of the said vessel in the ice, and no insurer would have
accepted such a risk."

A On the other hand, the contention of the shipowners is thus stated :

"In any case upon the evidence there was no prevention of loading, though there may have been greater difficulty in loading at Braila itself. The ship could have been loaded in the dock itself by hand, or might have been ordered to load in mid-stream or from the quay on the north bank of the river, both of which are admittedly usual loading places."

B The finding is as follows :

"19. No attempt in any way was made to load the *Matheos* at any time between Dec. 12, 1921, and March 9, 1922, and, although to do so in the position where she was might have been difficult and expensive, I am of the opinion that it would not have been physically impossible to do so by means of chutes and stages and manual labour ; one reason admitted by charterers' witness for not loading the steamer during this period was that the cargo would probably have become heated in the steamer and no insurer would have accepted the risk of insurance."

C Counsel for the shipowners, to whom this point has become far more crucial in the Court of Appeal than it had been at the arbitration, when so many other points were being put forward, argued, first, that the umpire meant to find that loading was commercially practicable during the period in question, though, no doubt, expensive ; second, that as a matter of law the defence of excepted perils could not succeed, unless the charterers obtained an affirmative finding that such loading was commercially impracticable ; and third, that his finding was at least ambiguous and that the case ought to be remitted to him for a clearer statement.

E I should be most reluctant to advise your Lordships to remit the case. In the nineteen months that have elapsed since it was stated, and doubtless after hearing many other arbitrations in the meantime, the umpire has probably forgotten all about it, and, if so, evidence would have to be gone into about events that happened at Braila over three years ago. I do not think that, in a matter which was peculiarly one for an expert, and on a point where he has not misdirected himself in point of law, it can be said that the charterers must necessarily fail, unless they obtain an express finding that the operation was commercially impracticable. If the evidence as to the ice had stood alone, the umpire could not have been required in law to demand evidence negating the commercial practicability of alternative modes of loading and to reject the evidence of detention by ice unless further evidence was forthcoming. It has been decided that when a *prima facie* case of excepted perils is met by an allegation of negligence (*The Glendarroch* (3)) or unseaworthiness (*The Northumbria* (4)), the burden of proof shifts to the party interested in establishing this allegation affirmatively, and I do not see why the same rule should not apply to an allegation of the existence of a practicable alternative mode to loading. If, in expressing his findings, the umpire negatives the allegation in silence by not giving effect to it (if indeed, it was raised by the shipowners at all) I do not think that his award can be said to be defective on its face. It seems to me to be a pure matter of construction, and I am by no means prepared to dissent from the construction adopted by the Court of Appeal. Having gone so far as to say that the operation would not have been physically impossible, the umpire might well think that, if he went no further, anyone would understand (as, personally, I should do) that as a matter of business it was out of the question. The concluding words of his finding seem to leave no doubt. Something in the sentence must be misprinted. To substitute "ship's" for "charterers'" would clear this up, but we are assured that no ship's witness made such an admission. Let it be assumed then that "admitted" should be "asserted" or "alleged." Why should the umpire refer to this piece of evidence in his finding at all, if he did not mean that he found it to be both important and true? It cannot be an ironical way of finding that the charterers failed to resort to a practicable alternative because they wished to save their pockets. I think it is reasonable

to impute to him another meaning. If the wheat heated from a detention of months under hatches, it might not merely be damaged but might rot and arrive at its destination no longer in specie. It is not a practicable thing, in addition to the expense of such a mode of loading, for the charterers to run the risk of losing the wheat uninsured, and for the shipowner to run the risk of losing his freight at the end of the voyage and of being left to claim on his insurance on freight. A

The questions on the effect of cl. 11 are these. The umpire thought it only applied when a ship was proceeding from Braila down to Sulina. This view was abandoned in the Court of Appeal. As SCRUTTON, L.J., points out, "time used in passing along her voyage is not part of her lay days." At your Lordships' Bar it was suggested that, just as in marine policies there is a difference between an insurance "at and from" and one "from" only, so here this exception must be deemed not to apply "at" Braila, but only, as in *Hudson v. Ede* (1), to the lighters bringing intended cargo from Braila down to Sulina, or that, as it was put in other words, it is a transit exception, not a stationary exception. If so, of course, the exception is nugatory as regards the ship, for the reason given by SCRUTTON, L.J., and the words now added to the clause as it stood in *Hudson v. Ede* (1) operate as a limitation on the exception as applicable to lighters. I think the words clearly apply to the detention of the ship at Braila, for they are words indicating the extremities of a section of the river, which is inclusive of the named ports, applying as they do to operations of loading, which are to take place at and in these ports. D
ROWLATT, J., took a third view—namely, that, as the charterers might have chosen either of two other loading-places, in which case the exact detention that happened in the dock might not have happened, they had not brought themselves within the exception. E He said :

"The charterers could not invoke that clause, unless the prevention went to all the forms of loading, which were three, which were open to him at his option in Braila."

Otherwise he would really be prevented from loading by his own selection of a loading place. He must take all the risk of the selected loading place proving to be more disadvantageous for loading than the others. This reasoning seems to me to be inconsistent with the fact that the order given was accepted, and that the dock was, when the order was given, a proper loading place. The risks of any change in the circumstances were the subject of provision in the charter itself, and there is nothing to restrict the charterers' choice in the manner suggested. I agree with the view of the Court of Appeal. The *Matheos*, being an arrived ship, was entitled to have a usual loading place intimated to her, but it was for the charterers to select for her, among the usual and proper places, one, which thereon became the place where her loading was to begin, and exceptions excusing delay in this loading attach and have relation to that place and mode of loading. F

I have only to add that I think your Lordships could not but refuse, as was done during the argument, to permit questions to be raised as to the effect of the Romanian Government's embargo, which had been advisedly disclaimed on the charterers' part before ROWLATT, J. No special ground for indulgence was shown, nor can it be said, by way of appeal, that the Court of Appeal was not entitled to hold the charterers to this disclaimer. For these reasons I think that the order of the Court of Appeal was right and should be affirmed. H

LORD ATKINSON and LORD BUCKMASTER concurred. I

Appeal dismissed.

Solicitors : *Holman, Fenwick & Willan ; Richards & Butler.*

[Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.]

A

R. v. CENTRAL CRIMINAL COURT JUSTICES. Ex parte LONDON COUNTY COUNCIL

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Acton, JJ.), January 19, 20, 1925]

[Reported [1925] 2 K.B. 43; 94 L.J.K.B. 479; 132 L.T. 666; 89 J.P. 65; 41 T.L.R. 269; 69 Sol. Jo. 381; 27 Cox, C.C. 734]

Central Criminal Court—Certiorari—Jurisdiction of High Court to grant writ to quash order—Order for payment by local authority of tax on honorarium payable by authority to clerk of court—Central Criminal Court Act, 1834 (4 & 5 Will. 4, c. 36), s. 20.

The Central Criminal Court is a superior court, and, accordingly, **held**, that the King's Bench Division had no jurisdiction to direct a writ of certiorari to issue to quash an order of that court, made under s. 20 of the Criminal Court Act, 1834, that income tax and super-tax on an honorarium payable to the clerk of the court by the local authorities liable to pay his salary should be paid by those authorities, an order which that court had power to make.

R v. Lee (1) (1876), 1 Q.B.D. 198, explained and distinguished.

Notes. For the position of the Central Criminal Court under the Judicature Acts see s. 18 (2) (vii) of the Supreme Court of Judicature (Consolidation) Act, 1925 (reproducing s. 16 (11) of the Judicature Act, 1873). The writ of certiorari was abolished by the Administration of Justice (Miscellaneous Provisions) Acts, 1938, which substituted an order of certiorari to be made by the High Court to remove a matter into the High Court for any purpose.

As to the jurisdiction of the Central Criminal Court see 9 HALSBURY'S LAWS (3rd Edn.) 450-452, and as to what tribunals certiorari may issue see *ibid.*, vol. 11, pp. 134-137. For cases see 14 DIGEST (Repl.) 141, 142, 16 DIGEST 400-402. For Central Criminal Court Act, 1834, see 5 HALSBURY'S STATUTES (2nd Edn.) 183.

Cases referred to:

- (1) *R. v. Lee* (1876), 1 Q.B.D. 198; 45 L.J.M.C. 54; 34 L.T. 445; 40 J.P. 551; 24 W.R. 550; 13 Cox. C.C. 199; 16 Digest 421, 2812.
- (2) *R. v. Central Criminal Court Judges and Justices* (1883), 11 Q.B.D. 479; 52 L.J.M.C. 121; 47 J.P. Jo. 116; 15 Cox, C.C. 324; 16 Digest 131, 293.
- (3) *Ex parte Fernandez* (1861), 10 C.B.N.S. 3; 30 L.J.C.P. 321; 4 L.T. 324; 7 Jur. N.S. 571; 9 W.R. 832; 142 E.R. 349; 16 Digest 131, 292.
- (4) *R. v. Boaler* (1892), 67 L.T. 354; 56 J.P. 792; 36 Sol. Jo. 753; 17 Cox, C.C. 569, D.C.; 16 Digest 401, 2448.
- (5) *R. v. Northallerton County Court Judge*, [1898] 2 Q.B. 680; 68 L.J.Q.B. 24; 79 L.T. 327; 47 W.R. 68; 14 T.L.R. 526; 5 Mans. 300, C.A.; affirmed sub nom. *Skinner v. Northallerton County Court Judge*, [1899] A.C. 439; 68 L.J.Q.B. 896; 80 L.T. 814; 63 J.P. 756; 15 T.L.R. 433; 6 Mans. 274, H.L.; 13 Digest (Repl.) 486, 1135.
- (6) *Re New Par Consols, Ltd. (No. 2)*, [1898] 1 Q.B. 669; 67 L.J.Q.B. 598; 78 L.T. 312; 46 W.R. 369; 14 T.L.R. 287; 5 Mans. 277, C.A.; 13 Digest (Repl.) 489, 1177.
- (7) *R. v. Brooke* (1894), 59 J.P. 6; 11 T.L.R. 163, D.C.; 16 Digest 434, 2955.

Rule Nisi for a writ of certiorari, directed to the judges and commissioners and officials of the Central Criminal Court, calling on them to show cause why an order for the payment of an honorarium of £1,000 to Sir Herbert Austin, the clerk of the court, for services rendered by him should not be quashed so far as it directed that the amount of income tax and super-tax on the honorarium should also be paid out of public funds, so that in effect Sir Herbert Austin would receive the honorarium free of tax. An affidavit of Sir James Bird, clerk to the London County

Council, set forth that on May 16, 1922, the justices and judges of the Central Criminal Court made or purported to make the order now sought to be quashed in the following terms:

"It is ordered by this court that any taxes demanded by the Inland Revenue authorities in respect of the honorarium this day ordered to be paid to Herbert Austin, clerk of this court, be forthwith paid to the said Herbert Austin by the treasurers of the counties of London, Middlesex, Essex, and Surrey, respectively, in the same proportions as are set out in an order of this court relating to salaries of officers, dated May 6, 1889. And it is further ordered by this court that the payment of the said taxes is a reasonable and necessary expense incident to the statute 4 & 5 Will. 4, c. 36 [the Central Criminal Court Act, 1834]."

The order of May 6, 1889, directed that seven-eighths of the salaries and expenses of the Central Criminal Court should be paid by the treasurer of the County of London.

By s. 1 of the Central Criminal Court Act, 1834:

"The Lord Mayor for the time being of the City of London, the Lord Chancellor or Lord Keeper of the Great Seal, and all the judges for the time being of His Majesty's Courts of King's Bench, Common Pleas, and Exchequer, the Dean of the Arches, the aldermen of the City of London, the Recorder, the Common Serjeant, the judges of the Sheriff's Court of the city of London, for the time being, and any person or persons who hath or shall have been Lord Chancellor, Lord Keeper, or a judge of any of His Majesty Superior Courts of Westminster, together with such others as His Majesty, his heirs and successors, shall from time to time name and appoint by any general commission as hereinafter stated, shall be and be taken to be the judges of a court to be called the 'Central Criminal Court' . . ."

By s. 20:

"It shall be lawful for the said justices and judges to ascertain, make, and settle a salary in lieu of such fees and allowances to be paid to the said officers or either of them for the performance of their respective duties . . . and to order and direct how and in what manner and by whom such fees and allowances or salary shall be paid, and also to order and direct such portion as they shall think fit of the . . . expenses incident to this Act to be borne and paid by the treasurer of each of the said counties. . ."

The Attorney-General (Sir Douglas Hogg, K.C.) and H. M. Givven showed cause.

Sir Leslie Scott, K.C., and Lancelot S. Fletcher, in support of the rule.

LORD HEWART, C.J.—This is a rule nisi for a writ of certiorari directed to the justices for the jurisdiction of the Central Criminal Court for the removal into this court of an order made by them or some of them at the general sessions of oyer and terminer and general sessions of the delivery of the lawfully appointed prisons held on May 16, 1922. Various grounds are set out in the rule, and the rule concludes as follows:

"Upon the hearing of the above motion, in the event of the court making absolute the order for a writ of certiorari, the court will be asked to order that the order above referred to, when returned, be quashed without further order."

It is not necessary to recapitulate in detail the facts of this matter. It is, I think, enough to say that in pursuance of the Central Criminal Court Act, 1834, to which I shall presently refer, the salaries and expenses of the court were ordered to be paid as to certain parts of them by the treasurer of the county of London. On May 16, 1922, two orders were made by the justices and judges of the Central Criminal Court. One of those orders was an order for the payment to Sir Herbert

A Austin, a distinguished public servant, who, among other things, is clerk to the Central Criminal Court, of what was therein described as an honorarium for services rendered, and the second order was an order, closely following upon the first, which provided in effect that the honorarium referred to should be paid free of income tax and super-tax. It is said on behalf of the London County Council that the second of those two orders, was made without jurisdiction, was ultra vires and void, and accordingly ought to be brought into this court and forthwith quashed.

B The first question which arises, however, is whether in such a case a writ of certiorari lies. This rule nisi is directed to the justices for the jurisdiction of the Central Criminal Court. Who are they? In order to answer that question one has to look at s. 1 of the Central Criminal Court Act, 1834. [His LORDSHIP read s. 1 and s. 20 of the statute and continued:] By s. 89 (1) of the Local Government Act, 1888, it was provided that the Central Criminal Court Act, 1834, should be construed as if the county of London were throughout mentioned in it as well as the county of Middlesex. That, then, is the court to which it is urged that a writ of certiorari should be issued by this court—in other words, the well-known remedy for removing into the King's Bench an order made by an inferior court is, it is said, a remedy applicable to the Central Criminal Court. Not only in my opinion is there no authority for that proposition, but all the authority which one can find is in the opposite direction. I refer only to certain cases. First of all, in *R. v. Central Criminal Court Judges and Justices* (2) it was held that mandamus would not lie to the judges and justices of the Central Criminal Court. In the course of the argument in that case, POLLOCK, B., said (11 Q.B.D. at p. 481):

E “The Central Criminal Court is at least as high a court as the court of assize. . . . It being thought convenient that prisoners charged with offences of a graver character committed in the city and in the county of Middlesex should be tried there, commissions were from time to time issued by the Crown to those justices and to the judges of the Courts of Queen's Bench, Common Pleas, and Exchequer, and also to the Judge of the Admiralty Court because cases of piracy and other crimes committed on the high seas could be most conveniently tried there. In 1834 was passed the Act under which the Central Criminal Court now sits.”

Then the learned baron proceeded to refer to the terms of s. 1 of the statute whereby the court is constituted, and he went on to say:

G “I find nothing in the Act to show that when the Central Criminal Court sits to try cases of treason or murder it sits in any other capacity than if it sits for the trial of any ordinary crime. It seems to me, therefore, that the court before whom the prisoner in the present case was tried was sitting as a superior court, of at least as high authority as justices of assize sitting under a commission of oyer the terminer and gaol delivery on circuit. There being no precedent to be found of this court—the highest common law court of criminal jurisdiction—ever having issued a mandamus to a superior court, which the Central Criminal Court clearly is, it is enough for me to say that this rule must be discharged.”

H MANISTY, J., delivered judgment to the same effect, and, having quoted the passage from a well-known judgment of WILLES, J., he added: “That equally applies to the judges and justices of the Central Criminal Court.” That decision was given in the year 1883.

I I turn from that to a case which is referred to in the argument and in the judgments, *Ex Parte Fernandez* (3). In that case there had been a trial at assizes and a committal by the presiding judge for contempt, and it was held that, the court of assize being a superior court, the judge had jurisdiction to commit and was not bound to set out at length in his warrant the cause of commitment inasmuch as his decision was not subject to review by the court above. In delivering judgment, WILLES, J., said this (10 C.B.N.S. at p. 55):

"It thus appears to me very clearly whether I consider the origin, the history, the procedure, or the jurisdiction of the court of assize, or the estimation in which it has ever been held, that I must class it as a superior court of a high order. Mr. Bovill has not cited a single authority or even hint to the contrary. . . . They belonged to that superior class to which credit is given by other courts for acting within their jurisdiction, and to whose proceedings the presumption *omnia rite esse acta* applies equally as to those of the supreme court of Parliament itself. GILBERT, C.B., lays down that 'These were superior courts within their jurisdiction in as ample a manner as a court of Westminster'."

That decision was in the year 1861. To come to much more recent times, in *R. v. Boaler* (4), a case which was determined in August, 1892, an application had been made for a rule nisi for a writ of certiorari directed to the Central Criminal Court to bring up a conviction for the purpose of quashing it. The case was argued before LORD COLERIDGE, C.J., and CAVE, J., and LORD COLERIDGE, C.J., said:

"I think we cannot grant this rule on two grounds, either of which is sufficient and both of which make it impossible for us to grant it. First, there is no authority for saying that this writ can go at all to the Central Criminal Court, which is a superior court. It is a court at least as high as the assizes, as the criminal court on the circuit; and it has been held, expressly with regard to those courts, that no certiorari will go to bring up a conviction obtained at the assizes for the purpose of being quashed here."

In like manner, CAVE, J., said:

"No instance of a writ of certiorari directed to the Central Criminal Court to bring up a conviction to quash it can be found. There is not even that, but there is not any evidence that anything of the kind has been done at quarter sessions."

In 1898, in *R. v. Northallerton County Court Judge* (5), the question was further considered. In that case the Queen's Bench Division had discharged a rule nisi for the issue of a writ of certiorari to bring up an order of the county court judge at Northallerton sitting in bankruptcy, and VAUGHAN WILLIAMS, L.J., in his judgment said this ([1898] 2 Q.B. at p. 686):

"The cases in which a certiorari has gone to bring up the order of an inferior court exceeding its jurisdiction even where a certiorari has been taken away by statute do not seem to me to touch the present case, because the basis of the decision in *Re New Par Consols* (No. 2) (6) was that the judge of the county court, exercising jurisdiction in a matter in which the statute gave him seisin, was not an inferior court, because in such a matter the statute gave him all the powers of a judge of the High Court. . . . A judge of the High Court, in the exercise of his jurisdiction, cannot be controlled by writs of prohibition or certiorari, but only by appeal; and if the county court judge, in the exercise of bankruptcy jurisdiction, is, as would seem to be the case from the decision in *Re New Par Consols* (No. 2) (6), placed on an equal footing, he is judge of law and fact, and his judgments are subject to appeal only, and cannot be reviewed by certiorari."

To put those judgments together and to consider them in the light of s. 16 of the Judicature Act, 1873, one may express the proposition in this way. Judges of assize are exercising powers upon the same plane with the powers exercised by judges of the High Court in these courts. The Central Criminal Court is a court of not less authority than the court of assize. It is a superior court, and a writ of certiorari from the King's Bench does not lie to the Central Criminal Court.

Reference has been made to a particular case which, it is suggested, affords an exception to the universal proposition that no authority is to be found for that which is sought to be done here, that is, *R. v. Lee* (1), but when one looks at that

A case it is not difficult to see how and why it exists in the isolation which it enjoys. In that case there had been a hearing of a summons against surveyors of highways, who were required to answer an information laid by Lee charging that a certain highway was out of repair. The surveyors denied the liability to repair. Thereupon the justices, acting under s. 95 of the Highway Act, 1835, directed an indictment to be preferred at the assizes against the inhabitants for permitting the highway to be out of repair. The indictment was preferred, and the trial came on before FIELD, J. He expressed the opinion that there was no evidence of obligation to repair the way as a highway for carts and carriages, but he ordered the indictment to be amended by limiting it to a horseway, and upon the indictment so amended a verdict of Guilty was entered. Afterwards application was made by the prosecutor, Robert Lee, for an order under s. 95 of the Highway Act, 1835, for payment of the costs of the prosecution, and FIELD, J., "deeming himself bound by the terms of the section, made the order." That having been done, a rule was granted calling upon—not FIELD, J., nor anybody in a position analogous to that of the justices for the jurisdiction of the Central Criminal Court—but calling upon Mr. Robert Lee to show cause why a writ of certiorari should not issue to bring up that order about costs. The matter came on for argument and one cannot think that it was a mere accident, before a court of which FIELD, J., was himself a member. No point was raised about jurisdiction, but FIELD, J., said this :

"I made the order reluctantly, but thought myself compelled by the statute. I am now satisfied that I was wrong and I think also that this decision [to quash the order] will do substantial justice."

E In other words, the learned judge was satisfied that he had made a slip, and he was nothing loth that the order about the costs which had been made should be brought up, the writ being directed to Robert Lee, the prosecutor, in order that that order might be quashed. From beginning to end not one word was said upon the one side or upon the other as to the jurisdiction of the court to issue a writ of certiorari in such circumstances. In my opinion, that case is to be regarded strictly F in relation to its particular facts, and it affords no authority whatsoever for the proposition which is urged in this case on the part of those who seek the rule.

G It only remains to add on this part of the matter that various questions, no doubt of no little historical interest, have been stirred. I shall not enter into them because, with due respect, it seems to me they throw little light upon the immediate question. I think it is right, however, to make this remark, that a clear distinction is to be drawn between what may be called the domestic or internal arrangement or re-arrangement of business which is brought about by the removal of indictments or presentments by means of certiorari, on the one hand, and, on the other hand, the removal, for the purpose of quashing it, of an order which has been made by a superior court. In other words, statutes and decisions upon mere change of venue are not in the smallest degree, in my opinion, upon the same plane as a proposal to bring from a superior court into this court an order which has been made for the purpose of quashing it. In the one case the superior court is making, for good reason, a useful re-disposition of its business. In the other case the superior court is invited to quash that which it itself has done, and the process involves the rather ludicrous position that judges are called upon themselves to show cause to themselves why they should not be directed to remove, so that it may be quashed, something which they themselves, after hearing, have determined. In my opinion, the beginning of the truth about this matter is to distinguish the things which ought to be distinguished. I think, therefore, there is no authority for the proposition with which those who seek to support this rule must begin, namely, that this is a case in which there is jurisdiction in this court to issue a writ of certiorari. I refer in a sentence or two only to an argument which has been added, and which, of course, is necessary to the support of the rule—namely, that the justices and judges of the Central Criminal Court, in making the order here complained of, were acting in excess of

their jurisdiction. In my opinion, there is no foundation at all for that criticism. Under s. 20 of the Central Criminal Court Act, 1834, there is power given to do certain acts. By the order which is now complained of the appropriate authority, seeking, and seeking only, to give full and proper effect to another order earlier in point of time and not here complained of, was acting within its powers in relation to the salaries and emoluments of its officers. It is not necessary to enter into the merits of the case. What is apparent is that these justices, being minded to recognise adequately the exceptional services of a distinguished public officer, awarded an addition, essentially of the nature of a temporary increase of salary, and, having made that award, took care to give effect to their original intention by providing that the payment should be made tax free. It is conceded in argument that if that which was done had been done under the name of "salary," no question could have arisen, but because of the particular form in which that which was done happened to be expressed it is said that there was an excess of jurisdiction. I refer to that matter only incidentally, and because it has been developed at some length on behalf of the London County Council, who feel, and no doubt feel strongly, that in matters of this kind they are in the position of persons labouring under the grievance of taxation without representation. Their real complaint is against the provisions of the relevant statutes. That complaint does not warrant, and certainly it cannot carry to success, a complaint made about an act done within the jurisdiction which those statutes confer. The real point, however, of this case is not that. The real point is the fundamental question of law, and with that I have already dealt. For these reasons, in my opinion, this rule ought to be discharged.

AYORY, J.—I concur in the judgment delivered by my Lord, but as the argument presented to us raises a question of the general jurisdiction of this court, I will add a few words expressing my own view, even at the risk of repeating what has been already much better expressed.

In my opinion, the extent and nature of this writ of certiorari is properly expressed in **SHORT AND MELLOR'S CROWN OFFICE PRACTICE**, at p. 14 :

"The writ of certiorari is the process by which the King's Bench Division, in the exercise of its superintending power over inferior jurisdictions, requires the judges or officers of such jurisdictions to certify or send proceedings before them into the King's Bench Division, whether for the purpose of examining into the legality of such proceedings or for giving fuller or more satisfactory effect to them than could be done by the court below."

That proposition, I understand, is not disputed by counsel supporting the rule, but he says either that the Central Criminal Court is an inferior court within the meaning of that rule, or, if it is not for all purposes an inferior court, that for the purpose of exercising its jurisdiction under s. 20 of the Act of 1834 it is an inferior court which is subject to the overriding jurisdiction of this court. At first sight one would say that no court can issue a writ of certiorari directed to itself to quash an order made by itself. That is what this proposition comes to when we remember that all the judges of this court are judges of the Central Criminal Court, who, by s. 2 of the Act of 1834, are to "use and exercise all powers and authorities belonging to justices of oyer and terminer and gaol delivery." The order of this case must be presumed to be made, therefore, by judges of this court, because it is an order of the court. It matters not by which particular two judges the order is signed. Being an order of the court it is, in effect, an order of the judges of this court.

Counsel has quoted statutes and text-books for the purpose of showing that the writ of certiorari will lie to judges of assizes. He has quoted such works as **VINER'S ABRIDGEMENT**, **COMYNS' DIGEST**, **COKE'S INSTITUTES**, and he might also have added on this same point **BACON'S ABRIDGEMENT** and **HAWKIN'S PLEAS OF THE CROWN**, which are all to the same effect undoubtedly, and at first sight appear to support the proposition that a writ of certiorari may go to a judge of assize. Upon that point

A I would like to refer again to the judgment of WILLES, J., in *Ex parte Fernandez* (3), in which he says (10 C.B.N.S. at p. 49):

"The result is that historically, the courts of assize, as being courts of general jurisdiction in all criminal cases, and having power to try all issues of fact of whatever importance arising in the several counties on their circuits, to which, therefore, every man is indebted in a greater or less degree for the protection of his property, his liberty, and his life, do stand in the place of the antient iters of the justices itinerant, and are a superior court, so to speak, by succession."

B Then there is the passage from BACON'S ABRIDGEMENT (7th Edn.), vol. 2, p. 391, under the title of "Courts," where he is distinguishing between courts of record, which are divided into such as are supreme, superior, or inferior, and referring to the Supreme Court of the Kingdom with the High Court of Parliament, he goes on to say:

"Superior courts of record are again, those that are more principal or less principal; the more principal ones are the Lords' House in Parliament, the Chancery, King's Bench, Common Pleas, and Exchequer; and by HALE, such are the justices itinerant ad communia placita & ad placita forestæ,"

D Therefore, according to HALE the justices itinerant are a superior court of record within the definition given by BACON, and, combining that passage with the judgment of WILLES, J., there can be no question that a court of assize is a superior court of record. The Central Criminal Court is clearly a court of assize, and, therefore, is a superior court of record, to which, in my opinion, this court cannot possibly grant a writ of certiorari.

E I will just refer to one or two of the cases which have been relied upon. I need not mention again *R. v. Lee* (1), which has been fully explained by my Lord, but it is worthy of observation that *R. v. Northallerton County Court Judge* (5) went to the House of Lords on appeal, and there are some observations by LORD HALSBURY in that case which are worth noting. In expressing his opinion he said:

F "It seems to me that this is a very plain case, and I am somewhat surprised that it should have been brought here, because it seems to me that the judgments below are perfectly satisfactory, and depend upon very plain principles."

After pointing out that in respect of bankruptcy the statute had given all the powers and jurisdiction which the High Court possesses to a county court judge sitting in bankruptcy, he goes on to say:

G "Now this county court judge was sitting in bankruptcy, and the confusion which is imported into it is that because, as I will assume for the moment, the judge issued a warrant which in form was wrong, but could have been put right, therefore it could have been put right, not in the court in which it was issued, but in the High Court. The absurdity of that is that the statute itself has made the county court the High Court for this purpose. You might just as well argue that a warrant defective in form, issued by the Court of Queen's Bench, could be set right by certiorari. Of course that is absurd. This is the High Court for this purpose."

H Then he says that the judgment of A. L. SMITH, L.J., is perfectly clear on the point, and he does not wish to add anything to it. LORD MACNAGHTEN, LORD MORRIS, LORD SHAND, and LORD BRAMPTON concurred in that expression of opinion. There is one other case, perhaps, which also calls for comment, and that is *R. v. Brooke* (7). That was quoted as an authority for the proposition that this court would grant a writ of certiorari directed to a judge of assize. When it is looked at I think it is nothing of the sort. It was a case where a defendant prosecuted for libel had been bound over by recognisance to keep the peace. He had broken the peace and the proceeding was for the purpose of enforcing the recognisance, and it was done under a rule of the Crown Office which provides that whenever it has been made to appear to the court or a judge that a party has made default in performing

the condition of any recognisance into which he has entered, filed in the Crown Office, the court or judge upon notice to the defendant and his sureties may order such recognisance to be estreated into the Exchequer without issuing any writ of scire facias. Although it is true that in giving judgment WILLS, J., said, "We have jurisdiction to grant a certiorari," that only means for the purpose of bringing up that recognisance in order that it might be enforced, and in effect it is, in my opinion, precisely similar to the procedure under which indictments have been in the past, and still are, removed by certiorari into this court. Those cases and those statutes regulating the removal of indictments have, in my opinion, no bearing on the question whether a superior court of record can issue a certiorari to another superior court of record to quash an order which has been made by that court.

I desire to add that many of those old authorities which were relied upon, and many of those statements in the text-books, must now be considered in the light particularly of ss. 5, 16 and 29 of the Judicature Act, 1873 [see now s. 1, s. 18, and s. 70 of the Supreme Court of Judicature (Consolidation) Act, 1925] which expressly enact that the judges of assize are part of the High Court of Justice. As to the further point taken by counsel supporting the rule that, even if the Central Criminal Court is a superior court of record when it is exercising jurisdiction under s. 2 of the Act of 1834, it ceases to be such a court when it is exercising jurisdiction under s. 20, I confess I am unable to appreciate how a court can for one purpose be a superior court of record and for another purpose be an inferior court of record, but, even if there was any foundation for that, I concur entirely in the reasons given by my Lord for saying that this order, which was made under s. 20, was not in excess of the jurisdiction of the court, and on those grounds I agree that this rule should be discharged.

ACTON, J.—I agree.

Rule discharged.

Solicitors: *Solicitor to the Treasury; D. P. Andrews.*

[*Reported by J. F. WALKER, Esq., Barrister-at-Law.*]

PRITCHARD v. JAMES CLAY (WELLINGTON), LTD.

[KING'S BENCH DIVISION (Lord Hewart, C.J., Sankey and Talbot, JJ.), Nov. 25, 1925]

[Reported [1926] 1 K.B. 238; 95 L.J.K.B. 107; 134 L.T. 244; 90 J.P. 15; 42 T.L.R. 139; 70 Sol. Jo. 266; 28 Cox, C.C. 122]

Master and Servant—Deduction from wages—Deduction from "sum contracted to be paid by employer to workman"—Agreement for payment of piece-work rate for perfect work, with reduced rates for defective work—Truck Act, 1896 (59 & 60 Vict., c. 44), s. 2 (1) (2).

The appellant was employed by the respondents upon piece-work as a moulder of iron pipes, the agreement providing that the appellant was to be paid 5½d. for a complete pipe 6 ft. long and free from defects, but that, if a pipe were incomplete or defective, a lower price, fixed by the agreement according to the extent of the incompleteness or the nature of the defect, was to be paid to the appellant. By reason of these variations in price the appellant received from the respondents less wages than he would have received if all the pipes had been complete and free from defects. No notice containing the terms of the agreement was kept affixed by the respondents in the manner provided by s. 2 (1) of the Truck Act, 1896, and no written particulars, showing the acts or omissions

A in respect of which deductions were made, were supplied by the respondents to the appellant, as required by s. 2 (2) of the Act.

Held: the contract between the parties was, not a contract to produce incomplete or defective pipes, but one to produce pipes 6 ft. long and free from defects, and, therefore, the deductions were "from the sum contracted to be paid by the employer to the workman" within s. 2 (1) of the Act, and, accordingly, recoverable by the appellant under s. 5.

Notes. Distinguished: *Riversdale Mill Co. v. Hart*, [1927] 1 K.B. 624.

As to deductions from wages, see 17 HALSBURY'S LAWS (3rd Edn.) 144-147, and for cases, see 24 DIGEST (Repl.) 1101-1105. For Truck Act, 1896, see 9 HALSBURY'S STATUTES 49.

C Case referred to:

- (1) *Sleeman v. Barrett, etc. (Executors of Bennett)* (1864), 2 H. & C. 934; 3 New Rep. 484; 33 L.J.Ex. 153; 9 L.T. 834; 28 J.P. 232; 10 Jur. N.S. 476; 12 W.R. 411; 24 Digest (Repl.) 1097, 448.

Case Stated by justices for the county of Salop.

D An information was preferred by the appellant, Alfred Edward Pritchard, under the Truck Act, 1896, against the respondents, James Clay (Wellington), Ltd., for that they, on June 26, 1925, and July 3, 1925, did make deductions of 9s. 2d. and 2s. 8d. respectively from the wages of the appellant, contrary to the Truck Act, 1896. Upon the hearing of the information the following facts were proved or admitted. James Clay (Wellington), Ltd., were ironfounders, with works at Ketley, near Wellington, Salop. Among other things, they produced iron pipes for housing. The appellant was employed by the respondents as a moulder of these pipes, upon piece-work only, and the agreement made by the respondents with the appellant for his remuneration was as follows: The appellant was paid an agreed price of 5½d. for a complete pipe 6 ft. long and free from defects. If a pipe was delivered that was incomplete or defective, an agreed price was nevertheless paid to the appellant, such agreed price being a price fixed at the time of the appellant's employment as a piece-worker for the delivery of an incomplete or defective pipe. If through any defect it was necessary for the respondents to cut a portion off a pipe, payment was only made as for the length remaining, e.g., if 2 ft. were cut off, the appellant was paid 4½d., the agreed price fixed as aforesaid for a 4 ft. pipe. If a pipe was bent, so that it was necessary for the employers to have it straightened, 5½d., the agreed price fixed for a bent pipe, was paid to the appellant for that pipe. If a pipe was too rough, so that it was necessary for the employers to have it ground, 5½d., the agreed price fixed for a rough pipe, was paid to the appellant for that pipe. If holes in the pipe had not been properly cored, or if it was necessary for the respondents to drill holes the appellant was paid the sum of 5½d. or 5 7/12d. respectively, these being the respective agreed prices fixed for such pipes when delivered. By reason of the said variations in payment, the appellant, on June 26 and July 3, 1925, was paid by the respondents wages that were less by the amount of 9s. 2d. and 2s. 8d. respectively than he would have received for the same number of pipes if they had been complete and free from defects. There were no notices containing the terms of the agreement kept affixed by the respondents as required by the Truck Act, 1896, and no particulars in writing were supplied to the appellant as required by that Act. I In the state in which the pipes left the appellant's hands it was not possible for the appellant accurately to determine whether the pipes were complete and free from defects, or whether, and to what extent, they were incomplete or defective, but the condition of the pipes after delivery was checked by persons appointed for that purpose by the respondents in conjunction with other persons appointed by the general body of the respondents' workmen for the same purpose. On the part of the appellant it was contended that the agreement was an agreement for deductions from the sums contracted to be paid by the respondents to the appellant, contrary to the Truck Act, 1896, and that the sums of 9s. 2d. and 2s. 8d. were

deductions made by the respondents contrary to that Act, and were subject to the penalties laid down by s. 4 of the Act. On the part of the respondents it was contended that the Truck Act, 1896, did not apply to the system of wages in force at their works, and that they had in fact made no deductions from the agreed remuneration. The justices, being of opinion that the sums of 9s. 2d. and 2s. 8d. were not deductions made by the respondents from the sums contracted to be paid by them to the appellant within the meaning of the Truck Act, 1896, dismissed the information.

Joy, K.C., and T. S. Sanderson for the appellant.

Bosanquet, K.C., and Alexander Graham, for the respondents.

LORD HEWART, C.J.—The real question in this case is : What was the contract with the workman? Was it a contract to produce incomplete or defective pipes, or was it a contract to produce complete pipes of a certain length and free from defects? To my mind, it is clear that the contract was that he was to be paid an agreed price of 5½d. for complete pipe 6 ft. long and free from defects. That was the standard or normal pipe, and that was the basis of the contract of employment. There follow in the statement of facts four separate variations of the sum of 5½d. These depend upon whether the pipe was of the right length, whether it was straight, or bent, or short, or too rough, or whether the holes in it had not been properly cored; in other words, the variations depended upon the performance of the workman in producing his work. One can scarcely imagine a more exact repetition of what is prohibited in s. 2 of the Truck Act, 1896 :

“Any deduction . . . for or in respect of bad or negligent work or injury to the materials or other property of the employer.”

In my opinion, this was an ingenuous, but not very ingenious, attempt to get round the Act. I think, therefore, that the appeal must be allowed.

SANKEY, J.—I agree. It is only necessary to say that the appellant was employed to make complete pipes. The other paragraphs of the case refer to bad workmanship in respect of which a deduction was made.

TALBOT, J.—I am of the same opinion. The only possible ground upon which the justices' decision might be supported is that the Truck Act, 1896, does not apply to piece-work. *Sleeman v. Barrett* (1) turned entirely upon the use of the word “wages” in the statute then in force, but by s. 10 of the Employers and Workmen Act, 1875, which is applied by s. 1 of the Truck (Amendment) Act, 1887, “the expression ‘workman’ does not include a domestic or menial servant,” but save as aforesaid includes every other workman. It is perfectly clear that *Sleeman v. Barrett* (1) throws no light upon the construction of this Act.

Appeal allowed : case remitted.

Solicitors : *Mills, Lockyer, Church & Evill*, for *R. Nelson Jones*, Birmingham ;
Gibson & Weldon, for *R. Gwynne*, Wellington, Salop.

[*Reported by J. F. WALKER, Esq., Barrister-at-Law.*]

Re LLOYD'S FURNITURE PALACE, LTD. EVANS v. LLOYD'S
FURNITURE PALACE, LTD.

[CHANCERY DIVISION (Romer, J.), January 27, February 10, 12, March 10, 1925]

[Reported [1925] Ch. 853; 95 L.J.Ch. 140; 134 L.T. 241;
[1926] B. & C.R. 29]

*Company—Winding-up—Fraudulent preference—Issue of debentures to creditor
—No benefit to debtor company—Statute 13 Eliz., c. 5.*

A company was promoted by E. who became a director of the company and, in 1917, before it commenced business, undertook to find the necessary working capital provided he was given security. E. and the other two directors resolved that debentures should be issued as and when E. applied for them, and from that date E. rendered himself liable for cash advances to the company. Although the company's financial position was unsound, it traded, and on Jan. 14, 1920, at a meeting of the directors it was resolved that, in view of the detrimental effect which an issue of debentures would have on the credit of the company, such issue should be postponed. The position grew worse and on May 30, 1922, the directors resolved to issue the debentures to E, those debentures to be a floating charge on the assets of the company and to carry interest. This was done on June 19, 1922, and they were registered. On Nov. 15, 1922, E. issued a writ to enforce his debentures and a receiver was appointed by consent. On Nov. 25, 1922, a creditor of the company, who had obtained a judgment and issued execution, presented a petition for the winding-up of the company and on June 10, 1923, an order was made for its compulsory winding-up. On July 4, 1923, E was made bankrupt. More than three months having elapsed between the issue of the debentures and the winding-up petition, the issue could not be avoided as a fraudulent preference under s. 210 of the Companies Act, 1908 [now s. 320 of the Companies Act, 1948], and so the liquidator took out a summons under the statute 13 Eliz., c. 5, relating to fraudulent conveyances, to determine whether the security was void under that Act.

Held: a fraudulent intention to prefer one creditor over other creditors was not sufficient under 13 Eliz., c. 5 to avoid a conveyance to that creditor unless the debtor was himself in some way benefited by the conveyance; on the facts that was not so in the present case; and, therefore, the debentures were not void as against the liquidator.

Notes. The Companies Act, 1908, was repealed by the Companies Act, 1929, which has been repealed by the Companies Act, 1948. Sections 210 and 212 of the 1908 Act correspond to ss. 320 and 322 of the 1948 Act. The period of three months in the Bankruptcy Act, 1914, s. 44, applicable to s. 210 of the 1908 Act, has been extended by s. 320 of the 1948 Act to six months and the period of three months mentioned in s. 212 of the 1908 Act has been extended to twelve months by s. 322 of the 1948 Act. The statute 13 Eliz., c. 5, has been replaced with amendments by s. 172 of the Law of Property Act, 1925.

As to what is a fraudulent preference see 6 HALSBURY'S LAWS (3rd Edn.) 682 et seq. and for cases see 10 DIGEST (Repl.) 1029 et seq. and 25 DIGEST 149 et seq. For the Companies Act, 1948, ss. 320 and 322 see 3 HALSBURY'S STATUTES (2nd Edn.) 702 and 704 respectively and for the Law of Property Act, 1925, s. 172, see *ibid.* vol. 20, p. 785.

Cases referred to :

- (1) *Re Gregory Love & Co., Ltd., Francis v. Gregory Love & Co., Ltd.*, [1916] 1 Ch. 203; 85 L.J.Ch. 281; 114 L.T. 395; [1916] H.B.R. 42; sub nom. *Re Gregory Love & Co., Ltd., Love v. Gregory Love & Co., Ltd.*, 32 T.L.R. 210; 60 Sol. Jo. 221; 10 Digest (Repl.) 771, 5013.

- (2) *Re Jackson and Bassford, Ltd.*, [1906] 2 Ch. 467; 75 L.J.Ch. 697; 95 L.T. 292; 22 T.L.R. 708; 13 Mans. 306; 10 Digest (Repl.) 772, 5019.
- (3) *Spencer v. Slater* (1878), 4 Q.B.D. 13; 48 L.J.Q.B. 204; 39 L.T. 424; 27 W.R. 184. D.C.; 25 Digest 157, 80.
- (4) *Maskelyne and Cooke v. Smith*, [1903] 1 K.B. 671; 72 L.J.K.B. 237; 88 L.T. 148; 51 W.R. 372; 19 T.L.R. 270; 47 Sol. Jo. 317; 10 Mans. 121, C.A.; 25 Digest 205, 425.
- (5) *Alton v. Harrison, Poyser v. Harrison* (1869), 4 Ch. App. 622; 38 L.J.Ch. 669; 21 L.T. 282; 17 W.R. 1034, L.J.; 25 Digest 184, 252.
- (6) *Re Softley, Ex parte Hodgkin* (1875), L.R. 20 Eq. 746; 44 L.J. Bay. 107; 38 L.T. 62; 24 W.R. 68; 5 Digest 887, 7337.
- (7) *Glegg v. Bromley*, [1912] 3 K.B. 474; 81 L.J.K.B. 1081; 106 L.T. 825, C.A.; 25 Digest 167, 133.
- (8) *Twyn's Case* (1602), 3 Co. Rep. 806; 76 E. & R. 809; sub nom. *Chamberlain v. Twyne*, Moore K.B. 638; 25 Digest, 162, 108.
- (9) *Holbird v. Anderson* (1793), 5 Term. Rep. 235; 101 E.R. 132; 25 Digest 204, 418.
- (10) *Middleton v. Pollock, Ex parte Elliott* (1876), 2 Ch.D. 104; 45 L.J.Ch. 293; 25 Digest 199, 377.

Summons by the liquidator of the company.

The facts are fully stated in the judgment of ROMER, J.

Topham, K.C., and *R. Peel* for the liquidator.

Luxmoore, K.C., and *J. B. Lindon*, for Joseph Evans's trustee in bankruptcy.

The following cases were referred to: *Re Gregory Love & Co., Ltd.* (1), *Re Jackson and Bassford, Ltd.* (2), *Spencer v. Slater* (3), *Maskelyne and Cooke v. Smith* (4), *Alton v. Harrison* (5), *Ex parte Hodgkin* (6), *Glegg v. Bromley* (7), *Twyn's Case* (8) *Holbird v. Anderson* (9), *Middleton v. Pollock* (10).

March 10. **ROMER, J.**—This is a summons by the liquidator of a company known as Lloyd's Furniture Palace, Ltd., asking that the master's certificate under the judgment in an action brought to enforce certain debentures issued by the company may be discharged or varied by disallowing the whole of the sum thereby certified to be due to the plaintiff, Joseph Evans, for principal and interest. The summons has, in fact, been issued for the purposes of raising the question as to whether the debentures are not void as against the liquidator under the statute 13 Eliz., c. 5 [now s. 172 of the Law of Property Act, 1925]. The defendant company were not in liquidation at the date when the judgment was pronounced, and consented to such judgment without raising the question as to the validity of the debentures. The judgment, however, contains no declaration of charge, and therefore the liquidator is not precluded from raising the question now.

The facts are as follows: The company was incorporated under the Companies Acts on March 19, 1917, with the object of carrying on the business of manufacturers of and dealers in household and other furniture. The business, in fact, carried on by the company from the date of its incorporation until the date of its liquidation consisted in the sale as retailers to persons in Pontypridd and other places in South Wales of furniture purchased from Joseph Evans or companies or firms in which he was interested. Joseph Evans was the promoter of the company. On April 24, 1917, at the statutory meeting of the company, the said Joseph Evans and a Mr. Chaundy were appointed the first directors of the company. On the same day, at a meeting of these two gentlemen as such directors, Mr. Chaundy was appointed secretary of the company, and a Mr. Newey was appointed an additional director. At the same time meeting Mr. Chaundy stated that the capital of the company, which was only £1,000, would be insufficient for the working of the business. Evans thereupon stated that he would find the necessary further capital provided that it was secured in some way, and it was thereupon resolved that debentures should be issued to him as and when he applied for the same. From

this date onwards Evans made, or rendered himself liable for, various cash advances to the company, but no debentures were ever issued to him until the month of June, 1922. The reason for this delay is one that reflects little credit upon either Mr. Evans or Mr. Chaundy. It is reasonably clear that during the year 1918 and subsequent years, the company was in an unsatisfactory financial condition and found it increasingly difficult to meet its monetary engagements.

On Jan. 20, 1919, at a directors' meeting, at which Evans and Chaundy were present, "the secretary stated that it was getting increasingly difficult to meet the company's engagements as they became due." The minute of that meeting ends with this statement: "The meeting was of the opinion that debentures should be created in order to obtain further advances." I am not sure why this statement was entered in the minutes, because it is clear that neither Evans nor Chaundy intended that any debentures should be issued so long as the company was enabled to obtain goods on credit. And for this reason. Both these gentlemen knew that if debentures were issued they would have to be registered, with the result that other persons would no longer be willing to give credit to the company knowing that at any moment they were liable to be defeated by an exercise by the debenture holder of his rights. At a meeting of these two gentlemen on Jan. 14, 1920, Chaundy, after referring to the financial position of the company, expounded his views with regard to debentures and, after this exposition of Chaundy's views, which were to the effect stated above, the meeting decided that, having regard to the detrimental effect an issue of debentures had on small limited companies, "matters should go on as hitherto until circumstances compelled otherwise." On Feb. 15, 1921, according to the minute of a meeting of these two directors on that date, the financial position was found to be still acute, and the minute states that the manager had been instructed to push the cash sales as much as possible, even though it might ultimately affect the business. Chaundy advocated putting goods into sales in the district with a view to raising capital, and stated that he had made arrangements with several concerns to trade upon bill terms.

It would appear that, so far, the policy of deferring the issue of debentures to Evans was proving successful. One may doubt whether Chaundy could have made arrangements with any concerns to trade upon bill terms had these concerns known that Mr. Evans held a first charge upon all the assets of the company to secure the moneys for which the company was liable to him. During the early part of the year 1922 the financial position of the company appears to have gone from bad to worse. On April 4 of that year, at a meeting of directors, at which Evans and Chaundy were present, together with a son of Evans who had been elected a director in February, 1921, it was stated that it had been found necessary, in order to obtain money, to clear out stocks almost without reserve. In this state of things it would seem that the time had arrived when, in the words of the minute of Jan. 14, 1920, "circumstances compelled otherwise," and it would no longer be safe in Evans's interests to delay the issue to him of the debentures. Accordingly on May 30, 1922, at a meeting of the same three directors, such issue was resolved upon. The minute of that meeting dealing with the matter is in these terms:

"The directors reported that in accordance with the resolution passed on April 24, 1917, the company had obtained loans from Mr. J. Evans aggregating £10,255 to Oct. 31, 1920, and Mr. Evans was desirous of having security for the amount so advanced. Resolved that the action of the directors be approved and confirmed, and that the directors be authorised to issue debentures or a debenture to Mr. J. Evans for the sum of £10,000, such debenture or debentures to be a floating charge upon the assets and effects of the company, and the principal to carry interest at £6 per cent. per annum, paid on the usual quarter days, June, September, December, and March."

In accordance with this resolution, ten debentures, each of £1,000, were issued to Evans on June 19, 1922, and were in due course registered. These are the

debentures which Evans is seeking to enforce in this action, and the validity of which is challenged by the liquidator. On Nov. 10, 1922, a creditor, named Wood, obtained judgment against the company and levied execution. On Nov. 15, 1922, Evans accordingly issued his writ in this action, and on the same day a receiver of the company's assets was appointed by consent. The assets of the company are probably insufficient to pay the moneys due to Evans, though the exact sum due to him on the security of the debentures, assuming them to be valid, has not been finally determined. On Nov. 25, 1922, Wood presented a petition for liquidation, and on Jan. 10, 1923, the company was ordered to be wound-up compulsorily. On July 4, 1923, Evans was adjudicated bankrupt, and Mr. Charles Thomas Appleby, the trustee in his bankruptcy, is the respondent to this summons, and on behalf of Evans's creditors asserts that the debentures cannot now be impeached.

It will be observed that the debentures were issued well over three months before the commencement of the winding-up of the company. It would seem indeed that Evans had taken steps to ensure that, so far as the petitioning creditor was concerned, no petition by him would be presented within the three months beginning on June 19, 1922. For on June 29, 1922, an undertaking had been given to this creditor on behalf of the company to meet a two months' bill which was to be dated July 1, and would be mature upon Sept. 1, 1922, such bill to be accepted by the creditor in settlement of his account against the company. Had this bill been given and dishonoured the petitioning creditor would in all probability have presented his petition for winding-up within three months from June 19. Evans therefore changed the date of the bill from July 1 to July 21, 1922, and caused this fact to be announced to the creditors by a letter of July 7, which was in these terms :

"Dear Sir,—Enclosed bill as requested. Please note kindly that our Mr. Joseph Evans has altered the date to the 21st, so that it will fall due on the 24th, a much more convenient date for us."

It could not matter to the company whether the bill fell due on the 24th rather than on Sept. 1. But it certainly was very much more convenient for Mr. Joseph Evans. However this may be, Wood's petition was not presented until Nov. 25, 1922. Had a winding-up order been made upon a petition presented within three months from the issue of the debentures, they would undoubtedly have been void as a fraudulent preference for the reasons stated by BUCKLEY, J., in *Re Jackson and Bassford, Ltd.* (2). In that case, the facts of which bear much resemblance to those of the present one, BUCKLEY, J., expressed himself as follows :

"If a creditor of a corporation takes a promise to give a security in the future and holds it over so as not to injure the credit of his debtor, in order to escape the necessity of registering under s. 14 of the Act of 1900, and thus disclosing to the creditors the fact that there is an incumbrance, it seems to me that is evidence of an intention to commit an actual fraud upon the general creditors from whom that information is withheld."

Evans could not therefore have relied upon the arrangement made in April, 1917, as negating an intention to prefer him by the issue of the debentures in June, 1922. The intention of Evans and the company throughout was that Evans should be preferred to the other creditors by an issue to him of debentures whenever the circumstances of the company should be such that it could no longer obtain credit.

Having regard, however, to the date at which the debentures were issued, the liquidator cannot avail himself of the provisions of s. 210 of the Companies Act, 1908 [now s. 320 of the Companies Act, 1948]. He bases his claim solely upon 13 Eliz., c. 5. It is not disputed by Mr. Luxmoore that if the debentures in the present case were (to quote the words of the statute)

"devised and contrived of malice fraud covin collusion or guile to the end purpose and intent to delay hinder or defraud creditors"

A of the company, they are avoided by the statute as against the liquidator. Whether they were or were not so devised or contrived is the question that I have to determine. The statute of Elizabeth has, as is well known, been the subject of judicial consideration in a greater number of reported cases, to many of which my attention was called in argument. Those cases seem to establish the principle that a conveyance is not avoided by the statute merely because it is made with the
B intention of preferring, and does in the result prefer, one creditor of the grantor over the others. In *Alton v. Harrison* (5) GIFFARD, L.J., in reference to a deed executed by a debtor at a time when he knew that a writ of sequestration would be issued against him, said :

C "If the deed is *bonâ fide*--that is, it is not a mere cloak for retaining a benefit to the grantor—it is a good deed under the statute of Elizabeth."

In *Middleton v. Pollock* (10), SIR GEORGE JESSEL said :

"The meaning of the statute is that the debtor must not retain a benefit for himself. It has no regard whatever to the question of preference or priority amongst the the creditors of the debtor."

D In *Glegg v. Bromley* (7) a Mrs. Glegg, being indebted to one Hay under a judgment, executed an assignment of certain property to her husband to secure an antecedent debt. It was found as a fact that the assignment was executed deliberately with the object of defeating Hay's claim. The assignment was nevertheless held to be good as against him. FLETCHER-MOULTON, L.J., said :

E "Now it is well settled law that apart from the rules of bankruptcy a person may pay his debts in any order he pleases, and may charge his property as he will as security for paying those debts. The covenous assignments referred to in the 13 Elizabeth are mock assignments whereby in some form or other the assignor reserves some benefit to himself, but an out and out assignment by way of charge to secure an actual existing creditor is not within the class of assignments which are affected by that statute, and, as the facts prove to my
F satisfaction that this assignment comes under that class, I am satisfied that there is nothing to be made of the suggestion that it was void under the statute of Elizabeth."

PARKER, J., said :

G "Does a debtor who gives his creditor security with the intention of preferring him to other creditors or another creditor, and consequently defeating or delaying such other creditors or creditor, have an illegal intention within the meaning of the statute? In my opinion it is well decided that he has not, and as far as I can gather no distinction has ever been drawn in the cases between a preference given for fresh security and a preference given without any fresh security."

H In the present case there can be no doubt that Evans committed a fraud upon the company's other creditors, that the company was a party to this fraud, and that, by reason of the fraud, a benefit was secured to the company. But the real fraud on the creditors consisted, not in taking the debentures, but in deliberately postponing their issue until June, 1922, so that the company should be enabled to obtain credit in the meantime. In the same way, it was not the issue of the debentures, but the postponement of that issue that benefited the company. I cannot find in the circumstances of
I the case anything more than a fraudulent intention throughout to prefer Evans to the other creditors, carried into effect when the debentures were issued. But if, as appears to be established by the authorities, a present fraudulent intention to prefer one creditor over the others is not sufficient under the statute to avoid a conveyance to that creditor, unless the debtor is himself in some way benefited by the conveyance, I am unable to see how the conveyance is avoided merely because the debtor always had the intention to prefer the creditor at some time or another. I should have been glad if I had been able to avoid these debentures issued to Evans. But, in view of

the authorities, I cannot, after giving the matter my best consideration, see how I can do so under the statute of Elizabeth; counsel for the liquidator has not suggested any other ground upon which I can do so at the instance of the liquidator. Whether any individual creditor who was induced to give credit to the company after April, 1917 has a right of action against Evans it is not necessary for me to determine. But in view of the authorities I do not see my way to declare these debentures to be void as against the liquidator. It is, however, to be hoped that the legislature, by extending the period of three months that is mentioned in s. 212 of the Companies Act, 1908 [now s. 322 of the Companies Act, 1948], or by some other means, may render impossible for the future a transaction similar to that which has taken place in the present case.

Solicitors: *Bell, Brodrick & Gray*, for *Cousins, Botsford & Co.*, Cardiff; *Cochrane & Cripwell*.

[Reported by J. S. SCRIMGEOUR, Esq., Barrister-at-Law.]

Re MAY'S SETTLEMENT. PUBLIC TRUSTEE v. MEREDITH

[CHANCERY DIVISION (Astbury, J.), Dec. 2, 1925]

[Reported [1926] Ch. 136; 95 L.J.Ch. 230; 134 L.T. 696]

Power of Appointment—Special power—Absolute appointment among issue—

Power of advancement given to trustees—Validity of power of advancement.

By a voluntary settlement a spinster conveyed property to trustees on trust for herself for life and subject thereto on trust for all or any of her issue in such manner and form in every respect as she should by deed or will appoint. She married and had issue two children. By deed poll she irrevocably appointed that the trustees of the settlement should stand possessed of the settled property after her death upon trust for her two children, naming them, in equal shares as tenants in common, and that the trustees should have power at any time—but during her life only with her written consent—to raise any part not exceeding a moiety of the share of each child in the trust premises and apply the same for his or her advancement, education, or benefit, as the trustees thought fit. She was unable out of her own means to provide a proper education for the children, and the Public Trustee, who had succeeded the trustees of the settlement, desired to exercise the power of advancement if it were valid and exercisable by him.

Held: where under a settlement the donee of a special power absolutely appointed to the objects of that power and gave the trustees a power of advancement during the life of the donee to the objects, the power to advance was valid and was not a delegation of a special power as the objects had an absolute, and not a contingent, interest, and, therefore, the trustee could validly exercise that power.

Re Greenslade (1), [1915] 1 Ch. 155, and *Re Joicey* (2), [1915] 2 Ch. 115, distinguished.

Notes. Considered: *Re Mewburn's Settlement*, *Perks v. Wood*, [1933] All E.R. Rep. 663. Explained: *Re Wills' Will Trusts*, *Wills v. Wills*, [1958] 2 All E.R. 472. Referred to: *Re Morris's Settlement Trusts*, *Adams v. Napier*, [1951] 2 All E.R. 528.

As to delegation of powers, see 25 HALSBURY'S LAWS (2nd Edn.) 526 et seq., and for cases, see 37 DIGEST 407 et seq.

A Cases referred to :

- (1) *Re Greenslade, Greenslade v. McCowen*, [1915] 1 Ch. 155; 84 L.J.Ch. 235; 112 L.T. 337; 59 Sol. Jo. 105; 37 Digest 408, 185.
- (2) *Re Joicey, Joicey v. Elliot*, [1915] 2 Ch. 115; 84 L.J.Ch. 613; 113 L.T. 437, C.A.; 37 Digest 408, 186.

B **Adjourned Summons.** By a voluntary settlement dated June 22, 1906 and made between Alice May, spinster, of the one part, and Walter Robinson and William Muskerry Tilson, of the other part, certain freehold premises and the proceeds of sale thereof were settled upon trust for the said Alice May during her life and after her death in trust for all or any of her issue "in such manner and form in every respect" as she should by deed, will, or codicil appoint. Walter Robinson, by his will dated Dec. 15, 1909, appointed the Public Trustee executor and trustee thereof, and devised and bequeathed all his real estate and the residue of his personal estate unto the Public Trustee upon trust for sale and conversion and investment as therein mentioned, and after payment of his funeral and testamentary expenses, debts and legacies, to pay the income and interest thereon to Alice May for her life, and subject thereto as the capital and income thereof in trust for all or any of her issue "in such manner and form in every respect" as she should by deed will or codicil appoint.

D Walter Robinson died on Feb. 19, 1910, without having revoked or altered his will, which was duly proved in the Principal Probate Registry on April 6, 1910. Alice May was married to H. A. Meredith on April 8, 1911, and her husband died some years later. There was issue of the marriage two children only, Gaenor Eleanor Meredith, who was born on Dec. 31, 1911, and Charles Henry Arthur Robinson Meredith, who was born on Dec. 9, 1913.

E By a deed poll dated Sept. 5, 1925, under the hand and seal of Alice Meredith she irrevocably appointed that the trustees or trustee of the said settlement should stand possessed of the hereditaments, thereby settled and the proceeds of sale thereof, and the investments for the time being representing the same, after the death of Alice Meredith for her two children Gaenor Eleanor Meredith and Charles Henry Arthur Robinson Meredith their heirs, executors and administrators in equal shares as tenants in common, and she directed that such trustees or trustee should have power at any time or times at their or his discretion—but during the life of Alice Meredith only with her consent in writing—to raise any part or parts not exceeding altogether a moiety of the share of each of her said named children, and apply the same for her or his advancement, education, or benefit, as such trustees or trustee might think fit. By the same deed poll Alice Meredith irrevocably appointed that the trustees or trustee of the will of Walter Robinson should stand possessed of his real and residuary personal estate and the investments for the time being representing the same after her death upon trusts for her said two named children in the same terms as she had appointed the settlement funds, and gave to such trustees or trustee a power of advancement in the same terms as the power which she had given to the trustees or trustee of the settlement.

H The Public Trustee was now the sole trustee of both the said settlement and the will of Walter Robinson. The trust funds subject to the trusts of the settlement were approximately of the value of £1,535, and the trust funds subject to the trusts of the will were approximately of the value of £5,205. Alice Meredith was unable, out of her own means, to provide a proper education for her two children, and the Public Trustee was desirous of exercising the powers of advancement out of the two trust funds given to him by the deed poll, but was doubtful whether such powers were valid and properly exercisable by him. He therefore issued this summons, to which Alice Meredith and her two children were defendants, to obtain the opinion of the court as to these questions.

I *J. V. Nesbitt* for the Public Trustee, referred to KEY AND ELPHINSTONE (11th Edn.), vol. 2, p. 902, note (f), *Re Greenslade, Greenslade v. McCowen* (1), and *Re Joicey, Joicey v. Elliot* (2).

M. Beebee for Mrs. Meredith and the infants referred to *Re Greenslade*, *Greenslade v. McCowen* (1), and *Re Joicey*, *Joicey v. Elliot* (2).

ASTBURY, J.—The Public Trustee by this summons asks for advice whether, under the trusts of the settlement made by Mrs. Meredith before her marriage and of the will of Walter Robinson, of both of which he is sole trustee, he can exercise the power of advancement in favour of the children of Mrs. Meredith which she has given to him by a deed poll of Sept. 5, 1925. [His Lordship then read the material parts of the settlement, will and deed poll, and continued:] The Public Trustee is doubtful whether, in view of the decisions of EVE, J., in *Re Greenslade* (1) and of the Court of Appeal in *Re Joicey* (2), the power which the deed poll purports to give him is exercisable by him, or whether it is not invalid as being a delegation of the power given to Mrs. Meredith by the settlement and will. In both the cases cited on behalf of the trustee the interests of the infants were contingent only, whereas, in the present case, they are absolute. In *Re Greenslade* (1) a testator bequeathed a particular share of his residuary trust funds to trustees upon trust for his daughter for her life, and after her decease, subject to any appointment of income to her husband, to hold the said share and the income in trust for her children or any of their issue in such manner as she should by deed or will appoint. By her will, after appointing a defeasible life interest in the settled share to her husband, she appointed the said shares, and the income thereof, to all her children who should attain twenty-five before the expiration of twenty-one years from her death, or should be living at the expiration of such period without having attained twenty-five, with a proviso under which possible grandchildren might become entitled under the appointment to an interest in their parent's share, and she empowered the trustees of the settled share to apply the income of the expectant share of any child or grandchild for or towards his or her maintenance, education, or benefit. EVE, J., held that the last clause was an attempted delegation of the daughter's power of appointment, and therefore inoperative. He said:

"In my opinion the clause in the mother's will is not a trust, but a power, and it cannot, I think, be denied that the trustees, acting under that power, could divert income from objects of the power of appointment, who become ultimately in possession under the appointment, to other objects, who, in the event, may never become entitled in possession."

In the other words, although the appointees' interests were contingent, the power of maintenance enabled the father's trustees to apply income in their favour, although they might never become entitled in possession. EVE, J., then gave a possible example, and continued:

"It must, therefore, be admitted that the power enables the trustees to modify in some respects the appointment made by the donee, a result which is for practical purposes tantamount to what would have arisen had the appointment of the income accruing prior to the period of distribution been made in express terms to such of the objects as the trustees might select. In other words, I think the power is, in effect, an attempt to delegate to the trustees a personal discretion exercisable by the donee."

In *Re Joicey* (2) a testator gave a sum of money to trustees upon trust to pay the income to his daughter for life, and after her decease as to the principal in trust for her issue born in her lifetime "for such interests in such proportions and in such manner in all respects" as she should by deed or will appoint, and in default of appointment for all her children equally. The daughter, in exercise of the power, by her will appointed the trust fund among all her children who should survive her and being male attain twenty-one, or being female attain that age or marry under it; and she declared that during the period of twenty-one years from her death the income of each child's share should be paid to the child, and if the child should die within the period of twenty-one years the child should have a power of appointment by will, and subject thereto in the event of the child leaving issue

A in trust for such child absolutely, but in the event of the child leaving no issue then the share was to go by way of accruer to the other shares. If the child should survive the age of twenty-one years the child was to take absolutely, "provided always that the said trustees" (of the testator's will) "shall (if and so far as I can authorise the same) have power from time to time or at any time during the said period of twenty-one years in their absolute discretion to transfer and make over the share or shares for the time being of the appointed funds of any son of mine who shall have attained the age of twenty-one years or any part of such share or shares to such son for his own use absolutely." The Court of Appeal, affirming JOYCE, J., held that the power conferred upon the trustees by the proviso was an attempt to delegate the power given by the testator to his daughter, and was therefore invalid. But LORD COZENS-HARDY, M.R., said :

C "The proviso was an attempt to enable the trustees in their absolute discretion to turn an adult son's contingent interest into an absolute interest. It is altogether beyond an ordinary power of advancement, as to which there might possibly be some argument."

WARRINGTON, L.J., said :

D "The words of this power are wide. They are for such interests in such proportions and in manner in all respects as the donee shall appoint. It may, I think, be conceded that these words are wide enough to enable the donee to attach conditions affecting either by way of acceleration, defeasance, or otherwise, the nature of the interest; . . . But in my judgment the provisions we have to deal with is one of a different nature. It is not even a mere power of advancement which might possibly be said to be so common an incident to such interests as the donee has here created as to be fairly within the words 'in such manner in all respects'—as to this I express no opinion."

E The question as to a power of advancement was not before the court, but both LORD COZENS-HARDY, M.R., and WARRINGTON, L.J., evidently thought that such a power might have raised different considerations.

F In FARWELL ON POWERS (3rd Edn.) p. 320, it is said that :

"An absolute appointment under a special power to a trustee for an object with a power of maintenance given to the trustee for the benefit of the object during infancy, would, it is submitted, be good : *Re Greenslade* (1) decides nothing to the contrary—and see *Re Joicey* (2).

G In the present case the widow has appointed the settled property—subject to her own life interest—to her daughter and son in equal shares as tenants in common. That gives them absolute interests. In addition to this she directs that the trustees holding the funds shall have power—but during her life only, with her written consent—not to confer an absolute interest on an appointee contingently entitled, but to raise part of the share of an absolute appointee, and apply the same for her or his advancement, education, or benefit. It would be a strange construction to hold that, within the authorities, these powers of advancement amount to a delegation of the widow's special powers of appointment. No doubt, if the appointees took only contingent interests, the powers of advancement would fall within the principle of *Re Greenslade* (1). But here we have nothing of the kind; the widow had absolute power to direct in what "manner and form in every respect" her children should take. She has given them absolute interests, and has merely provided, following the almost universal practice in settlements, that, if the appointees are in need of advancement, and the trustees are willing to make it, she appoints the funds accordingly. These absolute appointments are perfectly good, and the powers of advancement ancillary thereto are in no sense invalid as a so-called delegation of the widow's special powers.

Solicitor : Leonard Jessop Fulton.

[Reported by E. K. CORRIE, Esq., Barrister-at-Law.]

RYE v. PURCELL

[KING'S BENCH DIVISION (McCardie, J.), Dec. 4, 6, 18, 1925]

[Reported [1926] 1 K.B. 446; 95 L.J.K.B. 380; 134 L.T. 382; 70 Sol. Jo. 345]

Landlord and Tenant—Repair—Covenant to repair—Running with the land—Agreement containing covenant signed only by landlord—Conveyancing Act, 1881 (44 & 45 Vict., c. 41), s. 10.

By s. 10 of the Conveyancing Act, 1881 (now s. 141 of the Law of Property Act, 1925): "Rent reserved by a lease, and the benefit of every covenant or provision therein contained . . . on the lessee's part to be observed or performed . . . shall be annexed and incident to or shall go with the reversionary estate in the land . . ."

Held: the section applied in a case where the covenant was contained in an agreement for lease which was signed on behalf of the landlord only, and not by or on behalf of the tenant.

Notes. As to covenants running with the land, see 23 HALSBURY'S LAWS (3rd Edn.) 644-651, and for cases, see 31 DIGEST (Repl.) 338-342. For Law of Property Act 1925, see 20 HALSBURY'S STATUTES (2nd Edn.) 427.

Cases referred to:

- (1) *Ellis v. Torrington*, [1920] 1 K.B. 399; 89 L.J.K.B. 369; 122 L.T. 361; 36 T.L.R. 82, C.A.; 31 Digest (Repl.) 341, 4733.
- (2) *Rickett v. Green*, [1910] 1 K.B. 253; 79 L.J.K.B. 193; 102 L.T. 16, D.C.; 31 Digest (Repl.) 258, 3940.
- (3) *Cole v. Kelly*, [1920] 2 K.B. 106; 89 L.J.K.B. 819; 123 L.T. 105; 36 T.L.R. 262, C.A.; 31 Digest (Repl.) 341, 4738.
- (4) *Blane v. Francis*, [1917] 1 K.B. 252; 86 L.J.K.B. 364; 115 L.T. 850, C.A.; 31 Digest (Repl.) 471, 5975.
- (5) *Wedd v. Porter*, [1916] 2 K.B. 91; 85 L.J.K.B. 1298; 115 L.T. 243, C.A.; 31 Digest (Repl.) 470, 5961.
- (6) *Re Thompson, Ex parte Baylis*, [1894] 1 Q.B. 462; 63 L.J.Q.B. 187; 70 L.T. 238; 42 W.R. 462; 10 T.L.R. 89, D.C.; 42 Digest 127, 1217.
- (7) *Re Jones*, [1895] 2 Ch. 719; 64 L.J.Ch. 832; 73 L.T. 543; 60 J.P. 7; 44 W.R. 10; 13 R. 707; on appeal [1896] 1 Ch. 222, C.A.; 42 Digest 132, 1260.
- (8) *Bewley v. Atkinson* (1879), 13 Ch.D. 283; 49 L.J.Ch. 153; 41 L.T. 603; 28 W.R. 638, C.A.; 19 Digest 132, 896.
- (9) *Mitchell v. Cantrill* (1887), 37 Ch.D. 56; 57 L.J.Ch. 72; 58 L.T. 29; 36 W.R. 229, C.A.; 19 Digest 128, 858.
- (10) *Greaves v. Ashlin* (1813), 3 Camp. 426; 170 E.R. 1433, N.P.; 39 Digest 552, 1601.
- (11) *Harnor v. Groves* (1855), 15 C.B. 667; 24 L.J.C.P. 52; 24 L.T.O.S. 215; 3 W.R. 168; 3 C.L.R. 406; 139 E.R. 587; 17 Digest (Repl.) 317, 1240.
- (12) *Reuss v. Pickley* (1866), L.R. 1 Exch. 342; 4 H. & C. 588; 35 L.J.Ex. 218; 15 L.T. 25; 12 Jur. N.S. 628; 14 W.R. 924, Ex.Ch.; 39 Digest 393, 295.
- (13) *Pooley v. Driver* (1876), 5 Ch. 458; 46 L.J.Ch. 466; 36 L.T. 79; 25 W.R. 162; 36 Digest (Repl.) 423, 5.
- (14) *Hodson v. Heuland*, [1896] 2 Ch. 428; 65 L.J.Ch. 754; 74 L.T. 811, 44 W.R. 684; 30 Digest (Repl.) 408, 520.
- (15) *Biss v. Hygate*, [1918] 2 K.B. 314; 87 L.J.K.B. 1101; 119 L.T. 284, D.C.; 30 Digest (Repl.) 408, 522.

Action tried by McCARDIE, J., without a jury. The facts and arguments are fully stated in the judgment.

Greaves-Lord, K.C., and *Warwick Draper* for the plaintiffs.

Rayner Goddard, K.C., and *Willoughby-Williams* for the defendants.

Cur. adv. vult.

A Dec. 18. **McCARDIE, J.** read the following judgment. This case touches the law of landlord and tenant. On the points for my present decision the facts are not in dispute. The documents, though numerous and intricate, can be briefly summarised. The action is brought to recover damages for breach of repairing and painting obligations. The circumstances are these. By a deed of September, 1895, Messrs. Edwards and others leased to Gosling certain premises known as 5, Warwick Street, Regent Street, London, for twenty-one years from March 25, 1896, at a rent of £130 per year. The lease contained full repairing and painting covenants, including a covenant by the lessee that he would at the expiration or sooner determination of the lease deliver up the premises and also all landlord's fixtures

"in such good and substantial repair as should be consistent with the due performance of the several covenants hereinafter contained."

C In 1900 Gosling duly assigned the lease to the present defendant, Purcell. The lease, it will be observed, would expire in March, 1917. Meanwhile, viz., in July, 1910, the lessors of the deed of September, 1895, granted a building lease to one Grace for ninety-nine years as from March 25, 1910, subject to, but with the benefit of, the lease of September, 1895. Thus Grace became the reversioner of the lease of September, 1895. In 1911 Grace deposited his building lease with one Nicholls by way of equitable mortgage to secure an advance. In June, 1915, Grace was adjudicated bankrupt, and on June 17, 1915, one Bourner was appointed trustee. Hence the interest of Grace passed to Bourner under the Bankruptcy Act—subject, of course, to the interest of Nicholls as mortgagee. Soon after June 17, 1915, Nicholls, by virtue of powers under his mortgage, entered into possession of the mortgaged premises. So matters stood in the first month of 1917. In February, 1917, Nicholls (acting through Grace as his agent) agreed with the defendant verbally that the defendant should hold over after the expiration of the lease at the rent of £275 per annum as a quarterly tenant on the terms of the old lease, apart from the change in rent. This verbal agreement was confirmed in writing by two letters, dated Feb. 2, 1917, and Feb. 28, 1917, signed by Grace as duly authorised agent of Nicholls. The defendant himself, however, did not in fact sign any letter in confirmation of the agreement. On March 25, 1917, the lease of Sept. 10, 1895, expired. The defendant, however, remained in possession under the terms of the two letters of Feb. 2 and 3, 1917, and he paid rent to Nicholls at the higher rate which had been agreed. In July, 1917, Bourner (the trustee in bankruptcy of Grace) formally assigned the ninety-nine years' building lease of July, 1910, to Nicholls, who had previously been the equitable owner only of that lease. He (Bourner) did not in any way purport to assign the benefits of the expired lease of September, 1895. In May, 1918, Bourner obtained his release as trustee in the bankruptcy of Grace. The effect of this release must be decided (as I will consider later) by s. 93 of the Bankruptcy Act, 1914. In June, 1918, Nicholls who then, I have shown, had become entitled to the property, subject to the quarterly tenancy of the defendant, gave the defendant notice to quit on Sept. 29, 1918, pursuant to the terms shown in the two letters of Feb. 2 and 3, 1917. This notice, however, was not acted upon because in September, 1918, another agreement was verbally made between Nicholls and the defendant, viz., that the defendant should remain on at the premises as tenant from Sept. 29, 1918, to the declaration of peace after the war [of 1914–1918], at the rent of £325 per year. This verbal agreement was confirmed in writing by the following letter, signed by Grace as the authorised agent of Nicholls:

"Sept. 7, 1918. Dear Sir,—With reference to our conversation to-day the further rent of the premises will be £50, making £325 per annum as from Sept. 29 next. This tenancy to continue until the declaration of peace, and probably for three months after it, provided my lessor makes no objection.—Yours faithfully, ALFRED GRACE, on behalf of C. T. Nicholls.—To Mr. W. Purcell, Warwick Street, W."

In July, 1920, Nicholls assigned the building lease of July, 1910, to the plaintiff in this action, Mr. Rye. At the same time (July 22, 1920) Mr. Rye acquired the full freehold to the premises. Although the defendant should have given up possession at the declaration of peace in January, 1920, he did not do so, but stayed on till November, 1920, when he yielded up possession and left the premises (as the plaintiff asserts) in a serious state of dilapidation. He had always paid quarter by quarter the rent which fell due. The last document I need mention is a deed of Oct. 3, 1921, whereby Bournier (the trustee in the bankruptcy of Grace) expressly assigned to the present plaintiff all the benefits of the covenants and conditions of the lease of Sept. 10, 1895, and all rights of action for the non-observance of the covenants in that lease and also the full rights of the tenancy created in February, 1917, together with all causes of action thereunder against the defendant, and Nicholls assigned in substance to the plaintiff all the benefits of the covenants and conditions of the verbal tenancies of the defendant with respect of 5, Warwick Street, respectively created in the month of February, 1917, and the month of September, 1918, together with all causes of action, &c. Written notice of the deed of Oct. 3, 1921, was duly given to the defendant. The present writ was issued on May 3, 1922.

Upon these facts and documents the defendant submits that the present plaintiff is not entitled to maintain this action against him. The first point raised by counsel for the defendant arose upon the deed of Oct. 3, 1921, whereby Bournier (who had been the trustee of Grace) purported to assign the benefit, &c., of the covenants in the deed of September, 1895, together with the causes of action arising thereon and together also with the benefits of the tenancies of the defendant created (as I have indicated) in February, 1917. In my view, the assignment by Bournier is not void on the ground of what is called champerty and maintenance: see, e.g., *Ellis v. Torrington* (1). But, in my opinion, the further point taken for the defendant is a good one, viz., that Bournier had no right or power on Oct. 3, 1921, to assign anything at all. He had obtained his release on May 30, 1918. In my view, the effect of that release was clear. By s. 93 (5) of the Bankruptcy Act, 1914, it is provided:

"Where the trustee has not previously resigned or been removed, his release shall operate as a removal of him from his office, and thereupon the official receiver shall be the trustee."

It follows that Bournier had no power of assignment. His rights had passed from him and apparently they became vested ipso facto by his release in the official receiver: see s. 53 (3) of the Bankruptcy Act, 1914.

I now move to the second point. It will be noted that the first agreement between the defendant and Nicholls for continuing the tenancy was in February, 1917. It will also be noted that the later agreement between the defendant and Nicholls for continuing the tenancy was in September, 1918. It will suffice for the plaintiff's purpose if he can establish a right to sue on the later agreement of September 1918, for, if that can be done, the earlier agreement is of little importance. I will, therefore, deal with the later agreement of September, 1918, which the plaintiff submits, carried with it an obligation by the defendant to deliver up the premises (No. 5, Warwick Street) at the expiration of the tenancy in such good and substantial repair as should be consistent with the due performance of the repairing and other covenants of the lease. Now it was not till July 22, 1920, that the present plaintiff became the reversioner of the premises and the defendant became the tenant. It was some four months after July, 1920, that the defendant gave up possession. Now the question is whether upon the law as it stands the plaintiff can sue the defendant for breach of the tenancy agreement of September, 1918. The plaintiff cannot of course rely on 32 Hen. 8, c. 34 [relating to grantees of reversions: repealed by Law of Property Act, 1925], for that statute only applies to leases under seal: see the decisions collected in MR. REDMAN's excellent treatise

A on LANDLORD AND TENANT (8th Edn.) pp. 702, et seq. But the substantial point here is whether the plaintiff is able to maintain this action by virtue of s. 10 of the Conveyancing Act, 1881. That section says (so far as it is now material):

B "Rent reserved by a lease, and the benefit of every covenant or provision therein contained . . . shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease . . ."

C The section has been liberally interpreted, and modern views have given it a wide and useful effect. It was decided in *Rickett v. Green* (2) that the word "lease" in the section included an agreement for a lease. At a later date a further and important point was decided in *Cole v. Kelly* (3) which bears directly on the matter now before me. It will be observed that the letter of Sept. 7, 1918, signed by the agent of Nicholls, does not expressly provide that the terms of the old lease shall govern the new tenancy. A like state of things existed in the letters in *Cole v. Kelly* (3). The Court of Appeal, however, held that the terms of the old lease were, by necessary implication, incorporated into the new bargain made by the letters passing between the parties there. So here I hold, and, indeed, it was admitted by counsel for the defendant, that the letter of Sept. 7, 1918, must be taken, by reason of *Cole v. Kelly* (3), to incorporate such terms of the lease of September, 1895, as were applicable to the continued tenancy.

E This being so, the point taken by the able counsel for the defendant was that s. 10 of the Conveyancing Act, 1881, had no application here because the plaintiff could not show that there had been an agreement in writing signed, not only by the former landlord, but also by the tenant. In the present case there was no document, as I have said, signed by the tenant, i.e., the defendant; the letter of Sept. 7, 1918, was signed by the landlord's agent only. Section 10 of the Conveyancing Act, 1881, does not by its very words state that such agreement in writing signed by each must have existed ere the section was applicable. The words of the section are "Rent reserved by a lease." Those words, however, have been interpreted by F the Court of Appeal. In *Blane v. Francis* (4) it was held that s. 10 did not apply if the agreement was not in writing; a parol lease would not suffice for s. 10. In that case neither landlord nor tenant had signed any document at all, the bargain was merely parol, and the Court of Appeal held that the assignee of the reversion was not entitled to sue the tenant for breaches of the covenant to repair contained in the expired lease. There now arises a new point. It is settled by, as I have said, G *Blane v. Francis* (4) that s. 10 does not apply where the agreement was merely verbal. It is also settled that s. 10 does apply where both parties sign a document or letters which embody the bargain for continuing the tenancy: see *Cole v. Kelly* (3). The question here is: Does s. 10 of the Conveyancing Act, 1881, apply where the document showing the terms of the tenancy is signed by the landlord only? Is there H in such a case an "agreement in writing" as required by the cited decisions so as to bring the case within s. 10 of the Conveyancing Act, 1881. The plaintiff says "Yes"; the defendant says "No."

I have read through the three more relevant decisions to see what light they may throw on the matter. In *Wedd v. Porter* (5) there is but a passage by SWINFEN EADY, L.J., in which he says:

I "The plaintiff meets the objection by relying on s. 10 of the Conveyancing Act, 1881, and urges that now a writing not under seal will be sufficient. But this question does not really arise as there is no writing and no case for specific performance and nothing to show that any instrument at all was ever intended to be executed or signed by the parties."

That is all. In *Wedd v. Porter* (5), as EADY, L.J., pointed out, there was no writing at all. In *Blane v. Francis* (4) also, I have already indicated there was no writing at all signed by either landlord or tenant. EADY, L.J., says:

"I fail to see any ground upon which either the landlord or the tenant could compel the other to execute a lease putting those terms into writing. Neither party had agreed to it."

He further says "that s. 10 is not applicable to an agreement not in writing." BANKES, L.J., said: "In my opinion the language of s. 10 is appropriate and appropriate only to an instrument in writing," and LAWRENCE, J., said that the words of s. 10 "point virtually to a document under seal or in writing. They are inappropriate to an unwritten agreement." In *Cole v. Kelly* (3) both landlord and tenant had respectively signed letters containing either expressly or by implication the terms of the tenancy. Hence there are no dicta in the judgments which throw light on the point before me.

Upon the existing decisions, then, it stands that for the application of s. 10 of the Conveyancing Act, 1881, there must be an "agreement in writing." What is meant by that phrase? Does it mean that both parties must sign? It is well that there should be so far as possible consistency in English law; conflicting lines of decisions increase confusion. I therefore, take some collateral illustrative cases. In *Re Thompson* (6) the court had to interpret the words "an agreement in writing" in s. 4 of the Solicitors Act, 1870. It was held that there was an agreement in writing even though signed by one party only. This decision was followed by STIRLING, J., in *Re Jones* (7). In *Bewly v. Atkinson* (8) [approved by COTTON, L.J., in *Mitchell v. Cantrill* (9)] it was held that a consent or agreement expressly made or given by deed or in writing under s. 3 of the Prescription Act, 1832, need only be signed by the licensee. Examples of cases where a contract, though signed by one party only, have been held to be contracts in writing will at once spring to the mind. I may mention, e.g., *Greaves v. Ashlin* (10) (a sold note); *Harnor v. Groves* (11) (sold note); and *Reuss v. Picksley* (12) (agency contract). The words of JESSEL, M.R., in *Pooley v. Driver* (13) (5 Ch.D. at p. 483) must, I think, be regarded as limited to the specific matter there dealt with by him. In the present case the letter of Sept. 7, 1918, embodied in writing the verbal agreement made by the parties and the writing was signed by the landlord's agent. In my view, that letter constituted a sufficient "agreement in writing" to bring the present case within s. 10 of the Conveyancing Act, 1881.

I may give two further reasons in support of my opinion. First, it seems to me that the agreement shown by the letter of Sept. 7, 1918 (and which admittedly governed the relations of the parties), could have been specifically enforced (if justice so required) either by the tenant against the landlord who had by his agent signed the writing, or by the landlord against the tenant who had continued in possession of the premises with unequivocal reference to the written agreement: see *Hodson v. Heuland* (14) and *Biss v. Hygate* (15). Secondly, it must be remembered that the relation of landlord and tenant is one, not merely of contract, but also of estate. The contract of tenancy is peculiar in its aspects and incidents. This view of that species of contract is well shown if the case be taken where a lease duly signed and sealed by the landlord has been delivered by him to the tenant who has entered into possession thereunder but has signed no counter-part. It would seem clear in such a case that there is a valid agreement in writing within s. 10 of the Conveyancing Act, 1881, in spite of the absence of the signed counter-part signed by the tenant: see REDMAN'S LANDLORD AND TENANT (8th Edn.), p. 165. To hold otherwise would overthrow existing law, and would lead to great confusion. It seems to follow that in the case now before me there was an agreement in writing within s. 10 of the Conveyancing Act, 1881, and the decisions thereunder.

In the result, therefore, the plaintiff is, I think, entitled to sue the defendant for breach of the terms express and implied in the letter of Sept. 7, 1918, the most vital of those terms being the obligation to yield up possession of the premises in such good and substantial repair as should be consistent with the due performance of the covenants of the lease of September, 1895. I wish to add that I have dealt

A with the case upon the footing on which it was argued before me. There may well be another ground on which the plaintiff could sue the defendant. I refer to the important fact of actual payment of rent by the defendant to the plaintiff himself after the plaintiff had acquired the reversion and before the defendant gave up possession. The legal consequence which might well spring from that and the other facts of the case will be seen by reference to REDMAN ON LANDLORD AND TENANT (8th Edn.), p. 703. It has become unnecessary for me to consider the effect of the assignment by Nicholls on Oct. 3, 1921, to the plaintiff of the benefit of all the covenants and conditions of the tenancies created in February, 1917, and September, 1918, or to apply the decision of *Ellis v. Torrington* (1). The plaintiff, therefore, succeeds. The assessment of the amount will involve many intricate details. It is agreed by counsel that this question of damage shall be dealt with by the official referee. There will be liberty to apply.

Solicitors: *Rye & Eyre; W. H. Hales.*

[Reported by R. A. YULE, Esq., Barrister-at-Law.]

D

E

Re CITY LIFE ASSURANCE CO., LTD.

[COURT OF APPEAL (Sir Ernest Pollock, M.R., Warrington and Sargant, L.JJ.), October 23, 26, 27, 1925]

[Reported [1926] Ch. 191; 95 L.J.Ch. 65; 134 L.T. 207; 42 T.L.R. 45; 70 Sol. Jo. 108; [1925] B. & C.R. 233]

F

Company—Winding-up—Set-off—Mutual dealings—Assurance company and assured—Policy mortgaged by assured to company as security for loan—Winding-up of company—Right of assured to set-off mortgage debt against value of policy—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 31.

G

By an endowment policy of life assurance the company undertook to pay the assured £232 on Dec. 28, 1923, the assured agreeing to pay an annual premium of £10 8s. 6d. on Dec. 1 of each year. On Nov. 29, 1918, the assured mortgaged the policy to the company to secure a loan made to him by the company of £114. On June 30, 1923, a petition was filed for the winding-up of the company, and on July 19 an order was made for it to be wound-up compulsorily. On Dec. 1 the assured paid the last premium due from him. There was no assignment by the company to any third party, but in another case, where the facts were otherwise similar, the mortgage was equitably assigned, without notice to the assured, to the trustees of the trust deed of the company.

H

Held: in the case where there had been no assignment there had been a mutual dealing between the company and the assured within s. 31 of the Bankruptcy Act, 1914 (applied in the winding-up of a company by s. 207 of the Companies (Consolidation) Act, 1908; see now s. 317 of the Companies Act, 1948), and, therefore, the assured was entitled to have the mortgage debt set off against the amount payable to him by the company under the policy, it being immaterial that the policy was to be valued in accordance with the provisions of the Assurance Companies Act, 1909, and not by the trustee in bankruptcy under s. 31 (4) of the Act of 1914; but in the case where the mortgage had been assigned the characteristic of mutuality between the company and the assured, which was necessary for the application of s. 31, was not present and the assured in that case was not entitled to a set-off.

I

Re Asphaltic Wood Pavement Co., Lee & Chapman's Case (1) (1885), 30 Ch.D. 216, applied.

Re Lankester, Ex parte Price (2) (1875), 10 Ch. App. 648, overruled.

Notes. *Re Profits and Income Insurance Co.*, [1928] All E.R. Rep. 378; *Re City Equitable Fire Insurance Co., Ltd.*, [1930], All E.R. Rep. 315; *Re Fenton (No. 1), Ex parte Fenton Textile Association, Ltd.*, [1930] All E.R. Rep. 15.

As to set-off in bankruptcy see 2 HALSBURY'S LAWS (3rd Edn.) 480-486, and for cases see 4 DIGEST 389 et seq. For Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321.

Cases referred to :

- (1) *Re Asphaltic Wood Pavement Co., Lee and Chapman's Case* (1885), 30 Ch.D. 216; 54 L.J.Ch. 460; 53 L.T. 65; 33 W.R. 513, C.A.; 10 Digest (Repl.) 990 6814.
- (2) *Re Lankester, Ex parte Price* (1875), 10 Ch. App. 648; 33 L.T. 113; 23 W.R. 844; 4 Digest 401, 3653.
- (3) *Re National Benefit Assurance Co., Ltd.*, [1924] 2 Ch. 339; 94 L.J.Ch. 33; 132 L.T. 50; 40 T.L.R. 755; 68 Sol. Jo. 753; [1924] B. & C.R. 231; 10 Digest (Repl.) 1172, 8159.
- (4) *Paddy v. Clutton*, [1920] 2 Ch. 554; 90 L.J.Ch. 19; 123 L.T. 808; [1920] B. & C.R. 113; 10 Digest (Repl.) 1172, 8158.
- (5) *Re Law Car and General Insurance Corpn.*, [1913] 2 Ch. 103; 108 L.T. 862; sub nom. *Re Law Car and General Insurance Corpn., J. J. King & Sons, Ltd.'s, Claim*, 82 L.J.Ch. 467; 29 T.L.R. 532; 57 Sol. Jo. 556; 6 B.W.C.C.N. 100; 20 Mans. 227, C.A.; 10 Digest (Repl.) 1172, 8154.
- (6) *Palmer v. Day & Sons*, [1895] 2 Q.B. 618; 64 L.J.Q.B. 807; 44 W.R. 14; 11 T.L.R. 565; 39 Sol. Jo. 708; 2 Mans. 386; 4 Digest 410, 3714.
- (7) *Sovereign Life Assurance Co. v. Dodd*, [1892] 2 Q.B. 573; 62 L.J.Q.B. 19; 67 L.T. 396; 41 W.R. 4; 8 T.L.R. 684; 36 Sol. Jo. 644; 4 R. 17, C.A.; 4 Digest 401, 3654.
- (8) *Re Daintrey, Ex parte Mant*, [1900] 1 Q.B. 546; 69 L.J.Q.B. 207; 82 L.T. 239; 7 Mans. 107, C.A.; 4 Digest 404, 3678.
- (9) *Re Taylor, Ex parte Norvell*, [1910] 1 K.B. 562; 79 L.J.K.B. 610; 102 L.T. 84; 26 T.L.R. 270; 54 Sol. Jo. 271; 17 Mans. 145; 4 Digest 404, 3680.
- (10) *Mersey Steel and Iron Co. v. Naylor Benzon & Co.* (1884), 9 App. Cas. 434; 53 L.J.Q.B. 497; 51 L.T. 637; 32 W.R. 989, H.L.; 10 Digest (Repl.) 990, 6813.
- (11) *Gorringe v. Irwell India Rubber and Gutta Percha Works* (1886), 34 Ch.D. 128; 56 L.J.Ch. 85; 55 L.T. 572; 35 W.R. 86, C.A.; 8 Digest (Repl.) 583, 301.
- (12) *Dearle v. Hall, Loveridge v. Cooper* (1828), 3 Russ. 1; 38 E.R. 475, L.C.; 8 Digest (Repl.) 599, 430.
- (13) *Re Mid-Kent Fruit Factory, Ltd.*, [1896] 1 Ch. 567; 65 L.J.Ch. 250; 74 L.T. 22; 44 W.R. 284; 40 Sol. Jo. 211; 3 Mans. 59; 4 Digest 408, 3707.
- (14) *Forster v. Wilson* (1843), 12 M. & W. 191; 13 L.J. Ex. 209; 152 E.R. 1165; 4 Digest 396, 3625.
- (15) *Re Davies, Ex parte Cleland* (1867), 2 Ch. App. 808; 36 L.J. Bey. 45; 17 L.T. 187; 15 W.R. 1160, L.J.; 5 Digest 1172, 9486.
- (16) *Watson v. Mid Wales Rail. Co.* (1867), L.R. 2 C.P. 593; 36 L.J.C.P. 285; 17 L.T. 94; 15 W.R. 1107; 40 Digest (Repl.) 426, 193.

Appeals from orders of Eve, J., on a summons taken out in a winding-up.

The facts are summarised in the headnote and are also stated in the judgments. The summons raised the questions (i) whether under s. 31 of the Bankruptcy Act, 1914, as applied to companies in liquidation by s. 207 of the Companies (Consolidation) Act, 1908, a policy holder who had mortgaged his policy or certificate to the company, was entitled to set off the statutory value of the policy or certificate

By s. 207 of the Companies Act, 1908 [s. 317 of the Act of 1948], the rules of bankruptcy are to apply in the winding-up of the company. Section 30 of the Bankruptcy Act lays down what debts are provable in a bankruptcy. Sub-section (3) of s. 30 reads as follows :

"Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts payable in bankruptcy."

By sub-s. (8) "liability" for the purposes of the Act is to include

(b) "any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether the breach does or does not occur, or is or is not likely to occur or capable of occurring, before the discharge of the debtor";

(c) "generally any express or implied engagement, agreement or undertaking, to pay, or capable of resulting in the payment of, money or money's worth; whether the payment is, as respects amount, fixed or unliquidated; as respects time, present or future, certain or dependent on any one contingency or on two or more contingencies; as to mode of valuation, capable of being ascertained by fixed rules or as a matter of opinion."

Within the above definitions it seems clear that Mr. Pitts can prove in the liquidation for the amount of the policy money. It was throughout the currency of the policy a liability of the company contingent upon Mr. Pitts' life and his continuance in the due payment of the annual premiums. At the date of the presentation of the petition the policy had not strictly, under the conditions endorsed upon it, a surrender value such as to entitle the holder to one of the alternative options therein provided, because under them no surrender value is allowed to a policy which has been charged, but the charge could have been cleared away, and a surrender value once more obtained. More than that, it may be safely said that the policy had at that time a quantitive value, seeing that maturity of the policy was approaching, only one premium remained to be paid, and the debt charged on the policy was £114 and interest only. As BUCKLEY, L.J., said in *Re Law Car and General Insurance Corpn.* (5) :

"What the policy-holder is entitled to is the value of the contract at the date of the winding-up . . . which at that date is to be taken to have come to an end."

Section 31 of the Bankruptcy Act, 1914, provides for a set-off to be allowed in the case of mutual debts, mutual credits, and mutual dealings. This s. 31 replaced s. 38 of the Bankruptcy Act, 1883, which in turn replaced s. 39 of the Act of 1869. The three sections are similar in terms and effect subject to words necessary to make them fit into the system of bankruptcy under each act. It is right to observe that the principle of allowing set-off in bankruptcy proceedings has been continuously enlarged. "Mutual dealings" was added in 1869 to "mutual debts and mutual credits" which had been the words used in the earlier statutes regulating the right of set-off in bankruptcy. As LORD RUSSELL OF KILLOWEN said in *Palmer v. Day & Sons* (6) :

"The section in its present shape, however, has been held applicable to all demands provable in bankruptcy, and so to include claims as well in respect of debts as of damages liquidated or unliquidated, provided they arise out of contract."

He traces in that case the several changes which have been made in this clause as to set-off, and emphasises the fact that it has been steadily enlarged. By s. 30 (4) of the Bankruptcy Act, 1914, an estimate of the liability provable is to be made by the trustee subject to an appeal to the court. In the liquidation of a company under

A s. 206 of the Companies (Consolidation) Act, 1908, a just estimate is to be made of the liability.

B This method does not prevail in the winding-up of insurance companies. By the Assurance Companies Act, 1909, s. 17, it is provided that the value of a policy or of a liability under a policy in the winding-up of an insurance company is to be measured in accordance with the rule set out in Sched. VI to that Act. This mode of measuring the liability, however, does not alter its character. Apart from authority it would seem that the liability of an insurance company upon its policies measured as above forms a mutual debt or mutual dealing with its holder who has borrowed money on the policy from the insurance company. An illustration of a set-off in such a case is to be found in *Sovereign Life Assurance Co. v. Dodd* (7), where, it may be noted, as in the present case, premiums on the policy were paid after the petition to wind-up, so that, as is the case here, the policy had not completely matured before the winding-up. The court in that case distinguished the decision in *Ex parte Price* (2), on the ground that set-off was raised by way of defence to an action by the liquidator. In *Lee and Chapman's Case* (1) the question of set-off again arises. It was a set-off as between a sum due on the one side, and a measure of damages claimed on the other. There had been a charge upon one of the sums to be set off which did not go to the full sum estimated to be the amount of the sum due. SIR WILLIAM BRETT, M.R., says :

E "That charge has diminished the amount which I now have to deal with as between the liquidator and the commissioners. But the moment that I come to consider the rights as between the commissioners and the liquidator, and to consider them as if no charge had been made, I am driven back on what I have said before. As between them this claim to damages can be proved in the winding-up. The moment I come to that conclusion, I must hold that the Bankruptcy Act, 1869, s. 39, applies, and that the claim of the commissioners is to be treated by way of set-off, and they are entitled to say that they cannot be called upon to pay more than the amount which they owed the company diminished by that which the liquidator owed them for these damages."

F COTTON, L.J., in the same case, says :

G "In my opinion . . . mutual dealings in respect of which there are these cross-claims are capable of being proved in the liquidation as well as the other claims which the liquidator has as against the commissioners. And why should it not be? It is argued that this is not a liability at the time because there was no breach. At the time when the company commenced its liquidation it was under a contract which implied a liability to maintain these streets if it were required."

H It is to be observed that s. 31 of the Bankruptcy Act, 1914, is definite in its terms that where there is a mutual credit, mutual debt or other mutual dealings, the sums are to be set-off and the balance of the account and no more shall be claimed or paid on either side respectively. It is not merely permissive, it is a direct statutory enactment that the balance only is to be claimed in bankruptcy.

I In *Re Daintrey, Ex parte Mant* (8) the Court of Appeal held that there was a set-off in bankruptcy of a claim for damages against a debt due. The case is important. Daintrey owed Messrs. Mant £83. Messrs. Mant owed Daintrey or might owe him up to a sum of £300 LORD LINDLEY, M.R., says that there was some sum payable under the agreement, and proceeds :

"How can the trustee insist upon having 20s. in the pound from Messrs. Mant, and say that Messrs. Mant must be content with a dividend on the debt due to them from Daintrey?"

ROMER, L.J., says :

"It was not necessary that the money payable under the agreement should be immediately payable to the bankrupt at the date of the receiving order; nor

were the circumstances such that the account could be taken as between Messrs. Mant and the bankrupt at that date." A

The Court of Appeal affirmed the decision which had been given by BIGHAM, J., and declined to accept the dissenting judgment of WRIGHT, J., a judge whose experience in bankruptcy no one would contest. BIGHAM, J., in that case had said, speaking of the decision in *Sovereign Life Assurance Co. v. Dodd* (7): B

"It was enough that there existed at the commencement of the liquidation a debt on the one hand and a liability which in due course would mature into a debt, on the other . . . In the present case there was a debt due by Daintrey on the one side, and there was a transfer by him of his business on the terms that it should be worked so as to produce money payable to him on the other."

WRIGHT, J., had founded his decision, if not entirely, at any rate substantially, upon the decision of *Ex parte Price* (2). He says: C

"In that case there was at the time of the bankruptcy a certain existing liability to make a payment at an uncertain future time, and it was held not the subject of a set-off, because there was no sum due which could be ascertained or made the subject of an account or set-off."

That is the reasoning which he derives from *Ex parte Price* (2). *Re Daintrey, Ex parte Mant* (8) was followed by *Re Taylor, Ex parte Norvell* (9). In that case judgment had been given by PHILLMORE, J., and he founded himself upon *Re Daintrey* (8). He says: D

"Any obligation prospective or contingent to which the bankrupt is subject, and which, if it becomes an attaching obligation, will result in a money claim, is, under s. 37 (3) and (4) of the Bankruptcy Act, 1883 [s. 30 (3) of Bankruptcy Act, 1914], to be established as at the date of the receiving order, and if the obligation arises out of mutual dealings between the debtor and a creditor it is the subject of set-off." E

His judgment was accepted by LORD COZENS-HARDY, M.R., who says that he prefers to base his judgment upon the reasons assigned by PHILLMORE, J., and BUCKLEY, L.J., says: F

"They were debts in respect of a contract existing at the date of the receiving order, and by virtue of s. 38 [s. 31 of Act of 1914] there is necessarily a statutory set-off. The decision of this court in *Re Daintrey* (8) is, in my opinion, directly in point." G

Both *Re Daintrey* (8) and *Re Taylor* (9) are decisions of this court, and are as binding upon this court as *Ex parte Price* (2). It appears to me that they cut into the reasoning on which the decision in *Ex parte Price* (2) was decided. *Ex parte Price* (2) itself is from some points of view not easy to understand. There are parts of MELLISH, L.J.'s, judgment which I find some difficulty in following. and JAMES, L.J., says at the end of his judgment (10 Ch. App. at p. 651) that, although there was no right of set-off, "each party will prove for what he can, the one in the liquidation and the other in the bankruptcy." Then he says: "when there is a dividend ascertained in both cases I suppose one sum will be set-off against the other." I do not quite follow how he supposes that that would happen if there were no right of set-off at all, and that there was an independent proof in the liquidation and an independent proof in the bankruptcy. *Ex parte Price* (2) was decided before s. 10 of the Supreme Court of Judicature Act, 1875, was passed, by which section the system of bankruptcy was to be applied in the winding-up of a company. It had not been so applied before. So far as the reasoning on which it is based goes the case seems difficult to reconcile with the other decision of this court to which I have referred, *Lee and Chapman's Case* (1), followed by *Re Daintrey* (8), and *Re Taylor* (9). If it is necessary to choose between the authorities binding upon this court, I must choose to follow the most recent decisions, and to say that *Ex parte Price* (2), belongs to the time when the wide terms H I

A of the mutual-dealing section were not as general or as fully applied as they have been under the present decision. It appears to me that, following the three cases that I have referred to, and recognising that *Ex parte Price* (2) is binding upon this court, but was a decision given at a time when the law stood not as it is to-day and the advantage of the reasoning in the three cases to which I have referred was not available, the doctrine of *Ex parte Price* (2) ought not to be applied to the present case. Thus, in my judgment, EVE, J., rightly decided *Re National Benefit Assurance Co., Ltd.* (3) in 1924, and was right in following it in the present case, and, therefore, that the appeal from his decision ought to be dismissed.

C **WARRINGTON, L.J.**—The City Life Assurance Co. is being wound-up by the court under an order made on July 17, 1923, upon a petition presented on June 30 of the same year. We have before us two appeals from an order of EVE, J., on a summons issued for the purpose of determining certain questions arising in the winding-up. The two parts of the order appealed against are the declarations expressed respectively in the third and fourth paragraphs of the order. The third paragraph alone refers to the appeal to which the judgment I am about to deliver relates, and, therefore, I will read that paragraph only. It is to this effect:

D “That the holders of ordinary branch life and endowment policies issued by the company who have borrowed money from the company on the security of mortgages of such policies in the form described as ‘mortgage to secure private loan’ . . . but whose mortgages have not been deposited with the . . . trustees [of the company’s trust deeds] . . . are entitled to be credited with and to set off against the amount secured by such mortgages the actual value ascer-
E tained in manner applicable to such policies provided by Sched. VI to the Assurance Companies Act, 1909, of their said policies.”

This appeal was heard first inasmuch as if we had held that there was no set-off in this case the question raised by the second appeal would not have arisen.

F In the appeal now in question one Pitts was the holder of a policy dated March 6, 1905, for a sum of £232 payable on Dec. 28, 1923, or the earlier death of the assured, the premiums being paid annually on Dec. 1 in each year. The last premium was therefore payable on Dec. 1, 1923, and in June, 1923, when the winding-up commenced, the policy was still current. In November, 1918, the assured executed an ordinary mortgage of the policy to secure £114 with interest at 5 per cent. The policy, therefore, created a claim against the company which at the date of the
G winding-up was a future claim, and subject, therefore, to the provisions of s. 206 of the Companies Act, 1908 [s. 316 of Companies Act, 1948], and s. 17 of the Assurance Companies Act, 1909, under which the claim has to be valued and admitted to proof for the value so ascertained. [His Lordship read s. 30 of the Bankruptcy Act, 1914, so far as material, and proceeded:] That is a very wide definition indeed of liabilities which are to be deemed to be debts provable in
H bankruptcy. Section 31 is a well-known section providing for set-off in bankruptcy:

I “Where there have been mutual credits, mutual debts, or other mutual dealings, between a debtor against whom a receiving order shall be made under this Act and any other person proving or claiming to prove a debt under the receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party . . .”

A future debt, a debt not payable immediately but payable in future, even payable subject to a contingency, is deemed to be a debt provable in bankruptcy, and is, therefore, one of the liabilities referred to in s. 31 as a debt under a receiving order in the expression “person proving or claiming to prove a debt under the receiving order.”

The liquidator contends that the order of EVE, J., part of which I have read, is wrong because he says that there can be no set-off inasmuch as the value placed

upon the policy is not a debt due from the company, and cannot be the subject of such an account as is mentioned in s. 31 of the Bankruptcy Act. He relies upon *Ex parte Price* (2), a decision of the Court of Appeal, as being directly in his favour. He does not dispute that the position of policy holder and mortgagee constituted a mutual credit or mutual dealing, and he admits that if before the winding-up the policy had become a claim there would have been a case for a set-off as was decided in the *Sovereign Life Assurance Co. v. Dodd* (7). The real question is: Are we bound by the decision of this court in *Ex parte Price* (2) to decide that in this case there is no right of set-off? That was a case arising in bankruptcy and the bankruptcy rules as to set-off did not apply to winding-up. Technically, I doubt whether this court is bound by such a decision because it is a decision on a state of the law existing at that time, but not now existing. But whether the court is so bound or not, it would in ordinary cases be regarded as bound to follow such a decision unless the alteration in the state of the law provided some clear distinction between that and the case then before the court. If I were unable to find such a substantial distinction, and there was nothing else in the case, I should without hesitation follow *Ex parte Price* (2), leaving a superior court to say whether that case was rightly or wrongly decided. But I do not consider myself bound to follow it, not because I find a substantial distinction between that case and the present, for I do not, but because I am quite satisfied that the two very learned judges who decided *Ex parte Price* (2) would not have come to the same conclusion had they had before them the cases which have been decided in this court since the date of the decision of *Ex parte Price* (2), and I think I may add also in the House of Lords, having regard to *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (10).

The first of those cases is *Lee and Chapman's Case* (1). The company there in liquidation being wound-up had entered into a contract with the Commissioners of Sewers for the reconstruction of Queen Victoria Street. Under that contract at the date of the winding-up there was due to them under the engineer's certificate a very considerable sum of money. Under a term of the contract they were under an obligation in certain events, which happened after the date of the winding-up, to keep the street in repair for a period of years. The winding-up, of course, amounted to a repudiation of that contract which could be accepted by the other side as a breach and would give the commissioners the right to an action for damages. But at the date of the winding-up there was nothing actually due under that contract; in fact the contract had not become operative because the event had not happened, and, therefore, any liability thereunder was a future contingent liability which had to be estimated in the winding-up. The question arose whether there was as between the company and the commissioners a right of set-off between the sum due from the commissioners to the company and damages, which were, of course, unliquidated damages, for the breach by the company of their undertaking to repair. That was one of the questions which came before the Court of Appeal. BRETT, M.R., said this:

"The liquidator sues the commissioners for the price of the work done under the contract. The commissioners allege that they have a claim against the liquidator for damages which have been assessed, and as against him, by virtue of the Bankruptcy Act, 1869, s. 39 [s. 31 of Bankruptcy Act, 1914], those damages are to be considered as damages which can be set off by the commissioners against his claim. If there was no charge upon the claim of the company, it seems to me clear upon authority and upon the true construction of this section that the damages could be set off. But then a charge has been given to Lee and Chapman before the winding-up. These damages for breach of contract until they were assessed were unliquidated. If there had been no winding-up, could they have been set off as a claim by the commissioners against the company? Certainly not. They are not damages which can be set off under the contract. Then if they cannot be set off under the contract, the interest of the company is to have the payment for the work done not subject to this

A right of set-off. . . . Now I come to the question as between the liquidator and the commissioners wholly irrespective of this charge, and to be considered as if this charge had never been made. That charge has diminished the amount which I have now to deal with as between the liquidator and the commissioners. But the moment that I come to consider the rights as between the commissioners and the liquidator, and to consider them as if no charge has been made, I am driven back on what I have said before. As between them this claim to damages can be proved in the winding-up. The moment I come to that conclusion I must hold that the Bankruptcy Act, 1869, s. 39, applies, and that the claim of the commissioners is to be treated by way of set-off, and they are entitled to say that they cannot be called upon to pay more than the amount which they owed the company diminished by that which the liquidator owed them for damages."

It will be observed that the view taken by the Master of the Rolls in regard to this question of set-off depended upon this, that a claim for unliquidated damages which arose in the winding-up was a sum which could be proved in the winding-up. Cotton, L.J., in the same case says this :

D "Of course, that breach [of the contract to repair] had not occurred actually, but the company has put itself in such a position that it cannot possibly perform the contract, and the commissioners are entitled to prove, although the notice had not been given at the date of the liquidation or at the date of the completion of the work by the liquidator ; in my opinion there is a claim for damages capable, as the Vice-Chancellor thought, of being proved in the winding-up. The question is whether it does not come under that mutual-credit clause, s. 39 of the Act of 1869 : [s. 31 of Bankruptcy Act, 1914]. In my opinion it does ; mutual dealings in respect of which there are these cross-claims are capable of being proved in the liquidation as well as the other claim which the liquidator has against the commissioners. And why should it not be? It is to be argued that this is not a liability at the time because there was no breach. At the time when the company commenced its liquidation, it was under a contract which implied a liability to maintain these streets if it were required. It is now rendered impossible by the winding-up for the company to do that, and, in my opinion, though no notice has been given before the commencement of the winding-up, that is properly a liability the damages for which are capable of being proved, and, if capable of being proved, are capable under the mutual credit clause of being set off against any claim by the liquidator as against the commissioners."

The second of the cases was *Re Daintrey* (8), and that is another example in which the Court of Appeal gave a decision in favour of the claim to set-off when the claim on one side required to be estimated and was not a debt immediately payable at the date of winding-up. It is remarkable that *Ex parte Price* (2) was relied upon by the judge whose judgment was reversed, but there is no mention of that case in the judgments in the Court of Appeal. Both those judgments, however, are clear upon the point that what has to be ascertained is whether the claim in question as to which set-off is raised is a claim which can be proved in the bankruptcy or the winding-up, as the case may be. In the present case the claim under the policy valued in accordance with the provisions to which I have referred is to be deemed to be, and, therefore, for the purposes of construction is, a debt provable in the bankruptcy. If it is a debt provable in the bankruptcy, then, according to the authorities to which I have referred, that is a debt to which the mutual credit applies, and there would be the set-off. The fact that the amount of such claim has to be ascertained in the manner provided for by the Companies Act, and in this particular case by the Life Assurance Companies Act, seems to me to be immaterial for this purpose. It is merely a means whereby the amount of the debt deemed to be payable in bankruptcy is to be ascertained, but it does

not alter the nature of the debt, the value of which has to be ascertained, and it still remains, notwithstanding that, a debt provable in bankruptcy. It may be that technically the claim in this case comes immediately and in terms within the two decisions of *Lee and Chapman's Case* (1) and *Re Daintrey* (8) to which I have referred, because it may be the true view in law is that the claim in respect of the future liability under a policy is a claim for damages for breach of contract. If that is so, then the result is that it comes exactly within the decisions of those two cases. But whether that is so or not, it seems to me that the principle of the decisions in those cases governs the case with which we have to deal. On the whole, then, I think we are not bound to follow *Ex parte Price* (2), but we are at liberty to decide in accordance with the principles laid down in the two cases to which I have referred of *Lee and Chapman's Case* (1) and *Re Daintrey* (8). This appeal, therefore, must be dismissed, and the result is that *Re Lankester*, *Ex parte Price* (2) must be treated as overruled.

SARGANT, L.J.—I agree. Technically this is an appeal from a decision in a winding-up, but substantially it is an appeal from a reported decision of the same learned judge in *Re National Benefit Assurance Co., Ltd.* (3). In some ways I think it preferable to deal with that decision because here the assured is a person whose case appears to be an exceptionally strong one, there being only one premium to being paid by him before he would become entitled to the benefit of the policy. Perhaps it may be for that reason that his case was selected of those who benefit by the decision, but it is a test case, and we have to deal with it from the point of view of all the persons who were holders of policies and mortgaged them, whether their policies would become due in a very short time or whether they had only just effected their policies. Therefore, the general view expressed by EVE, J., in the case I have referred to becomes of especial importance. I do not think I can do better than follow the decision of the learned judge in that case, with which I entirely agree, and to follow the way in which he deals with the matter, because he deals first of all with the rules in bankruptcy as applied to the winding-up of a company [see s. 317 of Companies Act, 1948]. That is what we have to deal with, and I wish to consider those rules in the first place quite independently of authority. When we have s. 30 of the Bankruptcy Act, 1914, which provides what debts and liabilities are provable, and so on, I think it is impossible to avoid being struck with the extraordinary comprehensiveness of the language. Every conceivable kind of liability is made provable in bankruptcy. More than that, those liabilities when they are proved are to be deemed to be debts; they are notional debts for the purpose of applying to them the provisions of s. 31 under which the debts are to be set off one against the other and the balance only paid. That was a feature that was very much stressed, and I think, rightly stressed in argument. All kinds of liabilities as well as all kinds of debts, are made notional statutory debts, and then are set off against one another so that, under s. 31, the balance only is payable.

If that is so, looking at the matter independently of authority, how can it be said that the amounts which are to be paid or assessed as the damages or the moneys properly payable to the assured by reason of the company having broken their contract with him by going into liquidation—how can it conceivably be said that those sums are not liabilities made notional debts and capable of being set off under s. 31 against the debts due to the company? The mere fact that under the Assurance Companies Act, 1909, the amount payable is to be ascertained in a broad way seems to me of no importance at all. That is merely quantifying the obligation and can have no effect upon the result of the quantification when obtained. It still represents a liability. It, therefore, is a notional debt, and has to be set off under s. 31 against any debt due to the company meanwhile. That being so *prima facie* and apart from authority, it seems to me unquestionably that this set-off must be allowed, as the learned judge has found. Really, the only difficulty in the way of the court is *Ex parte Price* (2). With regard to that I think it is

A to be noticed that JAMES, L.J., put in the forefront of his reasons for coming to the conclusion that he did that at the time of that decision the bankruptcy rules had not been applied to the liquidation of a company, and although his decision was in the bankruptcy of Dr. Lankester, still the problem he had to consider was one, one half of which was concerned with the liquidation of the company in which Dr. Lankester had a policy. He obviously felt, as EVE, J., pointed out, that justice could not be done between the parties if on the one side you had an application of the rules of bankruptcy under which a balance only would be payable and on the other side the fact that in a liquidation of a company no such rule was to be applied. EVE, J., has pointed out the pecuniary results which might result from that in pounds, shillings, and pence. But the injustice was obviously weighing on the court in the decision to which they came. Since that case there have been at least three cases in the Court of Appeal—*Sovereign Life Assurance Co. v. Dodd* (7), *Re Daintrey* (8), and *Lee and Chapman's Case* (1), all of which seem to be inconsistent with *Ex parte Price* (2) if that is to be looked upon as being a general decision independent of the special and peculiar circumstances of that case. In my judgment, both on the language of the statute and on the strong balance of authority, we ought to affirm the decision of the learned judge in this case and approve his decision in the corresponding case of *Re National Benefit Assurance Co., Ltd.* (3).

STEPHENSON'S POLICY

Manning, K.C., and *Bischoff* for the appellant policy holder, Stephenson.

Grant, K.C., and *Dighton Pollock* for the trustees.

Gavin Simonds, K.C., and *Hecksher* for the liquidator.

E **SIR ERNEST POLLOCK, M.R.**—After dealing with the *Pitts' Policy case* (supra) EVE, J., said :

"The question is whether that judgment can be extended so as to include the case of policy holders and mortgagors whose mortgages were equitably assigned to the trustees of the trust deed antecedent to the winding-up."

F In other words, the claim here is by a policy holder as against the liquidator of the company, but the policy has been assigned by equitable assignment to the trustees. The case is important, for I understand from the Bar that no less than 900 of these policies were assigned to the trustees, and something like £375,000 was the sum for which they were held as security. However, shortly put, the point still arises whether the system of set-off, which we have held was applicable in a simple case between a policy holder and the liquidator, applies as between a policy holder whose policy has been assigned and is now held by the trustees. It is quite clear that as between the assignor and the assignee an assignment is complete without notice given. If modern authority for that is needed it will be found in *Gorringe v. Irwell India Rubber and Gutta Percha Works* (11), where COTTON, L.J., says :

H "It is contended that in order to make an assignment of a chose in action, such a debt, a complete charge, notice must be given to the debtor. It is true that there must be such a notice to enable the title of the assignee to prevail against a subsequent assignee. That is established by *Dearle v. Hall* (12), but there is no authority for holding this rule to apply as against the assignor of the debt. Though there is no notice to the debtor the title of the assignee is complete as against the assignor."

I Therefore, the company had assigned by an assignment, good as between them and the trustees as assignees, the policies of these policy holders.

If s. 31 of the Bankruptcy Act, 1914, is to apply, and a set-off is to be allowed, it must be upon mutual debts, mutual credits, and mutual dealings. The characteristic of mutuality must be present. That, I think, is clear from a number of cases that have been decided and maintained throughout the whole period during which set-off based upon mutual credits and debts has been allowed in bankruptcy

law, but if authority is required it can be found in *Re Mid-Kent Fruit Factory, Ltd.* (13), where VAUGHAN WILLIAMS, J., says of this set-off clause: "The characteristic of mutuality must always be present," and VAUGHAN WILLIAMS, J., was for a considerable time the learned judge in bankruptcy. Section 31 does not apply when the credits or debts or dealings are not between the same persons, or where one of the persons was acting in a different capacity from that in which the dealings with the other was incurred. If authority is needed it will be seen in *Forster v. Wilson* (14), where PARKE, B., traces the course of this legislation:

"The object of this clause (originally introduced in a temporary Act, 4 & 5 Anne, c. 17, continued by 5 Geo. 2, c. 20, and now re-enacted by the 6 Geo. 4, c. 16) is not to avoid cross-actions, for none would lie against assignees, and one against the bankrupt would be unavailing, but to do substantial justice between the parties, where a debt is really due from the bankrupt to the debtor to his estate; and the Court of King's Bench, in construing this clause (for it is the same clause in substance in the two last-named statutes) have held that it did not authorise a set-off, where the debt, though legally due to the debtor from the bankrupt, was really due to him as a trustee for another, and, though recoverable in a cross-action, would not have been recovered for his own benefit."

Those words in that passage were adopted and read in full by LORD CAIRNS in *Re Davies, Ex parte Cleland* (15), and LORD CAIRNS accepted the statement of the law made by PARKE, B., as a true exposition of the doctrine.

It seems to me, therefore, that in the present case, having regard to the fact that these trustees have become the holders of the policy, there is no mutuality which will entitle the policy holder to set off, as between him and the liquidator, the sum due to him upon the policy, and, therefore, that s. 31 does not apply to the case. It is suggested that there was an equity between the policy holder and the company that the policy holder should be able to invoke the principle of s. 31 if and when he required to do so, and that the company are not entitled to say there is no mutuality because under the dealings between the policy holder and the company the principles of s. 31 ought to have remained available to the policy holder. That argument does not, to my mind, carry weight. There is no equity that the rights which govern the parties if and when s. 31 applies should be always available. Section 31 appears to me to be a section which is applicable if and when there is a bankruptcy or winding-up of a company, but until that time has come the law which governs the rights of the parties is not in force and cannot be held to be an inchoate right which the policy holder had as against the company at the time when the winding-up of the company had not been commenced or, indeed, thought of. Section 31 provides for there being a statutory measure for ascertaining the rights of the parties, and that the balance only of the debts after they have been set off is to be provable. In the present case there is no mutuality and no equity that can be evoked to enable the policy holder to establish his right of set-off as against the liquidator. If there were any equity it must arise, I think, out of the contract between the parties. WILLES, J., in *Watson v. Mid Wales Rail. Co.* (16) refers to the difference between the rights which accrue under the Bankruptcy Act and the rights which would give rise to an equity between the parties. He says:

"It is necessary to show mutual credit; I do not mean in the sense of mutual credit under the statutory provisions of the bankruptcy law, but in the sense of there being an agreement or contract made or to be inferred that one debt was to liquidate the other. Where the balance only is to be the debt, there is a clear equity that one of the parties is not to have any detriment by the act of the other. But here the debts are payable at different times. There is nothing from which we can infer that one liability was to liquidate the other, or that the balance was to be considered due."

A It appears to me that in the present case those observations apply, there is no equity arising, as I have already said, under the Bankruptcy Act and there is no equity which would so be implied arising out of the contract between the parties. If it could be shown that there was an absolute right or an implicit right that the money which is to be received out of the policy alone was to be the source of payment of a debt, perhaps different considerations might arise, but the mortgage provides that there shall be a debt from the policy holder, and the contract express or explicit which is suggested by WILLES, J., does not appear to be available to the policy holder in this case. For these reasons, therefore, I am of opinion that the appeal fails and must be dismissed.

C **WARRINGTON, L.J.**—In this case EVE, J., has come to the conclusion that as between the class of policy holders and mortgagors, on the one hand, to which the question relates, and the company, there is no right of set-off of the amount due on their policies against the amount of their mortgage debts. He has done so because at the date of the winding-up the mortgage debts and the securities for them had been effectually transferred by way of equitable assignment by the company to certain trustees for another class of policy holder. The result of that was, of course, that at the date of the winding-up there was a debt due from the company to the policy holders, as we have already decided in the previous case, but there was no debt due from the policy holder to the company because the debt which had been due from the policy holder to the company had been effectually transferred to the trustees. Therefore, at the date of the winding-up there was no mutual credit or mutual debt which could come within the provisions of s. 31 and be set off the one against the other.

E In my opinion, quite independently of authority, that decision is a right decision. But it is not independent of authority, for the point precisely arose in *Lee and Chapman's Case* (1) to which I referred in my previous judgment. In that case the sum due to the company in liquidation from the Commissioners of Sewers had been charged by the company prior to the winding-up in favour of Messrs. Lee and Chapman, and the question arose whether, as between the company, on the one hand, and Messrs. Lee and Chapman, on the other hand, there could be a set-off of the amount due to the commissioners under their contract and the amount due under the original contract between the two. That was decided in favour of Messrs. Lee and Chapman ; so far as they were concerned there could be no right of set-off. COTTON, L.J., expresses himself on this point in these terms :

G "As regards the assignees, Lee and Chapman, they stand in a different position. Before the commencement of the winding-up the company had assigned to them the right of receiving to the extent of their debt the money payable under the contract. As regards that sum, there was no longer a mutual credit or the possibility of a mutual credit between the company and the commissioners. . . . As against Lee and Chapman, the mutual-credit clause cannot prevail, because it operates only as between the bankrupt and the person claiming to prove, not as between the person dealing with the bankrupt and someone to whom the bankrupt had previously assigned his interest in his contract."

I It was recognised in argument that that decision in *Lee and Chapman's Case* (1) would be conclusive against the policy holder in the present case but for one circumstance of distinction, and that was that in *Lee and Chapman's Case* (1) a notice of the assignment in favour of Lee and Chapman had been given to the commissioners the day before the winding-up, while in this case no notice of the assignment had been given at all. In my opinion, that distinction is immaterial. The argument founded upon it rests on what is, with all respect, in my opinion, a misapprehension of the effect of notice in question of equitable assignment. The equitable assignment itself is absolute and complete whether notice is given or not. That was decided by this court in *Gorringe v. Irwell India Rubber and Gutta Percha Works* (11). The object of giving notice, and the only object, is to prevent

or render difficult, first, any arrangements between the debtor and creditor which may be to the detriment of the assignee of the debt, and, secondly, to prevent any subsequent assignee of the debt from obtaining priority over the original assignee who gives the notice, and it is only in reference to those matters that the notice becomes material. It seems to me, therefore, that, notwithstanding the absence of notice, this case is precisely within the decision of *Lee and Chapman's Case* (1), and that the mutuality which is necessary in order to apply the mutual credit clause of the Bankruptcy Act did not and does not exist. The decision, therefore, on that point, was right. A B

But then it was contended before us—as far as I understand his judgment, it would appear not to have been contended before Eve, J.—that on the true construction of the mortgage deed and in the events which have happened there was a bargain between the mortgagor and the company as mortgagees that the mortgagor should in every extent have a right of set-off, that is to say, that the mortgagee should be only liable to pay the mortgage debt out of moneys payable under the policy. In my opinion, that contention is not justified by the deed. The deed contained an absolute covenant to pay. It also, it is true, contained a provision that if the mortgagor paid the premiums, paid the interest, and performed his other obligations under the deed, so long as he did that the debt could not be called in. That, in my opinion, does not amount to a contract that in all events the only fund to be looked to for payment of the debt should be the policy. If that had been the intention of the parties, it would have been perfectly easy to insert that provision in the mortgage deed. That has not been done. In my opinion, therefore, there was no contract on the part of the company to resort only to the proceeds of the policy for payment of their debt. There having been a winding-up which has altered the relation of the parties, the right of set-off under the rule applicable in the case of winding-up would have applied if it had not been for the assignment, but in face of the assignment, which has destroyed mutuality, it cannot be applied. The decision of Eve, J., was, therefore, right and this appeal ought to be dismissed. C D E

SARGANT, L.J.—I have come to the same conclusion, but with some considerable reluctance as regards the last point which has been dealt with by WARRINGTON, L.J. As regards the question of notice of assignment I entertain no doubt whatever. For the purpose of making the assignment effectual as between the assignor and the assignee it was quite unnecessary to give any notice at all. That has been completely settled by the case to which counsel for the trustees referred and which my Lord has mentioned, *Gorringe v. Irwell India Rubber and Gutta Percha Works* (11). I feel also that there cannot be any equity that the state of things at the time of the liquidation or bankruptcy shall be such that the equitable doctrine of the statutory doctrine of set-off shall apply between the parties. For the purpose of applying that doctrine one has to find what is in fact the position of the parties at the relevant date, namely, the date of liquidation. If it so happens that at that date there are mutual debts or mutual liabilities deemed to be debts, then those have to be set off against one another. But I do not see that any person is entitled to complain or to ask to be put in the same position as if there were that mutuality when, in fact, it has been displaced by the action of the parties. F G H

I come to the question of the bargain between the parties as contained in the mortgage itself, and I must say that I think that really the policy holder has been very hardly treated here and is in a position in which he could not reasonably have expected to be placed. He borrows money from the company, making this express bargain with the company that so long as he pays interest on his mortgage and pays his premiums the debt shall not be called in. He would naturally, I think, feel that he was not in the position of an ordinary debtor at all. If he works out his policy bargain, he will at the conclusion of the policy term become entitled to a present sum of money as against which, I think, there would be held to be a set-off of the amount owing by him in respect of the mortgage debt. What has I

A happened? The company has gone into liquidation and has rendered it practically impossible for him to perform those conditions by virtue of which he would in course of time have been liberated altogether from this debt and have received his policy moneys. Then he finds that in consequence of there having been an assignment to trustees the mortgage debt is owing to some other persons, and, although those other persons are, of course, bound by the contract in place of the persons

B who assigned to them, still there is not in terms any possibility of the policy holder performing that special bargain by virtue of which he will be liberated from payment of his debt and will receive the balance of his policy money free. All that seems to me to be a very unexpected result, and one which the policy holder, however prudent, would hardly have been likely to contemplate. I have been searching diligently to see whether out of that I can find anything amounting to a contract or an equity or a bargain, but, having done my very best in that respect, I am

C unable to find that there was a bargain between the policy holder and the company under which in all events there was to be a set-off of the mortgage debt against the policy money. I am still less able to find a set-off as between the mortgage debt by contract and the sums which become payable under the Assurance Companies Act, 1909, for breach of their bargain by the company in respect of the policy. So,

D reluctantly I am driven to concur with the other two members of the court, and to affirm the decision of EVE, J., but I do think there is a real hardship here upon the policy holder who has borrowed money and whose mortgage debt happens to have been transferred to these trustees, and if any higher court would find an equity in his favour I should be only too pleased.

E Solicitors: *Preston, Snow & Lyttleton*, and *Coburn & Co.*; *Maxwell, Simpson & Batley*; *Johnson, Jecks & Colclough*; *Peter Thomas & Clark*.

[Reported by H. LANGFORD LEWIS, Esq., *Barriater-at-Law*.]

F

G Re LISTER. Ex parte BRADFORD CORPORATION v. DURRANCE

[COURT OF APPEAL (Sir Ernest Pollock, M.R., Atkin and Sargant, L.JJ.), November 13, 30, 1925]

[Reported [1926] Ch. 149; 95 L.J.Ch. 145; 134 L.T. 178; 42 T.L.R. 143; 90 J.P. 33; 24 L.G.R. 67; [1926] B. & C.R. 5]

H *Bankruptcy—Disclaimer of property—Personal liability of trustee—Liability not flowing directly from property disclaimed—Liability for rates—Disclaimer of tenancy—Trustee in occupation of house—Use as store for bankrupt's furniture—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 54 (2).*

I A bankrupt was the occupier of a dwelling-house under a verbal quarterly tenancy. The trustee in the bankruptcy went into occupation of the premises, taking possession of the furniture, and appointed the debtor and his wife caretakers of the property. The trustee's occupation of the premises lasted from April 2 to May 15, 1923, and in respect of that period he was entered in the rate-book as occupier. On June 1 he gave notice that he disclaimed the tenancy under s. 54 (2) of the Bankruptcy Act, 1914.

Held: the provision in s. 54 (2) that a disclaimer "shall . . . discharge the trustee from all personal liability in respect of the property disclaimed as from the date when the property vested in him" must be given a reasonably restricted meaning and it did not include a liability which did not flow directly from the

property disclaimed, but resulted from a voluntary act by the trustee, even though the trustee was acting prudently and in fulfilment of his duty to the estate ; in the present case neither the tenancy nor the duty to take possession of the furniture imposed any liability for rates on the trustee, who might have sold or warehoused the furniture, but chose to go into occupation of the bankrupt's house and use it as a store ; and, therefore, notwithstanding the disclaimer, he was personally liable to pay the rates accruing during the period of his occupation.

Notes. Referred to: *Re Sharman's Will Trusts, Public Trustee v. Sharman*, [1942] 2 All E.R. 74.

As to disclaimer by a trustee in bankruptcy see 2 HALSBURY'S LAWS (3rd Edn.) 457 et seq., and for cases see 5 DIGEST 938 et seq. For Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321.

Cases referred to :

- (1) *Re Sandwell, Ex parte Zerpas* (1885), 14 Q.B.D. 960; 54 L.J.Q.B. 323; 52 L.T. 692; 33 W.R. 522; 2 Morr. 95; 5 Digest 945, 7750.
- (2) *Wilson v. Wallani* (1880), 5 Ex. D. 165; 49 L.J.Q.B. 437; 42 L.T. 375; 44 J.P. 475; 28 W.R. 597; 5 Digest 951, 7797.
- (3) *Re Levy, Ex parte Walton* (1881), 17 Ch.D. 746; 50 L.J.Ch. 657; 45 L.T. 1; 30 W.R. 395, C.A.; 5 Digest 951, 7791.
- (4) *Hill v. East and West India Dock Co.* (1884), 9 App. Cas. 448; 53 L.J.Ch. 842; 51 L.T. 163; 48 J.P. 788; 32 W.R. 925, H.L.; 5 Digest 950, 7786.
- (5) *Re Finley, Ex parte Clothworkers Co.* (1888), 21 Q.B.D. 475; 57 L.J.Q.B. 626; 60 L.T. 134; 37 W.R. 6; 4 T.L.R. 745; sub nom. *Re Finley, Ex parte Hanbury*, 5 Morr. 248, C.A.; 5 Digest 949, 7778.
- (6) *Re Latham, Ex parte Glegg* (1881), 19 Ch.D. 7; 51 L.J.Ch. 367; 45 L.T. 484; 30 W.R. 144, C.A.; 5 Digest 948, 7774.
- (7) *Schofield v. Hincks* (1888), 58 L.J.Q.B. 147; 60 L.T. 573; 37 W.R. 157; 5 T.L.R. 101, D.C.; 5 Digest 946, 7756.

Appeal from an order of P. O. LAWRENCE, J., on a Special Case stated by the deputy judge of the county court of Yorkshire sitting at Bradford for the opinion of the High Court pursuant to s. 100 (3) of the Bankruptcy Act, 1914, on the question whether where a trustee in bankruptcy went into occupation of onerous property which he subsequently disclaimed he was liable to pay the rates on the property during the period of his occupation.

The bankrupt, Joseph Smith Lister, committed an act of bankruptcy on Dec. 23, 1922. A petition was presented on Jan. 25, 1923, a receiving order was made on Feb. 8, and he was adjudicated bankrupt on Feb. 12. The liabilities amounted to £1,584 16s., and there was a balance of £52 14s. 10d. available for dividend. At the beginning of the bankruptcy the bankrupt was the occupier of No. 26, Merton Road, Bradford, on a verbal quarterly tenancy at a rent of £9 16s. a quarter. On Feb. 8, 1923, the trustee in the bankruptcy entered into possession of the premises and was entered on the rate-book as occupier from April 2 to May 15, 1923. No appeal was brought against the rate or entry. On June 1, 1923, the trustee filed a notice under the provisions of s. 54 of the Bankruptcy Act, 1914, disclaiming the tenancy agreement under which the premises were held. The apportioned part of the rates due for the period from April 2 to May 15, 1923, during which period the trustee was in occupation, amounted to £2 17s. 2d.

By s. 54 (1) of the Bankruptcy Act, 1914, a trustee in bankruptcy was given power at any time within twelve months after his first appointment to disclaim any property of an onerous character. By s. 54 (2):

"The disclaimer . . . shall . . . discharge the trustee from all personal liability in respect of the property disclaimed as from the date when the property vested in him . . ."

A By sub-s. (8) :

“Any person injured by the operation of a disclaimer under this section shall be deemed to be a creditor of the bankrupt to the extent of the injury, and might accordingly prove under the bankruptcy.”

B The Special Case stated the following questions for the opinion of the court :
(i) Whether the trustee was personally liable to pay the rates; (ii) whether they were payable out of the assets in priority to the debts provable in the bankruptcy; (iii) or whether the notice of disclaimer operated to determine the personal liability (if any) of the trustee to pay the rates from the date the premises so disclaimed vested in him.

C A. C. Clauson, K.C., and W. N. Stable, for the rating authority, submitted that liability for rates was not an obligation which sprang from ownership, the trustees only became liable for the rates by reason of his going into occupation. Therefore, s. 54 (2) of the Bankruptcy Act, 1914, only discharged the trustee from any liability which was incident to the vesting of the property in the trustee and not from such a liability as a liability to rates which did not attach owing to the ownership vesting in the trustee, but only arose when the trustee went into possession. [They referred to *Re Sandwell, Ex parte Zerpas* (1), *Wilson v. Wallani* (2).]

D E. H. Hansell, for the trustee in bankruptcy : It has been held that the primary object of s. 54 (2) is to relieve the bankrupt and his estate and the trustee in the bankruptcy from all liability as though the property had never vested in the trustee; see *Re Levy, Ex parte Walton* (3) (17 Ch.D. at p. 751), *Hill v. East and West India Dock Co.* (4) (9 App. Cas. at p. 455); and *Re Finley, Ex parte Clothworkers Co.* (5) (21 Q.B.D. at p. 482); the Poor Rate Assessment and Collection Act, 1869; and the Agricultural Rates Act, 1908.

F LAWRENCE, J., held that the rates were a liability on the trustee in respect of the property disclaimed and that within the precise words of s. 54 (2) the trustee was discharged from all personal liability in respect of those rates. He made declarations (i) that the trustee was not personally liable to pay to the applicants the rates or any part thereof; (ii) that the rates were not payable out of the assets in priority to the debts provable in the bankruptcy; (iii) that the notice of disclaimer operated to determine the personal liability of the trustee to pay the rates as from the date when the premises so disclaimed vested in him; and (iv) that the rating authority had no right to rank for dividend for the rates.

G The rating authority appealed.

A. C. Clauson, K.C., and W. N. Stable, for the rating authority, in addition to the cases cited in their argument in the court of first instance relied upon *Re Latham, Ex parte Glegg* (6) (19 Ch.D. at p. 15).

The Solicitor-General (*Sir Thomas Inskip, K.C.*), and E. W. Hansell, for the trustee.

H SIR ERNEST POLLOCK, M.R.—This is an appeal from the decision of LAWRENCE, J., given on July 2, 1925, upon a Special Case, and the question to be decided, as stated by LAWRENCE, J., is whether, where a trustee in bankruptcy goes into occupation of an onerous property, he gets rid of the liability to pay the rates in respect of it during the period of his occupation by virtue of his disclaimer of the property under s. 54 of the Bankruptcy Act, 1914, and the immunity given to a trustee in bankruptcy under sub-s. (2) of that section.

I It is unnecessary to repeat all the facts stated in the Special Case, but I set out paras. 4, 5, 6, and 10 of it as relevant to this judgment as follows :—

4. At the commencement of the bankruptcy the bankrupt was the occupier of certain premises known as 26, Merton Road, Bradford, under a quarterly verbal tenancy at a rent of £9 16s. per quarter. The said premises consisted of a dwelling-house and were occupied by the bankrupt for residential purposes only. 5. On Feb. 8, 1923, the [trustee in bankruptcy] entered upon the said premises and

took possession of the said bankrupt's furniture there and such furniture remained on the premises till May 15, 1923, when the [trustee] sold the same to Sarah Lister the wife of the bankrupt and gave up possession thereof to her. The [trustee] as hereinafter appears was entered in the rate-book as occupier from April 2 to May 15, 1923, and no appeal was brought against the said rate or entry. 6. On June 1, 1923, the [trustee] filed in the county court of Yorkshire holden at Bradford a notice under and by virtue of the provisions of s. 54 of the Bankruptcy Act, 1914, disclaiming the said verbal tenancy agreement under which the said premises were held. 10. The apportioned parts of the said rates for the period from April 2, 1923, to May 15, 1923, during which period the [trustee] was so in occupation of the said premises as aforesaid are as follows :

April 2, to May 15, 1923	Poor Rate	...	...	...	...	...	£2 4 8
Do.	General District Rate	...	...	...	...	...	0 11 7
Do.	Water Rate	...	...	...	...	...	0 0 11
							£2 17 2

It is not questioned that the trustee was entitled to exercise his powers of disclaimer under s. 54 in respect of the agreement of tenancy under which the dwelling-house was held by the bankrupt. As the Special Case finds, the trustee entered upon the premises, took possession of the furniture, and allowed himself—without raising an appeal—to be entered on the rate-book as occupier of 26, Merton Road, with the result that the demand for the £2 17s. 2d. in question in the case, which includes a small sum for water rate, was made upon him. The trustee, however, claims immunity from the payment of this sum by reason of the words in s. 54 (2) that the disclaimer “shall also discharge the trustee from all personal liability in respect of the property disclaimed as from the date when the property vested in him . . .” That date is fixed by s. 53 (2), and was in the present case Feb. 12, 1923—that is, antecedent to the date at which the liability now sought to be enforced arose. LAWRENCE, J., decided in favour of the trustee. He appreciated that his decision might involve some startling results, but felt unable to cut down the apparent meaning of the large and comprehensive words to which I have referred. I have come to a different conclusion, but not without some doubt.

The present s. 54 (1) re-enacts s. 55 (1) of the Bankruptcy Act, 1883, with the addition of a power to extend the time for disclaimer. By sub-s. (8) any person injured by a disclaimer may prove as a creditor of the bankrupt to the extent of the injury he has suffered, for the purpose of the disclaimer is to relieve the bankrupt and his estate and his trustee from liability arising out of the property disclaimed, but not to affect the rights and liabilities of third parties in relation to the property disclaimed: see *Re Levy, Ex parte Walton* (3). It is to be observed that in the present case, if the trustee is relieved from liability, it is, to say the least, doubtful whether the overseers would be able to recover the rates from the bankrupt's estate under this sub-section. Now the word property appears to be used in s. 54 with different significations in different places in the section. In the first line “property” connotes the same property which passed to the trustee under the operation of s. 53, which vests all the property of the bankrupt in the trustee, but in sub-s. (2) the disclaimer operates to discharge the bankrupt and “his property”—i.e., his assets from liability: see per LINDLEY, L.J., in *Re Finley, Ex parte Clothworkers Co.* (5) (21 Q.B.D. at p. 482, and see p. 484), where he says :

“It is sometimes used to denote the thing owned—land or shares, or whatever it may be; it is sometimes used to denote the bankrupt's interest in the thing, whatever it may be, and it is sometimes used, apparently indiscriminately, to denote both of these things. There is an ambiguity in the expression.”

Attention has been called to a number of statutes dealing with rating where the liability to pay rates is spoken of as “in respect of land, houses, or buildings.”

A That may be so, but no liability in respect of land, houses, or buildings arises except to an occupier in respect of his occupation. Occupation is the foundation of the liability, so that the similarity of the words used in sub-s. (2), "personal liability in respect of the property disclaimed," does not appear to afford a helpful test as to a liability which does not arise under a rating Act without something more, that is, occupation. Moreover, inasmuch as occupation is the test, it is questionable
B whether, if the overseers were relegated to a proof in bankruptcy, they would recover these rates for a period during which the bankrupt was not in occupation.

It has been held—and, I think, rightly—in *Schofield v. Hincks* (7) that these words under which immunity is claimed for the trustee do not enure to cover a wrongful act committed by the trustee in selling hay and straw grown on a farm of a bankrupt tenant, in breach of the tenant's agreement, although the trustee
C disclaimed the lease under which the restriction arose. It is clear that some restriction must be placed upon the immunity of the trustee, and where, as here, the act under which his liability arises does not fall upon him merely on account of the "property" passing to him, but is one of his own volition, and not essential to the preservation of the assets—however prudent the act may have been—it is difficult to suppose that the legislature intended that the trustee was to be relieved.
D The words in sub-s. (1),

"Notwithstanding that he has endeavoured to sell or has taken possession of the property, or exercised any act of ownership in relation thereto,"

appear to me to free the trustee from consequences which might be suggested where his act has been done entirely for the purposes of the estate and its realisation.

E For these reasons, though, I repeat, not without doubt, in my judgment, the trustee seeks an interpretation of sub-s. (2) beyond what it is intended to cover, and the question put in the Special Case must be answered, as to (i) in the affirmative, and (iii) in the negative, in respect of the full amount claimed, namely, £2 17s. 2d. The appeal will be allowed with costs.

F **ATKIN, L.J.**—The facts of this case are stated in the Special Case. All that need be mentioned for the purpose of this judgment are that the debtor at the date of the commencement of the bankruptcy was occupying under a verbal quarterly agreement of tenancy a house in Merton Street, Bradford, in which was his furniture. His property, therefore, included the agreement of tenancy which became vested in his trustee in bankruptcy pursuant to ss. 129 and 53 of the Bankruptcy Act, 1914. The trustee went into occupation of the premises,
G apparently by taking possession of the furniture, leaving them there for safe custody, and appointing the debtor and his wife caretakers. The rates on the house being yearly, rates had been made from April 1 to March 31, and being due at the date of the receiving order, have been admitted to rank in priority in pursuance of s. 33 of the Act of 1914. Why the amount stated in the Special
H Case as so ranking is limited to the period from adjudication to the end of the current period, I do not know, and have not inquired. From April 2, 1923, the trustee was entered on the rate-book as occupier. He has not appealed, and it is to be taken that he was properly so entered and became personally liable for rates as long as his occupation continued. On May 15 he sold the furniture to the debtor's wife, and then ceased to occupy the premises. On June 1, he gave notice
I under s. 54 of the Act that he disclaimed the tenancy. The local authority claim from him £2 17s. 2d., being the apportioned rates for the period of his occupation from April 2 to May 15. The particular rates are the poor rate, ground district rate, and water rate.

The trustee claims that his liability to pay the rates in question is a personal liability in respect of the property disclaimed, and that he is discharged from it under the disclaimer provision, s. 54 (2). I have come to the conclusion that this contention is wrong. It is necessary in the first place to ascertain what is the property disclaimed. This seems plain from the words of the section and the

notice of disclaimer. The trustee had the right to disclaim because the particular property of the debtor was property unsaleable or not readily saleable by reason of its binding the possessor thereof to the performance of an onerous act or to the payment of a sum of money, or it may be also because it was an "unprofitable contract." The property so described was, not the house, but the tenancy agreement; and the notice of disclaimer which forms part of the case quite correctly disclaims the "tenancy." The question, therefore, is whether the trustee's liability to pay rates arose in respect of the tenancy which he disclaimed. The learned judge in his judgment appears to have treated the property disclaimed as the house, the hereditament, and this appears with respect not to be accurate.

If, then, one considers whether the liability in question is a liability in respect of the tenancy the answer appears to me to be reasonably plain. The words "in respect of" may be of very wide import. In their widest guise it may be said that the liability arises in respect of the tenancy because, unless the trustee had the right to occupy under the tenancy, he probably would not have gone into occupation. But to give this wide consideration to the words would be to extend the relief given in the section beyond reason. If the trustee, being in occupation, had employed a builder to repair the roof or make other necessary repairs in this wide sense the objection might arise in respect of the tenancy, for it was under the tenancy that he obtained the right to interfere with the roof. But it could not be contended that the section relieved the trustee from such obligations. So, if the trustee, as occupier became liable in tort to an invitee or to a passer-by or to the highway by reason of the state of the premises or if he incurred liability for infringing by-laws. It appears to me that the words must be given some reasonably restricted meaning, and, giving them the widest reasonable consideration, I think they do not include a liability which does not flow directly from the property disclaimed, but is the result of a voluntary act done by the trustee. The tenancy itself imposed no liability for rates upon the trustee; nor did the property in the furniture nor the duty imposed by s. 48 (1) to take possession of the furniture. He might have sold the furniture forthwith, or warehoused it. If he had taken a shed or house to store the furniture he would clearly be personally responsible for the rates on such shed or house, and I see no reason why, if he desires to use the debtor's house as a store, which he had the right to do, his position is any different. Whether he acquires a right under a new contract or avails himself of a contractual right vested in him, his liability appears to me to arise in respect of his own act; and in the latter case not to arise in respect of the contractual right of which he might or might not avail himself. It may be noted that part of his liability in question is for water rate. There appears to have been some further question as to water rents which is not the subject of dispute in this case, and it is possible that the rate does not cover the whole of the charges for water supplied to the house. I do not know the terms of the Bradford Corporation's statutory powers, but if they are in ordinary form they would not include the right to charge unless water were supplied to the house. If the trustee for his own or his caretakers' convenience chooses to have water supplied to the house, is there any reason why he should be discharged from payment for it. If the charge were for gas supplied I can imagine no dispute would be raised, and yet, in the wide sense contended for, the gas would equally be supplied in respect of the tenancy.

Our attention was called to the words of the section which enable the trustee to disclaim notwithstanding that he has attempted to sell or has taken possession of the property or exercised any act of ownership. I think that these words are merely intended to defeat any possible contention that the acts suggested amount to final election to hold the property so as to fetter the right to disclaim. They cannot involve the consequence that liabilities incurred in doing any of the acts mentioned are to be taken to be liabilities in respect of the property eventually disclaimed. If it were so, liabilities incurred to the printer in respect of advertisements, the auctioneer or house agent instructed to sell, the builder in repairing would fall

A within the section. It is not necessary, and is, perhaps, inadvisable, to discuss what the precise scope of the words in sub-s. (2) is. They plainly cover liabilities necessarily imposed by the vesting of the property disclaimed, such as liability to perform the covenants of a lease, or to pay calls on shares, or to give or pay for delivery of goods or contracts. There may be liabilities which directly flow from the property when vested which would also be covered. But they do not cover liabilities which the trustee voluntarily incurs, even though in doing so he is acting with prudence and in fulfilment of his duties to the estate.

B The argument for the trustee asked us to consider the public disadvantages of this decision as affecting trustees in bankruptcy. I have not thought it necessary to weigh the advantages or disadvantages further than was necessary to construe the statute. But it has to be remembered that the trustee is not bound to go into rateable occupation of any property, and that in ordinary circumstances the rates are provided for by s. 33 for the current period of a rate. On the other hand, the period of disclaimer may be as long as twelve months, or even longer, if extended by the court, and I can see no urgent claim of public policy which requires a trustee in bankruptcy to have beneficial occupation of rateable hereditaments without including a contribution to the expenses which benefit him just as much as any ordinary occupier. I think that the appeal should be allowed, and that the first question should be answered in the affirmative and the third in the negative.

D **SARGANT, L.J.**—In this case LAWRENCE, J., has realised the strangeness of the result at which he has arrived, but he has felt himself unable to disregard what he characterises as the precise wording of s. 54 (2) of the Bankruptcy Act, 1914. E The crucial part of his reasoning is to be found in the following passage, namely :

F “The rating authority rates the property which is occupied by the trustee. The property so occupied becomes the rateable hereditament, and it is in respect of the occupation of that rateable hereditament that the personal liability of the trustee attaches. In ordinary parlance that is a liability in respect of the property disclaimed, and I see no warrant for saying that the court ought to restrict the generality of the words here used.”

G With great respect to the learned judge, I think that he has not sufficiently distinguished between the hereditament itself, No. 26, Merton Road, and the interest in that hereditament which formed the property of the bankrupt, and was alone capable of vesting in the trustee, and of being the subject of a disclaimer by him. H The terms of the disclaimer itself recognise the very limited nature of the property to which it applies. It is a disclaimer, not of No. 26, Merton Road—that is of the rateable hereditament itself—but of the bankrupt's quarterly tenancy of the house at a stated rent, and the discharge of the trustee effected by s. 54 (2) “from all personal liability in respect of the property disclaimed,” is, in my judgment, a discharge from all personal liability in respect, not of the hereditament generally, but merely of the quarterly tenancy that has passed from the bankrupt to the trustee by virtue of the vesting effected by s. 53 (2) of the Act. Stress has been laid for the trustee on the words in sub-s. (1), of s. 54,

I “notwithstanding that he has endeavoured to sell or has taken possession of the property, or exercised any act of ownership in relation thereto,”

and it has been urged that these words protect the trustee here because his entering into occupation was merely taking possession. But this argument again seems to miss the true purpose and effect of these words. They are, in my judgment, intended to provide for cases where the trustee is uncertain whether a particular interest of the bankrupt is beneficial or onerous, and to enable the trustee to take possession of the interest, and endeavour to dispose of it to advantage without being estopped by that conduct from subsequently disclaiming the interest should it turn out to be not merely valueless, but onerous. The words clearly relate to the conduct of the trustee with reference to what vests in him—that is, in this

case the tenancy of the house. I can see no sufficient reason for extending them so as to include also any other conduct of the trustee in relation to the house. A

A hypothetical case such as would not be uncommon in London may, perhaps, be taken by way of illustration. Assume that a house when built had been leased by the freeholder to A. for ninety-nine years at a ground rent of £2, that A. had then subleased to B. for ninety-nine years less a day at an improved rent of £7, that some ten years later B. had in consideration of a premium subleased to C. for fifty years at £50, that shortly afterwards C. had granted an occupation lease to D. at £120, and that D., while still in possession, acquires the original ground lease to A. and becomes bankrupt. It seems to me unquestionable that D.'s trustee in bankruptcy could deal quite separately and independently with the two properties of D. in the house, namely (a) the ground lease entitling the owner to an improved leasehold ground rent of £7 per annum and (b) the occupation lease at £120, and that he might disclaim the latter lease if onerous without in any way affecting his right to retain and dispose of the clearly beneficial interest under the original ground lease. But on the construction that the learned judge has put on the section the contrary result would ensue; the right and liabilities of the trustee under the ground lease as being in respect of the property disclaimed, viz., the house, would also be determined. In my judgment, this example demonstrates the inadmissibility of this construction. B C D

The use throughout s. 54 of the words "disclaim" and "disclaimer" is in itself a strong indication of the scope of the section. The words, in my view, connote a repudiation of, or refusal to claim, rights or property which would automatically devolve on or accrue to the person making the disclaimer. They are precisely applicable to a renunciation of a property which with all its rights, interests and liabilities has vested in the trustee under s. 53 (2), of the Act. They are not appropriate to any interests, rights or liabilities that have been acquired or undertaken by the voluntary act of the trustee himself, and independently of devolution from the bankrupt. "Disclaime disclamare signifieth 'utterly to renounce'"; (Co. Litt. 102a); and for other references see STROUD'S JUDICIAL DICTIONARY (2nd Edn.) p. 539. And the word is habitually used in this sense at the present day with reference to the non-acceptance or renunciation of the office and estate of a trustee under a deed or of an executor and trustee under a will. It is true that, whereas such a renunciation in the case of a deed or will has to be of the totality of the office and estate, and ab initio, the Bankruptcy Act places the trustee in bankruptcy in an exceptional position by enabling him to disclaim one or more items only of the property devolving on him, and to do so after acts of taking possession or attempting to realise which would or might under the general law preclude any subsequent disclaimer. But I can see no sufficient reason for further extending this special privilege beyond rights and liabilities in respect of assets which have necessarily devolved upon the trustee by virtue of the statutory vesting in him, and for applying it to any interests, rights, or liabilities which are the result not of the statutory vesting but of his subsequent voluntary actions. For such actions he remains personally responsible. I agree that the appeal should be allowed with costs. E F G H

Appeal allowed.

Solicitors: *N. L. Fleming*, Town Clerk, Bradford; *Solicitor to Board of Trade.*

[*Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.*]

A HUDDERSFIELD FINE WORSTEDS, LTD. v. TODD

[KING'S BENCH DIVISION (Wright, J.), October 13, 14, 15, 1925]

[Reported 134 L.T. 82; 42 T.L.R. 52]

B *Deed of Arrangement*—*Instrument made in respect of affairs of insolvent debtor for benefit of creditors*—"Insolvent debtor"—*Resolutions by creditors to be embodied in deed*—*Continuance of "insolvency" until execution of deed*—"Benefit of creditors generally"—*Deeds of Arrangement Act, 1914* (4 & 5 Geo. 5, c. 47), s. 1 (1) (a) (b).

C *Estoppel*—*Estoppel by deed*—*Deed void by statute*—*Right of party assenting to and taking advantage of deed to set up invalidity*.

D Under a deed of arrangement dated Dec. 30, 1921, which the defendant entered into to give effect to resolutions passed by his trade creditors between June and December, 1921, he agreed to pay to the creditors a composition plus certain profits arising out of his business, which he covenanted to carry on up to a certain date, and the creditors covenanted to release him from full liability and not to proceed against him so long as the conditions were fulfilled. Certain small private creditors were not parties to this deed which was not registered. After paying a portion of the agreed composition, the debtor sold his business and entered into a new scheme of arrangement with his creditors, but the plaintiffs, who were assignees of creditors who had been parties to the deed of arrangement, refused to consent to this scheme and sued for the amounts originally due to their assignors, less sums already paid to them by way of composition.

E **Held:** (i) the defendant was insolvent in June, 1921, and the passing of the resolutions containing the provisions later included in the deed of December 30, 1921—the effect of those resolutions being dependent on the execution of the deed—did not prevent his being at the date of the execution of the deed an insolvent debtor within s. 1 (1) (b) of the Deeds of Arrangement Act, 1914, and, therefore, the deed was made "for or in respect of the affairs of a debtor who was insolvent at the date of the execution of the instrument" within s. 1 (1) (b), and, as it was not registered, it was void under s. 2 of the Act, and the plaintiffs were entitled to recover.

F **Held, further:** (i) the plaintiffs were not estopped by reason of their assent to the deed from setting up its invalidity as against the defendant; (ii) even if such an estoppel existed, the defendant had, by selling his business, departed from the conditions which released him from his original liability, and, therefore, the original liability revived and the plaintiffs, being relegated to the original rights of their assignors, were entitled to judgment.

G **Quære:** whether, in view of the fact that the private creditors were not parties to the deed, the deed should be considered as having been made "for the benefit of the defendant's creditors generally" within s. 1 (1) (a) of the Act of 1914.

H **Notes.** As to compositions and arrangements see 2 HALSBURY'S LAWS (3rd Edn.) 608 et seq., and as to estoppel by deed see *ibid.*, vol. 15, p. 214 et seq. For cases see 5 DIGEST (Repl.) 1134 et seq. and 21 DIGEST 242 et seq. For Deeds of Arrangement Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 307.

I Cases referred to:

- (1) *Re Glen, Ex parte Glen* (1867), 2 Ch. App. 670; 36 L.J. Bcy. 51; 17 L.T. 98, C.A.
- (2) *Re Wilson*, [1916] 1 K.B. 382; 85 L.J.K.B. 329; 32 T.L.R. 75; 60 Sol. Jo. 90; [1916] 2 H.B.R. 17, D.C.; 21 Digest 332, 1257.
- (3) *Roe v. Mutual Loan Association Fund, Ltd.*, (1887) 19 Q.B.D. 347; 56 L.J.Q.B. 541; 33 W.R. 723; 3 T.L.R. 655, C.A.; 5 Digest (Repl.) 1075, 8670.

- (4) *Re Lee, Ex parte Grunwaldt*, [1920] 2 K.B. 200; 89 L.J.K.B. 364; 123 L.T. 31; [1919] B. & C.R. 287; Digest Supp.
- (5) *Re A Bankruptcy Notice*, [1924] 2 Ch. 76; 93 L.J.Ch. 497; 68 Sol. Jo. 458; [1924] B. & C.R. 188; sub nom. *Re A Bankruptcy Notice (No. 62 of 1924), Ex parte Petitioning Creditors v. Debtor*, 131 L.T. 307, C.A.; Digest Supp.
- (6) *Smith v. Baker* (1873), L.R. 8 C.P. 350; 42 L.J.C.P. 155; 28 L.T. 637; 37 J.P. 567; 5 Digest (Repl.) 973, 7849.

Action tried by WRIGHT, J., without a jury.

The plaintiffs brought this action against the defendant as assignees of trade debts amounting to £7,339 13s. 5d. owing by the defendant to Learoyd Bros. & Co., Ltd., and Joseph Sykes & Co., Ltd., in respect of goods purchased by him from those companies.

Stuart Bevan, K.C., and *Beyfus*, for the plaintiffs.

J. B. Matthews, K.C., and *Fortune*, for the defendant.

Cur. adv. vult.

Oct. 15. **WRIGHT, J.**, read the following judgment. In this case the plaintiffs claim a sum of money which has been agreed between the learned counsel, from the defendant, who carried on business in 1921 as Todd and Wearne. The plaintiffs claim as assignees of two sums of money which constitute the agreed amount, and they stand in the same position as their assignors. The one amount was assigned to them by Joseph Sykes & Co.; the other amount was assigned to them by Learoyd Bros. & Co. In each case the indebtedness arose in respect of goods sold and delivered. The defendant was carrying on business as a merchant, the assignors who had supplied the goods were spinners, and the assignments seem to have taken place in connection with an amalgamation of the business of the assignors with that of the assignees. No question is raised as to the original indebtedness, but the defence which is set up, and which has certain ramifications, turns upon the effect to be given to a composition which was entered into in the year 1921 between the defendant and the assignors.

The defendant, who had purchased his business from A. Todd's trustees, was subject to the same misfortune which befell so many merchants in the latter part of 1920 and in 1921. About the middle of 1921 it was obvious that, by reason of the enormous slump in values which had taken place as compared with those ruling in the previous year, the defendant's financial position was very difficult indeed. I need not go into the details, but a balance-sheet was prepared in June, 1921, which showed a deficiency of about £40,000. His creditors fell under two main heads. There were the trade creditors of whom the assignors were two, and the amount owing to them was something like £110,000. There were certain other creditors called cash creditors, and the amount owing to them came to something in the neighbourhood of £40,000. The balance-sheet showed assets which left such a deficiency as I have already indicated. Now it is well known that in 1921 the creditors in a case like this were not anxious to force debtors into bankruptcy, and preferred, very wisely and very prudently, to enter into compositions or arrangements, and that course was adopted in the present case. As a result of considerable negotiations certain resolutions were prepared and were assented to by all the trade creditors, with the exception of a very few small creditors whose debts were paid in full, and who, therefore, dropped out of the whole transaction. The form of resolution which had been prepared was assented to as I have said, by all the other trade creditors. I was given a copy of one of these forms; it is signed by the trade creditor under these words: "We have passed and agreed to be bound by the above resolution, and request the committee to act as therein provided." The document itself, which is headed "Private and confidential," is headed: "Todd and Wearne," with their description. It goes on:

"It was resolved that the following arrangements be accepted in settlement of the claims of all the creditors of the firm."

A Then it proceeds to say that a committee of creditors should be appointed, whose names are given; that the committee should have full supervising powers with regard to carrying out the arrangement and dealing with questions of difference between the firm and its creditors or between different classes of creditors. Thirdly :

B "The cash creditors and the trustees of A. Todd, deceased, will enter into an agreement with the trade creditors whereby the cash creditors and the trustees of A. Todd, deceased, are not to receive any payments on account of their claims until the trade creditors have received 10s. in the £ mentioned in cl. 4 below, but they are to receive interest."

In cl. 4, it is provided :

C "The firm shall continue to carry on its business and collect its assets, and, as its funds become available, the firm shall distribute moneys to trade creditors pro rata until 10s. in the £ has been paid on the debts owing to the trade creditors; the remaining 10s. in the £ shall be paid out of a proportion of the profits for the period from June 25, 1921, to April 30, 1926, in so far as they may be sufficient,"

D subject to certain conditions. In these conditions there is provision made for the preparation of a balance-sheet as on April 30, 1922, and April 30 in each succeeding year up to 1926. I need not refer to the other provisions of the document, but the various trade creditors signed this form in the interval of time between Oct. 18 and the middle of December. That document clearly contemplated the preparation and the execution of a contract between the trustees of A. Todd, deceased—they had been the vendors of the business to the defendant, and were large creditors—

E and, in addition, the cash creditors, on the one hand, and the trade creditors on the other. The preparation of that contract was proceeded with, and a contract was eventually executed on Dec. 30, 1921. The parties to that contract were the trustees, the trade creditors, and the cash creditors, all of whom executed the document, and that is the document relied on as the deed of arrangement in this case.

F It appears from the correspondence that the advisers who were responsible for the preparation of this document were of opinion that it did not need registration under the Deeds of Arrangement Act, 1914, and it was not registered. The correspondence shows a very natural reluctance to register any such document, because that would involve a publication of the insolvency of the firm, and, as I have said, the legal advisers seem to have taken the view that registration could be dispensed with.

G In my judgment, as I shall explain a little later, that view was erroneous, but it was the view on which the whole matter proceeded, and in so far as anyone is responsible, it seems to have been the responsibility of the legal advisers of the defendant. I lay no stress on that, however, because it is perfectly clear that, in this matter, the assignees, the present plaintiffs, were in no way responsible as influencing the judgment of the other parties to the transaction. This indenture of Dec. 30, 1921, between the parties whom I have specified, begins with certain recitals with which I shall have to deal a little later in detail, and then it proceeds to set out the covenants and agreements between the several parties, which are to this effect : That none of the parties will bring any action against Sidney Todd—that is, the defendant—so long as certain conditions are fulfilled—that is to say, so long as the business is carried on as a going concern and the defendant continues to devote his time and attention to it, and effect is given to the resolution and a receiving order is not made.

H Subject to these conditions, the parties covenant and agree to bring no action or proceeding. Provision is made that the amounts available in accordance with the resolution to which I have referred and which were scheduled to the indenture were to be applied in paying interest to the cash creditors and to the trustees on their debt, and in paying to the trade creditors, so far as funds should be available, amounts sufficient to discharge one moiety, but no more, of the trade creditors' debts, without interest. Then provision is made, if further amounts are available, after the payment has been made, for further payments

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pari passu with the trade creditors to the cash creditors and to the trustees in respect of the balance of their indebtedness. There is a release in cl. 3 in these terms : A

"Subject to the payment of one moiety of their said debts and to any further payment to be made to them as aforesaid, the trade creditors hereby release and discharge the said Sidney Todd and his estate from such part of their said debts as shall not be paid in manner aforesaid as at April 30, 1926, and from all actions, proceedings, claims, and demands in respect thereof." B

The sanction of the court was necessary to that indenture so far as it affected the trustees, and the matter was brought before RUSSELL, J., towards the end of January, 1922, at a time when the period fixed by the Deeds of Arrangement Act, 1914, for registration of the deed had expired. The deed, as I have explained, was not at that or at any other time registered. I have nothing to suggest to me that the learned judge's attention was in any way drawn to the fact that the deed had not been registered. He sanctioned the deed in the ordinary course. C

The business was carried on in accordance with the terms of the resolution and of the indenture, and two payments were made to the creditors, one of 2s. in the £ and the other of 1s. in the £. After a while it became clear that the hopes of the various parties as to what the business would realise by way of profit were not likely to be fulfilled, and in 1924 the defendant, no doubt acting under advice, came to the conclusion that the best way was to have what in effect was a new agreement with his different creditors under which they would accept a smaller amount in full settlement, and in order to realise that smaller amount—he suggested that they should receive what would amount to 7s. in the £ in all—it was decided to form a company, to sell all the assets of the business to the company in return for shares in the company, and to raise a some of money, £25,000 from D
Lloyds Bank by an issue of debentures, and to use that £25,000 in paying a further amount, which the creditors were to receive in full satisfaction and discharge. E
The bulk of the creditors accepted those conditions, and, accordingly, the company having been formed, became the purchaser of the business of the defendant, and the agreement under which that was carried out is dated Aug. 25, 1924, but the plaintiffs refused to be parties to this way of dealing with the situation. They actually stood out for a large amount by way of compensation than the other creditors were willing to accept, with the result that they were left out altogether; and so far as they are concerned they are no parties to the arrangement under which the resolutions of 1921 and the deed of arrangement of 1921 were entirely departed from and abandoned. F

On these facts the question is whether the plaintiffs are now entitled to succeed in recovering the original amount of the debts, subject only to such deductions as are necessary by reason of the payments made while the deed of arrangement and the resolutions were being carried out. Counsel for the defendant, in a very able and comprehensive argument, has raised certain objections and certain defences which he says prevent the plaintiffs from recovering, or, as I rather think he puts his case, from recovering more than the balance of 10s. in the £ which they were entitled to under the deed of arrangement. Counsel for the plaintiffs, on the other hand, says that the deed of arrangement, not having been registered, was void, and that the parties were relegated to their original rights, or, more accurately, had never lost their original rights, if they were desirous of enforcing them. He says that the deed of arrangement is void, because whereas it ought to have been registered, it was not, in fact, registered. He further says that, even if the deed of arrangement is not void, still under the deed of arrangement itself as a contract, the defendants are not entitled to rely on its terms, because the release which it contains was conditional, and the conditions have been departed from by the defendant; and, further, that the entire deed of arrangement had been repudiated by the defendant, so that he can no longer set up its terms in answer to the claim of the plaintiffs. Counsel for the defendant contends that the deed of arrangement was G
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A not void at all, that it did not need registration; and he further contends that, even if it was void for want of registration, the plaintiffs, or their assignors, have so acted as to be estopped from setting up that the deed is void, and, therefore, are bound by it. He further contends that on the true construction of the deed the most that the plaintiffs can recover is the 10s. in the £, subject to some nominal allowance for the possible fact that in the period between the selling of the business to the company and April 30, 1926, some profit might have been realised; but he refers to facts which seem to show that there was no very great likelihood, no serious or substantial likelihood, of any profit being realised in that period, having regard to what had happened in the past, so far as one can forecast the future.

B The first question I have to decide is whether the deed required registration; if it did, then I shall have to consider whether there is any such estoppel as counsel for the defendant contends for, and I shall have, thirdly, to deal with the construction of the deed. On the first point, namely, whether the deed requires registration, I must refer to the terms of the Deeds of Arrangement Act, 1914. Under that Act there is a definition of what is a deed of arrangement. The first subsection of s. 1 is the governing part, and it provides :

D "A deed of arrangement to which this Act applies shall include any instrument of the classes hereinafter mentioned whether under seal or not—(a) made by, for or in respect of the affairs of a debtor for the benefit of his creditors generally; (b) made by, for or in respect of the affairs of a debtor who was insolvent at the date of the execution of the instrument for the benefit of any three or more of his creditors. . . ."

E Then, assuming that the governing definition is fulfilled, there is, in s. 1 (2) an enumeration of certain classes of instruments which are referred to, such as assignments of property, deeds or agreements for a composition, deeds of inspectorship, a letter of licence, and any agreement or instrument entered into for the purpose of carrying on or winding-up the debtor's business, and so forth. I need not spend time on the second subsection, because it is perfectly clear that, if the terms of the first subsection apply to the instrument in this case, the instrument will fall under one or more of the definitions contained in the second subsection.

F Counsel for the plaintiffs claims that the instrument here falls under both (a) and (b) of s. 1 (1). He says that the instrument falls under (b), because it was made by, for or in respect of the affairs of a debtor who was insolvent at the date of the execution of the instrument, and was for the benefit of any three or more of his creditors. The point seems to have been taken at some stage of these proceedings that the defendant himself was not a party to the deed of arrangement, but I found a difficulty in seeing how that would matter, having regard to the terms of the Act; counsel for the defendant did in no way press that point, and I disregard it. But the question has to be determined whether the debtor, the defendant, at the time of the execution of the deed of arrangement, namely, Dec. 30, 1921, was insolvent. It is perfectly clear, and I need not examine the evidence at any length, because it is admitted that, in one sense of the word, the defendant was clearly insolvent, that is to say, in June, 1921, he was unable to pay his debts in the ordinary course of business as they fell due. His position is clearly shown by the balance-sheet, and it was that fact which led to the various steps being taken which eventually resulted in the indenture of December, 1921, but counsel contends that at the date of the indenture the defendant was no longer insolvent. The ground on which he founds that argument is that the resolutions promulgated in October, 1921, and assented to by all the trade creditors before Dec. 30, 1921, had changed and reduced the indebtedness of the defendant and that, therefore, he was no longer bound to make any payments to his creditors, except under and in accordance with the terms of the resolutions, with the result that it could not be said at any time that he was unable to pay his debts as they fell due, except in accordance with the terms of the resolutions. That, counsel for the defendant

contends, is the case as regards the trade creditors, and as regards the cash creditors he relies on the contention that it is not shown that their debts were presently payable, except as regards the £11,000 due to the trustees, which was not being pressed for, the balance of the purchase money of the business which could have been met, if necessary, out of the defendant's private assets. I do not think that the contention is sound. The resolutions relied on by counsel for this purpose are somewhat difficult to understand from the point of view of their precise legal effect. The legal advisers who prepared them seem to have regarded them as not constituting any legal obligation at that stage, and the correspondence shows that they clearly contemplated that the arrangement would have to be embodied in a formal instrument. In addition to that, however, the resolutions themselves seem to be conditional and to be entirely dependent on the completion of such a contract as was embodied in the indenture, to which the cash creditors and the trustees of A. Todd, deceased, would be parties, and until that document was prepared and executed, and, I assume, executed in such a way as to have legal validity, in my judgment none of the assenting trade creditors was bound by the resolutions. I am assuming that the resolutions were not within the Deeds of Arrangements Act, 1914, and that no question of registration arises in connection with them, but, in my judgment, the defendant was insolvent at the dates when the deed of arrangement was executed, and, if that is so, if I am right in that, the instrument clearly falls within the definition in s. 1 of the Act and, therefore, is void, unless it was registered, as in fact it was not.

Counsel for the plaintiffs also relied on the category set out in s. 1 (1) (a) of the Act—that is to say, he contended that the instrument in question was an instrument made by, for or in respect of the affairs of a debtor for the benefit of his creditors generally. Counsel for the defendant strenuously attacked that contention and gave me a very interesting and illuminating history of the legislation, which has finally reached its present form in this Act, and he referred to the analogous provisions of the Bills of Sale Acts and of the Bankruptcy Acts. He relied on the fact, which was proved in evidence, that there was certain private creditors of the defendant who were not contemplated by the deed, were not mentioned in the deed, and who, as he contends, were not entitled to come in and claim the benefits of the deed. He relied in particular, as stating the general principle which has been carried out in the later legislation, on a decision of LORD CAIRNS in *Re Glen* (1), under s. 192 of the Bankruptcy Act, 1861. But counsel for the defendant says that that judgment contains the first use of the word “generally” in connection with creditors. He referred to certain earlier cases, all to the effect that in the Bankruptcy Acts, and in the Bills of Sale Acts, and the Deeds of Arrangement Acts the requirement that the instrument should be for the benefit of creditors involved all the creditors without any distinction of category or kind or amount. He referred to other decisions, which I need not trouble about, because there is no doubt that the language used means all creditors. The instrument is to be for the benefit of the creditors generally. No case was referred to by counsel for the defendant which quite covered the peculiar point raised here, because the parties who prepared the deed of arrangement obviously ignored the small private indebtedness of the defendant amounting, perhaps, in all, taking the highest figure suggested, at something like £150. That has to be compared with the total indebtedness as regard the cash creditors and the trade creditors, amounting to £150,000. Counsel for the plaintiffs contended that the amount of the private creditors' indebtedness was so small that it might be disregarded altogether. I do not consider it necessary to form any express conclusion on that point, but I confess that I am very much impressed by counsel's argument that the idea of the legislation in giving this definition is that no creditor should be shut out from the benefit of the deed of arrangement. It is not absolutely clear that, under this particular deed, the private creditors could not have come in. I think it very doubtful indeed; but, assuming that they could not have come in, then they were left out, and the result would have been that their needs—small, perhaps, but not unimportant—were entirely

A disregarded in the deed of arrangement and a composition which disposed of all the assets of the debtor. I feel, therefore, the force of counsel's reasoning, though I do not consider it necessary to give effect to it, because I have already decided on the other ground that, the debtor being insolvent, the deed of arrangement falls within the category under s. 1 (1) (b).

B That being so, the deed was not registered, and is, therefore, void, and, subject to the further point of counsel for the defendant, which I shall next consider, the plaintiffs are relegated to or have never lost their original rights, and are, therefore, entitled to claim for the whole remaining balance of the indebtedness. But counsel contends that, even if the deed is void, the plaintiffs here are estopped, or are in law in some way debarred from setting up that invalidity as against the defendant. That argument, simply as a matter of principle, and apart from
C authority, does seem to me a very difficult proposition. Estoppel generally involves a representation of an existing fact made by one party to the other with the intention that the other party should act upon it, and with the result that the other party does act upon it to his detriment. In this particular case, as I understand the facts, I find it difficult to see any element of estoppel. I do not find that the plaintiffs or their assignors made any representation at all in respect of this deed.
D It was put before them by the defendant's advisers, who thought that it did not need registration, and the plaintiffs assented to it and executed it. I do not find any representation there, but, even if some further effect is to be given to the consideration that afterwards they received payments under this deed, the payments of the 2s. and the 1s., and were prepared to receive further payments if they came, I do not see how that can be a representation by conduct, and, if it were a representation by conduct, I should still find it difficult to see how it could be the representation of any existing fact. A representation either by words or conduct that a void instrument was valid would be a representation of a matter of law, and, if it is attempted to reduce the matter to a more specific definition, the only representation that I can conceive would be that the deed did not require registration. But, as
F I have already said, that was the view of the debtor's advisers, and I have no ground at all for thinking that they were influenced by the conduct of the plaintiffs or the plaintiffs' assignors in the matter, and in any case that would not be the representation of any existing fact, but of a proposition of law, and an erroneous proposition of law at that. I do not find that the defendant acted on the faith of the representation. I have found that there was no representation, but I do not find that there
G was any act induced by any conduct of the plaintiffs, and I do not find that there was any act by the defendant to his detriment, because the deed of arrangement and everything which was done under it were more to the advantage of the defendant than to anyone else. The defendant was escaping being made a bankrupt, and the conduct of the plaintiffs and the other creditors was influenced by a very wise and prudent sentiment then prevailing against making use of bankruptcy proceedings in the very unfortunate events which followed the slump of 1920 and 1921.

H There is, however, a still further and most serious objection in principle to the application of the doctrine of estoppel to circumstances of this character. It has long been held that a deed of arrangement which is void under the Act cannot be treated as valid because creditors have assented to it; such creditors, by reason of the fact of assenting to the deed, cannot be treated as being estopped by their
I conduct in assenting. That seems very obvious, because the act of assent involves a conclusion of the contract, and the contract itself, the law says, is void. That being so, it would be very strange if, on the ground of estoppel by subsequent conduct, the parties were deemed in law to have by fiction assented to a document which the law forbids them to assent to in the sense of assenting to something which is valid. The Deeds of Arrangement Act, 1914, is based on a policy which requires publicity to be given to these transactions, and insists on publicity. I should certainly feel great difficulty in concluding that something which the law says cannot be done by express and overt act can be validly done on the faith of

such a fiction as is involved in the application of the doctrine of estoppel. On principle, therefore, I should hold that in law the circumstances relied on by the defendant, even if they could in fact contribute an estoppel, could not have that result in a case where the contract in question is declared by law to be void on grounds of public policy.

But counsel for the defendant has argued that I am either bound to hold the contrary or at least ought to hold the contrary of what my own judgment would be, because of the state of the authorities, and he has referred me with his customary care and thoroughness to certain cases. He has referred me to *Re Wilson* (2), where in a Divisional Court HORRIDGE, J., held on the facts of that case that the debtor was estopped as against the trustee under the deed from alleging that the deed was invalid. HORRIDGE, J., gave judgment in the Divisional Court with ROWLATT, J., who did not deal with this part of the case, although he expressed some doubt about it. HORRIDGE, J., based his conclusion very largely on certain dicta which he found in *Roe v. Mutual Loan Association Fund, Ltd.* (3). The facts which HORRIDGE, J., then had before him were somewhat different from the facts in this case, and the matters relied on as constituting estoppel went, I think, beyond anything which is alleged in this transaction. In a later case the same learned judge, who, of course, in addition to his general eminence, has very peculiar experience in these matters—*Re Lee* (4)—refused to apply the principle of estoppel to the facts in that case, because in that case he said that everyone knew that the document was invalid and that there was, therefore, nothing which could constitute representation. These cases were followed by a very full and illuminating examination of the whole question by the Court of Appeal in *Re A Bankruptcy Notice* (5). All the members of the court discussed the principles involved in the question of estoppel as applied to matters of this kind and discussed the earlier authorities, and, in my judgment, the principles laid down, especially in the very illuminating judgment of ATKIN, L.J., are contrary to the conclusion that there can be in law an estoppel of the sort which counsel contends for in this case—that is to say, an estoppel of such a nature that a plaintiff who has assented to and taken the benefit of a deed of arrangement is thereby debarred from setting up the invalidity of the deed, that invalidity flowing from the express words of a statute of a public nature and being based upon principles of public policy. The case of *Roe v. Mutual Loan Association Fund, Ltd.* (3) does seem to contain statements of principle to the opposite effect, and when the arguments concluded I was desirous of reading that case before I gave judgment. I confess that I have found it a little difficult to understand, and I am somewhat consoled by finding that other and more eminent lawyers have found the same difficulty. *Roe v. Mutual Loan Association Fund, Ltd.* (3) is a decision of a very strong court—LORD ESHER, M.R., LINDLEY and LOPES, L.JJ. The facts were comparatively simple. The plaintiff was suing in tort for the conversion of his furniture. That furniture had been seized by the defendant under a bill of sale. The bill of sale was invalid and void, but the plaintiff, after executing the bill of sale, and before the act of seizure of the furniture under it, had filed his petition, had been made bankrupt, and in his statement of affairs had credited the defendant with the value of the furniture, leaving him to prove for the balance. The judge who tried the case held that the plaintiff was entitled to succeed. On appeal that judgment was reversed. The claim was certainly a very unmeritorious claim, and the Court of Appeal in the main seem to have proceeded on the basis of an earlier case of *Smith v. Baker* (6) a case which gave effect to the well-known principle that a plaintiff who sues for moneys had and received thereby waives the tort and cannot afterwards sue in tort. Having regard to what had happened in *Roe's Case* (3), it seems that that would have disposed of the matter entirely on the basis that the bill of sale was void, because, though the plaintiff could have sued originally in tort for the wrongful seizure, yet by what he had done in bankruptcy he had in fact waived the tort and had placed the matter on the basis of money had and received. That would have been enough to dispose of

A the matter, and it may be that that is a sufficient explanation of the case, but there are certainly dicta which go beyond that, and, if it were not that the Master of the Rolls and the lords justices in the Court of Appeal, in *Re A Bankruptcy Notice* (5) had expressed a grave doubt as to the soundness of the dicta in *Roe's Case* (3), it would certainly have constituted a very serious difficulty for a judge of first instance, but, examining the authorities, as I have done, with some care, as
B a whole I think that their general effect, especially having regard to the last decision of the Court of Appeal, is to justify the conclusion at which I arrive—namely, that in the circumstances of this case, and as a matter of law, the estoppel contended for by counsel for the defendants is not justified. That being so, the matter is disposed of, because the plaintiffs can claim irrespectively altogether of the deed.

C But I ought to deal with the further point of the construction of the deed itself, on the assumption that the deed is binding between the plaintiffs and the defendant. On that assumption the conclusion I arrive at on the construction of the deed is this. First of all, in my opinion, cl. 1, which is the clause under which the various parties agree that they will not bring or take any action or proceeding whatsoever against Sidney Todd for the purpose of recovering any sum due to him, her, or them, from the said Sidney Todd is a clause which does not, when it uses the words
D "any sum due to him, her or them," refer to the 10s. provided for in cl. 3 or in cl. 2 (d). I think the sum due to him, her, or them has to be read in connection with the recitals, and refers to the original debt in each case. That must be so, I think, as regards the cash creditors, and I see no reason why the word "sum" should be construed in relation to the trade creditors as meaning anything other than the original amount due. If that is so, then the promise which the parties
E have made that they will not bring any action for the purpose of recovering the sum due is conditional, and it is perfectly clear that those conditions were broken by the defendant when he disposed of his business and ceased to carry out the deed of arrangement altogether in August, 1924. Then the other clause relied on by counsel for the defendants is cl. 3, which is the release clause and provides :

F "Subject to the payment of one moiety of these said debts, and to any further payment to be made to them as aforesaid, the trade creditors hereby release and discharge the said Sidney Todd and his estate from such part of their said debts as shall not be paid in manner aforesaid on April 30, 1926, and from all actions, proceedings, claims, and demands in respect thereof."

G That release, in my judgment, is conditional on the payment of one moiety of the debts, with further payments, if any. As that has not been done or attempted to be done, the release, in my opinion, ceases to be effective. I further think that the defendant, having entirely abrogated and repudiated this deed in August, 1924, could not set up this deed by way of defence to an action for moneys which, but for the deed and apart from the deed, were clearly due from him to the plaintiffs. The result is that, on the construction of the document itself with which I do not
H wish to deal at any great length, because this judgment has already run to considerable dimension, assuming it to be valid, I think that, in the events which have happened the plaintiffs are still entitled to succeed. I cannot help feeling that it is a little hard on the defendant at this date to be relegated to his original indebtedness, but that, I think, is the result which follows in law. I, accordingly, give judgment for the plaintiffs, with costs for the amount which counsel assure me has been
I agreed.

Judgment for plaintiffs.

Solicitors : Gery & Brooks ; Wansøy, Stammers & Co.

[Reported by T. R. FITZWALTER BUTLER, ESQ., Barrister-at-Law.]

Re RAYNER. COUCH v. WARNER

[CHANCERY DIVISION (Romer, J.), February 6, 1925]

[Reported 184 L.T. 141]

Will—Gift to children “who shall live to attain the age of twenty-one years”—
Child attaining age of twenty-one years prior to date of will.

A testator, by his will dated March 5, 1886, devised certain freehold land with a public-house to the use of his son R. for his life, and after his death to the use of the son's wife E., and after the death of the survivor of them to the trustees of his will, on trust for sale, and to divide the net proceeds of such sale among all the children of R. and E., “who shall live to attain the age of twenty-one years in equal shares.” The testator died in 1887, R. died in 1893, and E. died in 1923. The eldest child of R. and E. attained the age of twenty-one years in 1884. On a summons to decide whether the gift to the children included the child who had already attained the age of twenty-one years at the date of the will,

Held: the child who had attained the age of twenty-one years before the date of the will was not excluded.

Loring v. Thomas (1) (1861), 1 Drew. & Sm. 497, applied.

Notes. Referred to: *Re Walker, Walker v. Walker*, [1930] 1 Ch. 469.

As to time to which a will refers see 34 HALSBURY'S LAWS (2nd Edn.) 222, 223, and for cases see 44 DIGEST 762 et seq.

Cases referred to:

- (1) *Loring v. Thomas* (1861), 1 Drew. & Sm. 497; 30 L.J.Ch. 789; 5 L.T. 269; 7 Jur. N.S. 1116; 9 W.R. 919; 62 E.R. 469; 44 Digest 796, 6528.
- (2) *Barraclough v. Cooper* (1905), [1908] 2 Ch. 121, n.; 77 L.J.Ch. 555, n.; 98 L.T. 852, H.L.; 44 Digest 532, 3483.
- (3) *Re Lambert, Corns v. Harrison*, [1908] 2 Ch. 117; 77 L.J.Ch. 553; 98 L.T. 851; 44 Digest 798, 6537.
- (4) *Re Williams, Metcalf v. Williams*, [1914] 2 Ch. 61; 83 L.J.Ch. 570; 110 L.T. 923; 58 Sol. Jo. 470, C.A.; 44 Digest 798, 6540.

Adjourned Summons.

By his will, dated March 5, 1886, Henry Rayner, the testator, after appointing executors, proceeded as follows:

“I give and devise unto and to the use of my son Reuben William Rayner, of Brentwood, in the County of Essex, coffee-house keeper, all that my freehold piece and parcel of ground with the public-house thereupon known as the Cherry Tree, and all the appurtenances thereto situate in the Writtle Road in the Parish of Chelmsford aforesaid for and during the term of his natural life, he keeping the same in tenantable repair and insured against loss by fire, and from and after his decease I give and devise the same unto and to the use of his wife Elizabeth Rayner for and during the term of her natural life, she keeping the same insured against loss by fire, and from and after the death of the survivor of the said Reuben William Rayner and his said wife Elizabeth Rayner I devise the same to the trustees or trustee for the time being of this my will upon trust to sell the same and after payment of the expenses of the sale and conversion thereof to divide the net proceeds of such sale amongst all the children of the said Reuben William Rayner and Elizabeth Rayner who shall live to attain the age of twenty-one years in equal shares. . . .”

The testator died on March 7, 1887, and his will was proved by the executors on April 4, 1887. On the death of the testator, Reuben William Rayner entered into possession of the lands and public-house referred to and remained in possession until his death on Jan. 11, 1893, when his wife, Elizabeth Rayner, entered into

A possession on receipt of the rents and profits. She died on Aug. 18, 1923, and the trustees of the will sold the land and public-house. It appeared that one of the children of Reuben and Elizabeth Rayner had attained the age of twenty-one years before the date of the will. This summons was taken out to determine whether the gift to "the children . . . who shall live to attain the age of twenty-one years" included a child who had already attained that age at the date of the will.

B *H. Langford Lewis (E. W. Sutton with him)* for the summons.

H. A. Hind for the child who had attained twenty-one years of age before the date of the will.

W. J. Whittaker and C. G. Church for other parties interested.

C **ROMER, J.**—I do not think that, in the present state of the authorities, it is open to me to do anything but to accede to the argument of counsel for the child who had attained twenty-one years of age before the date of the will. It appears to be well settled that, when you find a gift to a class such as "children who are to attain the age of twenty-one," that includes children who have already attained that age. In *Loring v. Thomas* (1), KINDERSLEY, V.-C., considered whether the words "who shall die" could apply to a child who had already died, and he held that a gift to the children of a child "who shall die" was to be read as a gift to the children of a child who should then be dead. He argued that, if the word "shall" was to be confined to events which might happen in the future, that would be contrary to the obvious intention of the testator. He meant, I think, that he could not attribute so capricious an intention to the testator.

D In *Barraclough v. Cooper* (2), which is referred to in *Re Lambert, Corns v. Harrison* (3) ([1908] 2 Ch. at p. 121), the House of Lords has to deal with a similar point to that decided in *Loring v. Thomas* (1). LORD MACNAGHTEN says (*ibid.*, at p. 125):

E "Without a clear expression of intention on the part of the testator, I should not attribute to him such a whimsical and, if I may say so, cruel result as that derivable from the early part of the will. It seems to me that it would be very unnatural that the testator should have provided for the lady during the lifetime of his widow . . . and then, after having contemplated that she was very likely to marry, he should have left her without the possibility of making any provision for her children."

F LORD LINDLEY said (*ibid.*, at p. 126):

G "The words 'shall die' are an old phrase that has been treated over and over again as equivalent to 'shall be dead'."

H It is clear that he would have decided *Loring v. Thomas* (1) in the same way without the clue given in that case. In *Re Williams, Metcalf v. Williams* (4), there was again a similar case to that of *Loring v. Thomas* (1). LORD COZENS-HARDY, M.R., there says ([1914] 2 Ch. at p. 63):

"I propose to read this will as an ordinary man would and construe it without allowing myself to be influenced by the numerous authorities except to this extent, that I must hold that the words 'shall die' are equivalent to 'shall be dead'—that is quite well settled."

I In the same case, BUCKLEY, L.J., said (*ibid.*, at p. 65):

" . . . being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall hereafter attain that age or marry.' Ought I to say that that means shall hereafter attain twenty-one? Is it likely the testator would have meant that only those persons were to take under his will who after the date of his will or his death attained twenty-one? Is it not rather expressive of qualification in the sense that 'shall' means 'shall be found to be a person who attains his majority' and that whether he does so before or after the date of the will or death makes no difference?"

I think that there BUCKLEY, L.J., held that no testator in his senses would use the words "shall die" so as to exclude a child or grandchild who had already predeceased him. [His Lordship read the will, and continued:] It is said that a child who attained twenty-one before the date of the will ought to be excluded. But I think to hold so would be to attribute a capricious intention to the testator, and I am not bound to do so. I, therefore, hold that such child is not excluded from the gift.

Solicitors: *Paterson, Candler & Sykes*, for *Leonard Gray & Co.*, Chelmsford.

[Reported by J. S. SCRIMGEOUR, Esq., Barrister-at-Law.]

BRITISH AMERICAN CONTINENTAL BANK, LTD. v. BRITISH BANK FOR FOREIGN TRADE, LTD.

[COURT OF APPEAL (Bankes, Warrington and Scrutton, L.JJ.), November 26, 27, December 9, 1925]

[Reported [1926] 1 K.B. 328; 95 L.J.K.B. 326; 134 L.T. 472; 42 T.L.R. 202]

Mistake—Mistake of fact—Money paid to agent for principal under mistake of fact—Recovery of money.

If money is paid to an agent on behalf of a principal under a mistake of fact, which the law recognises as a mistake justifying a demand for the return of the money paid under the mistake, the agent must return it to the person from whom he receives it, unless, before the mistake is discovered, he has paid over the money he has received to his principal, or settled such an account with his principal as amounts to payment, or has done something which so prejudices his position that it would be inequitable to require him to refund. Where in fact agents for a principal have received money under a mistake of fact and have paid over the money, but the money has subsequently been returned to them, the same obligation to return it applies in the same way and to the same extent as it did in the interval between the first receipt and the paying of it away.

Notes. As to recovery of money paid under a mistake see 26 HALSBURY'S LAWS (3rd Edn.) 921 et seq., and for cases see 35 DIGEST 147 et seq.

Cases referred to:

- (1) *Kerrison v. Glyn, Mills, Currie & Co., Ltd.* (1909), 101 L.T. 675; 15 Com. Cas. 1; reversed (1910), 102 L.T. 674; 26 T.L.R. 404; 15 Com. Cas. 241, C.A.; reversed (1911), 81 L.J.K.B. 465; 105 L.T. 721; 28 T.L.R. 106; 56 Sol. Jo. 139; 17 Com. Cas. 41, H.L.; 1 Digest 670, 2826.
- (2) *Kleinwort, Sons & Co. v. Dunlop Rubber Co.* (1907), 97 L.T. 263; 23 T.L.R. 696; 51 Sol. Jo. 672, H.L.; 35 Digest 156, 530.
- (3) *Buller v. Harrison* (1777) 2 Cowp. 565; 98 E.R. 1243; 1 Digest 670, 2828.
- (4) *Holland v. Russell* (1863), 4 B. & S. 14; 2 New Rep. 188; 32 L.J.Q.B. 297; 8 L.T. 468; 11 W.R. 757; 122 E.R. 365, Ex. Ch.; 1 Digest 672, 2834.
- (5) *Standish v. Ross* (1849), 3 Exch. 527; 19 L.J.Ex. 185; 12 L.T.O.S. 495; 13 J.P. 269; 35 Digest 158, 541.
- (6) *Behn v. Burness* (1863), 3 B. & S. 751; 2 New Rep. 184; 32 L.J.Q.B. 204; 8 L.T. 207; 9 Jur. N.S. 620; 11 W.R. 496; 1 Mar. & C. 229; 122 E.R. 281, Ex. Ch.; 35 Digest 6, 1.

- A (7) *Continental Caoutchouc and Gutta Percha Co. v. Kleinwort, Sons & Co.* (1904), 90 L.T. 474; 52 W.R. 489; 20 T.L.R. 403; 48 Sol. Jo. 383; 9 Com. Cas. 240, C.A.; 3 Digest 179, 332.

Appeal from a decision of SANKEY, J.

- B The plaintiffs claimed to recover from the defendants a sum of money as money paid to the defendants under a mistake of fact. SANKEY, J., gave judgment for the defendants. The facts are stated in the judgments.

The plaintiffs appealed.

A. T. Miller, K.C., and Malcolm Hilbery for the plaintiffs.

W. A. Jowitt, K.C., and Sir Cassie Holden for the defendants.

Cur. adv. vult.

- C Dec. 9. The following judgments were read.

- BANKES, L.J.**—By an agreement made between the plaintiffs in London and the Pacat Finance Corpn. in New York, the plaintiffs agreed to sell to the Pacat Corpn. 750,000 Belgian francs, deliverable in Brussels on Dec. 31, 1920. By the same agreement, the Pacat Corpn. agreed to sell to the plaintiffs £12,000 sterling, deliverable on the same date in New York in dollars. The following arrangements were made for carrying out the transaction and disposing of the francs when paid. The Pacat Corpn. instructed the plaintiffs to pay the money to the defendants in Brussels, for their account, and they instructed the defendants to receive the money and to pay it over to the Banque Industrielle de Chine, Antwerp, for account of their Paris office. The defendants arranged with the Banque des Colonies to receive the money from them and to pass it on to the Antwerp Bank. The plaintiffs, on their part, instructed the Crédit Général Liégeois at Brussels to make the payment on their behalf to the defendants. These arrangements were all made prior to Dec. 31, and in the early morning of that day the francs were paid by the Crédit Liégeois, on the plaintiffs' behalf, to the defendants. The defendants, on the same day, paid the same amount to the Banque Industrielle de Chine, Antwerp.
- F On Dec. 30, two cables were sent from New York, one by the Pacat Corpn. to the plaintiffs, the other by the agency in New York of the Banque Industrielle de Chine, to the bank at Antwerp. The two cables were in the following terms: From Pacat Finance Corpn. to the plaintiffs: "With reference our instructions for delivery marks twelve million and francs seven hundred and fifty thousand value thirty-first December please do not make these deliveries as we are not in position to complete these transactions." From Banque Industrielle de Chine, New York, to their Antwerp branch: "Referring our cable December 28, 750,000 British Bank Foreign Trade will not be paid."

- G Both cables were received on Dec. 31. On that day, the plaintiffs, on receipt of the cable addressed to them, telegraphed from London at 10.28 a.m. to the Crédit Liégeois, instructing them not to make the payment to the defendants.
- H The payment had already been made before the telegram was received. An attempt was made to stop the payment by the defendants to the Banque des Colonies, but this also was too late. On Jan. 3, the Banque Industrielle de Chine, Antwerp, telegraphed to the Banque des Colonies instructing them to pay the 750,000 francs back to the defendants. This was done, and a receipt was given acknowledging the receipt of the money "by order and for account of the Banque Industrielle de Chine, Anvers." A letter of the same date was written explaining the circumstances. The letter was as follows:

"We beg to acknowledge receipt of your letter of Dec. 31, 1920, notifying us that you had paid to our favour with the Banque des Colonies of your city by order of the Pacat Finance Corpn. of New York for account of our Paris office the sum of francs 750,000. Having regard to our having been advised by our New York office that this payment will not be made, we have this morning wired to the Banque des Colonies requesting them to repay you the said sum,

assuming, as we suppose, that the payment in our favour was made by inadvertence." A

On the same day, the defendants wrote to the Bank Industrielle de Chine, Antwerp, asking for instructions as to what to do with the money, and the latter, by letter dated the following day, informed them that the payment was made to them for the purpose of cancelling their payment of Dec. 31 last. On receiving information that the money was in the defendants' possession, the plaintiffs demanded the repayment of it. The receiver appointed in the bankruptcy proceedings of the Pacat Corpn. sent instructions to the defendants not to part with it, which instructions, as the corporation were debtors to a considerable sum to the defendants, the latter were, no doubt, very ready to obey. It was in these circumstances that the action was commenced, claiming a return of the 750,000 francs on the ground that they had been paid under a mistake of fact. B C

In the court below, it appears to have been almost, if not quite, conceded that the payment had been made under what the law would regard as a mistake of fact, and the question which was contested was the duty of the defendants, as agents to receive the money for the Pacat Corpn., to pay it back. In this court, both points were insisted on. The law in reference to the right to a return of money claimed to have been paid under a mistake of fact has been considered in *Kerrison v. Glyn, Mills, Currie & Co., Ltd.* (1). As that case went to the House of Lords it is of the highest authority, and in its facts it bears a close resemblance to the present case. In the court of first instance, HAMILTON, J., said (15 Com. Cas., at p. 12) that the key to the question in that case was whether the plaintiff, when he paid to the defendants the money, the return of which was claimed, was under a legal liability to do so. If he was, then it was impossible to claim that the money was paid under a mistake of fact. I think that this test was accepted both in the Court of Appeal and in the House of Lords, and that the Court of Appeal only differed from the judge below in reference to the proper inference to be drawn from the facts. Incidentally, in that case the question of what kind of mistake of fact would justify a claim for the return of money was discussed. FLETCHER MOULTON, L.J. (*ibid.*, at p. 248), expresses a strong opinion that it was not enough for the plaintiff in that case, being, as the lord justice considered, under a liability to pay, to say that, had he known that his creditor had committed an act of bankruptcy, he would not have paid. On the other hand, in the House of Lords, both LORD ATKINSON and LORD MERSEY express an equally strong view that, on the assumption that the plaintiff was under no obligation to make the payment, a mistaken belief whether the person on whose behalf the payment was made was "a living commercial entity, able to carry on their business as theretofore," was a mistake of fact which entitled the plaintiff to claim a return of the money paid. D E F G

The material fact in the present case is that, on the day before payment was made, the Pacat Corpn. had sent a cable to the plaintiffs asking them not to pay the 750,000 francs, because they were "not in a position to complete transactions." This intimation clearly amounts to an offer to release the plaintiffs from any obligation to make the payment, and when once it had been dispatched it ceased, in my opinion, to lie in the mouth of the corporation, or in the mouth of anyone representing them, to say that when, on Dec. 31, the payment was made, the plaintiffs were under a legal obligation to make the payment. In these circumstances, the expressions of opinion by LORD ATKINSON and LORD MERSEY, to which I have referred become material, and indicate that the mistake of fact on which the plaintiffs rely is one which the law recognises as a mistake justifying a demand for the return of the money paid under the mistake. H I

It becomes necessary, therefore, to consider the second point, and here I am unable to agree with the view of the learned judge. It is, I think, clear law that if money is paid to an agent on behalf of a principal under a mistake of fact, the agent must return it to the person from whom he received it. unless, before the mistake was discovered, he had paid over the money he had received to his principal

A or settled such an account with his principal as amounts to payment, or did something which so prejudiced his position that it would be inequitable to require him to refund: see per LORD ATKINSON in *Kleinwort, Sons & Co. v. Dunlop Rubber Co.* (2). In the same case, the Lord Chancellor stated the law thus (23 T.L.R., at p. 697):

B "It is indisputable that, if money paid under a mistake of fact is redemanded from the person who received it before his position has been altered to his disadvantage, the money must be repaid in whatever character it was received."

This statement is cited with approval in the *Kerrison Case* (1) (17 Com. Cas., at p. 54). It was conceded in the present case that, assuming the payment to have been made under a mistake of fact, and the demand for the return of the money to have been made before the defendants had parted with it, it would have been C to have been no answer for the defendants to say that the Pacat Corpn. or their trustee in bankruptcy objected. The argument for the defendants was founded on the assertion that, when the money was returned to them it was returned to them as agents for the corporation, and they held it for them, and in a different capacity from that in which they received it, and, therefore, there was no privity of contract D entitling the plaintiffs to require the return of the money. I doubt if the facts warrant the argument, but assuming that they do, the argument would apply equally to the first receipt of the money. The money when returned to the defendants, in the circumstances in which it was returned, was held by them under precisely the same conditions as it was originally received by them, except that the instructions to pay it away had been withdrawn. In these circumstances, E in my opinion, the obligation which the law imposes on an agent to return money paid to him for his principal under a mistake of fact applies in just the same way and to the same extent as it did in the interval between the first receipt of the money and the paying of it away. In my opinion, the plaintiffs are entitled to succeed. The judgment for the defendants must be set aside and entered for the plaintiffs with costs, and the plaintiffs must have the costs of the appeal.

F **WARRINGTON, L.J.**—This is an appeal from a judgment of SANKEY, J., in favour of the defendants in an action for money had and received to the use of the plaintiffs. The material facts of the case are as follows, and are not in dispute. The parties to the transaction are: (i) The plaintiffs, who were at the material time, namely, December, 1920, and the early part of January, 1921, a financial house G carrying on business in London; (ii) the defendants, a banking firm in Brussels, acting as the agents there of the Pacat Financie Corpn., carrying on business in New York; (iii) the Pacat Financie Corpn.; (iv) the Crédit Liègeois, acting in the matter as agents for the plaintiffs; and (v) the Banque Industrielle de Chine, established H at Antwerp, with a branch at Paris, and having as their agents in Brussels the Banque des Colonies. On Dec. 23, 1920, the plaintiffs sold to the Pacat Corpn. 750,000 Belgian francs at a price which, according to a conventional rate of exchange, amounted to \$46,431.25, to be delivered in Brussels on Dec. 31 to the defendants I for the account of the corporation, and to be paid for on the same day in New York. On Dec. 24 the defendants were instructed by the Pacat Corpn. that they would receive the 750,000 francs, and were to pay that sum to the Banque Industrielle de Chine for account of their Paris office. On Dec. 28, the plaintiffs, by cable instructed the Crédit Liègeois to pay on Dec. 31 750,000 francs to the defendants on account of the Pacat Corpn. On Dec. 29 the Banque Industrielle de Chine requested the defendants to pay the 750,000 francs to the Banques des Colonies on their account. On Dec. 31, about nine o'clock in the morning, the Crédit Liègeois paid 750,000 francs to the defendants, who forthwith, or shortly afterwards, paid the same sum to the Banque des Colonies on account of the Banque Industrielle de Chine at Antwerp, and received a receipt for the same from the Banque des Colonies. Meanwhile there arrived in London at 8.16 p.m. on Dec. 30 a cablegram from the Pacat Corpn. to the plaintiffs instructing the plaintiffs not

to deliver the 750,000 francs. In fact, on the same day, a petition in bankruptcy was presented against the Pacat Corpn., and a receiver was appointed who afterwards became the trustee. The cablegram of Dec. 30 was delivered at the plaintiffs' offices about 9.30 a.m. on Dec. 31. At 10.20 a.m. on that day, the plaintiffs dispatched a telegram to the Crédit Liègeois, in Brussels, in the following terms: "Ours 28th, do not make payment British Bank account Pacat Finance, New York, 750,000, 31st. If made, ask for repayment." This telegram was received at 11.20 a.m. The Crédit Liègeois then, by telephone, requested the defendants not to give up the sum in question, but were informed that it had already been paid to the Banque des Colonies. They then wrote a letter to the Banque des Colonies asking them in the circumstances to keep the money "for such end as may be right." The steps they had taken, and the result, were duly reported to the plaintiffs. December 31 was a Friday. On Monday, Jan. 3, the Banque des Colonies, acting on the instructions of their principals, the Banque Industrielle de Chine, paid back the 750,000 francs to the defendants, who thereupon informed the Crédit Liègeois of the fact. On Jan. 4 the Banque Industrielle de Chine wrote to the defendants the following letter, according to the translation in the correspondence: "We beg to acknowledge receipt of your letter of the 3rd inst. and confirming our telephone interview of to-day. We beg to inform you that the payment of francs 750,000 made to you under date Jan. 3 by the Banque des Colonies at Brussels, was made by way of return of your payment under the same title of Dec. 31 last."

The translation on the next page, though slightly different in expression, is, I think, substantially to the same effect. After some correspondence the writ was issued on June 27, 1921.

On these facts two questions arise: (i) Is the case one in which the 750,000 francs can be said to have been paid to the defendants under a mistake of fact? (ii) If so, did the repayment by the Banque des Colonies in the circumstances in which it was made restore the parties to the position in which they would have been had the intimation of the alleged mistake reached them before they had made the original payment to the Banque des Colonies?

Before the learned judge, the plaintiffs' view that the payment by the Crédit Liègeois was made in mistake of fact was not seriously contested, but the defendants did not withdraw their contention, and before us it was insisted on. The defendants said that the payment was made under a legal liability and to the right person, and, therefore, could not be recovered, and they relied on the statement of the law by FLETCHER MOULTON, L.J., in *Kerrison v. Glyn, Mills, Currie & Co., Ltd.* (1) (15 Com. Cas. at pp. 247-8). But the plaintiffs reply that, while not disputing that the discharge of a legal obligation cannot be recalled by reason of the discovery of circumstances previously unknown which would have induced the debtor to allow himself to be sued rather than pay, on the facts of the present case, the payment in question was not made in discharge of a legal obligation, for, at the time of payment, no legal obligation to make it existed. I think the plaintiffs are right. The contract did not create a unilateral obligation on the part of the plaintiffs. The obligations of both parties were mutual and interdependent, exactly as in the case of a contract for the sale and purchase of ordinary goods. If the plaintiffs, before making the payment, had received the cable of Dec. 31 from the Pacat Corpn., they would clearly have been entitled to accept it as a repudiation by them, and it is practically a necessary inference that they would have done so and have refused to make the payment. They, in fact, made it in the belief that the Pacat Corpn. were in a position to pay, and would pay, the corresponding sum in dollars. Their belief was mistaken, and when they discovered the truth they were, in my opinion, entitled to recover the money as money had and received to their use. Assuming this to be so, the defendants, though merely agents for the Pacat Corpn., could have been sued by the plaintiffs, and their defence would have been that they had paid away the money before they knew of the mistake: see *Buller v.*

A *Harrison* (3), the judgment of LORD MANSFIELD. As matters stood in the afternoon of Dec. 31 when they were informed of the mistake, this ground of defence would have been complete.

But then there arises for decision the second question mentioned above. SANKEY, J., has decided this against the plaintiffs, thinking that the transactions of Jan. 3 were separate from and independent of those of Dec. 31 and did not revive the right which the plaintiffs would have had if the money had remained in the hands of the defendants when the original payment was made by the *Crédit Liégeois*. With all respect, I cannot agree with this view. I think the real question is, with what intent did the *Banque Industrielle de Chine*, through its agents the *Banque des Colonies*, make the repayment, and, in my opinion, it is clear—whichever of the two translations of their letter of Jan. 4 be accepted—that they made it with a view to placing the defendants in the same position as they would have been in if they had not paid the money away on Dec. 31. If this be the correct view, then, as from Jan. 3, the defendants held the 750,000 francs as money had and received to the use of the plaintiffs.

B Lastly, does the interposition of the trustee in bankruptcy make any difference? In my opinion, it does not. The liability sought to be enforced is that of the defendants to whom the money was paid. It is clear on the authorities that the mere fact that they have credited it to their principals in the account between them does not relieve them of their liability—see *Buller v. Harrison* (3)—and it seems to me that the existence of the principals and of such rights against their agents as they may have is an irrelevant fact.

C In my opinion, the appeal ought to be allowed and judgment entered for the plaintiffs for the appropriate sum in sterling, with costs here and below.

D **SCRUTTON, L.J.**—The real question in dispute between the plaintiffs and defendants in this case is which of the two shall receive a sum of 750,000 Belgian francs in full, and which of the two shall only receive a dividend on that amount in the bankruptcy of *Pacat Finance Corpn.*, an American firm, called hereafter *"Pacat."* The answer to this question involves the correct application of the rules governing the action for money had and received to the use of the plaintiffs on the ground of mistake of fact.

E The facts are as follows: *Pacat* had a contract with the plaintiffs by which, in consideration of *Pacat's* supplying the plaintiffs with dollars in New York on Dec. 31, 1920, the plaintiffs were to supply to the instructions of *Pacat* 750,000 Belgian francs in Brussels on the same day. It is not clear whether this transaction was mixed up with a transaction for similar amounts, but with the parties reversed, to be completed on Jan. 31. *Pacat* wanted the Belgian francs in connection with some transaction with the *Banque Industrielle de Chine*, as to the nature of which there was no evidence. To carry out the transaction, the plaintiffs instructed the *Crédit Liégeois* in Brussels to hand over on Dec. 31 that amount of Belgian francs to the defendants, whom *Pacat* had instructed to receive it on their behalf. *Pacat* had also instructed the defendants to pay the francs when received to the Brussels representative of the *Banque Industrielle de Chine*, who turned out to be the *Banque des Colonies*. On Dec. 30, 1920, *Pacat* in New York stopped business, and an interim receiver was appointed by the court. On that day, before the appointment, *Pacat* had cabled to the plaintiffs:

F "With reference our instructions for delivery marks twelve million and francs seven hundred fifty thousand value thirty-first December. Please do not make these deliveries as we are not in position to complete transaction."

G It appears from a telegram from the *Banque Industrielle de Chine*, New York, to their Antwerp branch on Dec. 31: "Referring to our cable December 28th, 750,000 British Bank Foreign Trade will not be paid," that the *Banque de Chine*, in New York, must have had a similar communication. Before, however the plaintiffs had received their cable, and had time to pass it on to Brussels, the *Crédit Liégeois*

had paid the money to the defendants, who, acting on their instructions, had paid it over to the Banque des Colonies. If the payment to the defendants was under mistake of fact, there is no doubt that, on their paying it over before notice of the mistake, to, or on the instructions of, their principal, the defendants would no longer be liable to an action for money had and received to the plaintiffs' use: *Holland v. Russell* (4). Apparently, in the court below, there was not much argument whether this payment was in mistake of fact, the real controversy being as to the effect of a subsequent transaction. But before us it was argued that as, if the payment were under an existing legal liability, it would not matter that it was also induced by a mistake of fact, in this case there was an existing legal liability. It was said that, if Pacat's announcement that he was not going to pay dollars in New York was a repudiation of the contract, the other party might or might not accept it when he knew of it, and until he knew of it and accepted it, he was legally liable to perform.

In such a state of facts, reliance was placed on the statements of the law by HAMILTON, J., and FLETCHER MOULTON, L.J., in *Kerrison v. Glyn, Mills, Currie & Co., Ltd.* (1). HAMILTON, J., said this (15 Com. Cas., at p. 14):

"It was contended on behalf of the defendants that if the plaintiff paid the money, being under a legal liability to pay it, he, of course, paid it to discharge his obligation under the contract, and not under a mistake, and, therefore, cannot recover it. That, no doubt, is so."

And FLETCHER MOULTON, L.J., said (*ibid.* at p. 248):

"To my mind, it simply comes to this, that the plaintiff paid money due from him without knowledge that an act of bankruptcy had been committed, and certainly that is not sufficient ground for getting it back. The mere fact that if he had known that an act of bankruptcy had been committed he would not have paid this money, but would have allowed himself to be sued or allowed the trustee to enforce whatever rights he might have, is certainly not a ground for recovering back this money. The plaintiff paid it, in my opinion, under a legal liability, to the right person."

I am not sure that these statements of the law quite take into account such cases as *Standish v. Ross* (5), where the sheriff who had paid under a legal liability at the time he paid, recovered because a subsequent event by relation back had made his payment no longer a legal liability. But no doubt it must be considered whether there was liability on the plaintiff to pay at the time the payment was made. I think the payment of dollars in New York and of francs in Brussels were intended to be concurrent, each a condition of the other. Each party had till the end of the business day to make them, but I do not think the law would split up the day and say that a payment on the day, but before its end, was without legal liability. Nor do I think the law would introduce the doctrine of relativity so as to take notice of the fact that, owing to difference of position, the day in New York ended after the day in Brussels. In my view, each payment was a condition of the other, and the plaintiffs were not bound to pay francs in Brussels unless Pacat paid dollars in New York. Pacat, on Dec. 30, sent a communication to the plaintiffs that he was not going to pay dollars on the due date, and did not, in fact, pay them. He announced that he was not going to perform the condition, and did not perform it. The plaintiffs paid in ignorance of the fact of the announcement and of the non-performance. In my opinion, this is not payment under a legal liability. They were not liable to pay on Dec. 31, because the condition of liability was not performed, and they had not waived its performance. Take as an illustration an ordinary condition precedent—*Behn v. Burness* (6). A ship is chartered on Dec. 20, "now in the port of Amsterdam," first payment of time freight on Jan. 1. The ship was not on Dec. 20 in the port of Amsterdam, but the charterer did not know of it until Jan. 10. Was he liable on Jan. 1 to pay the freight? I think not. The

A condition of liability was not fulfilled, and the charterer had not waived it. So here, in my opinion, on Dec. 31, Pacat had not performed, and had stated their intention not to perform, and the plaintiffs had not waived performance. For these reasons, I agree with the view on which the judgment below proceeded that there was an original payment under mistake of fact.

B But now come the facts which raise the difficulty. The Banque Industrielle de Chine, who had sent the cable that the francs would not be paid, on learning that they had been paid to the Banque des Colonies, instructed that bank to repay them. The Banque des Colonies, on Jan. 3, accordingly repaid the money to defendants, who acknowledged the receipt. They wrote to the Banque Industrielle de Chine as follows :

C "We beg to inform you that the Banque des Colonies, Brussels, have to-day paid us for your account 750,000 francs in respect of which we await your instructions,"

and very properly informed the Crédit Liégeois of the receipt. They wrote :

D "We beg to inform you that the Banque des Colonies, Brussels, have repaid to us by order of the Banque Industrielle de Chine, Antwerp, without further advice 750,000 francs. This for your information."

On Jan. 5, the receiver of Pacat instructed the defendants not to part with any Pacat money, and to receive for his account any payment due to Pacat. In fact, what happened was that the defendants credited Pacat in account in their books, thus reducing the amount he owed them, but getting the amount credited in full instead of with a dividend on the account. The learned judge below has taken the view that this repayment is a fresh and separate transaction which does not revive the liability which the defendants had lost when they paid away to, or by instructions of, their principal the money they had received under a mistake of fact. The position is curious and novel, but on consideration I am unable to agree with this view. The defendants had paid the Banque des Colonies under

F a mistake of fact, and the Banque Industrielle de Chine to whom they paid, recognising this mistake, had rectified it by cancelling the transaction and putting back the money where it was before the mistake. In my opinion, this leaves the defendants where they were before they paid the money to the Banque des Colonies. Then, in my opinion, they were bound to repay the plaintiffs through the Crédit Liégeois, and the fact that Pacat said : "Don't repay," would have been no answer.

G The liability was a personal liability of theirs, arising, as HENN COLLINS, M.R., put it in *Continental Caoutchouc and Gutta Percha Co. v. Kleinwort, Sons & Co.* (7) (9 Com. Cas. at p. 248), because they personally have "the benefit of the windfall, and must restore it to the true owner." When they paid it away they were merely a conduit pipe, and had not "the benefit of the windfall." But where no valid transaction having intervened, but only a mistaken flow in the conduit pipe, the

H error or flow is corrected, and the money returns to them, they have again "the benefit of the windfall and must return it to the source from which it originally came through mistake of fact." Just as it would be no answer to their original liability to say, "Pacat forbids me to repay it," because the liability is theirs as holders as well as Pacat's, so, in my opinion, it is no answer to say, "the trustee of Pacat forbids me to return it," for the liability is their personal liability as

I holders of the windfall.
For these reasons, after careful consideration of the arguments of counsel, to which I personally was much indebted, I am of opinion that the appeal should be allowed and judgment entered for the plaintiffs for the English equivalent of 750,000 Belgian francs, with costs here and below.

Appeal allowed.

Solicitors : *Henry Hilbery & Son ; Roney & Co.*

[*Reported by T. W. MORGAN, Esq., Barrister-at-Law.*]

Re DAVIES. SCOURFIELD v. DAVIES

[CHANCERY DIVISION (P.O. Lawrence, J.), May 14, 1925]

[Reported [1925] Ch. 642; 94 L.J.Ch. 337; 133 L.T. 460;
69 Sol. Jo. 744]

Will—Specific devise—Gift of estate and “proceeds of sale of such parts . . . as have been sold”—Parts sold after date of will—Effect of Wills Act, 1837 (1 Vict., c. 26), s. 24.

Under the will of Sir J. S., who died in 1876, the testator succeeded as tenant in tail to the estate known as the W. estate, and by his will, dated Sept. 5, 1921, he devised all that estate, “and also the investments and moneys representing the proceeds of sale of such parts of the said estate as have been sold,” to his wife in fee simple and absolutely. He disentailed the W. estate before he died on Nov. 18, 1922. Between the date of his will and that of his death the testator entered into contracts for the sale of other parts of the W. estate. Some of these were completed during his lifetime and others were completed by his executors after his death. On a summons to determine whether the gift to the testator's wife comprised only the proceeds of the sales of the W. estate which had been sold before the date of the will, or included also the proceeds of the sales of those parts of that estate sold by the testator after the date of his will,

Held: the gift comprised moneys received for the sale of portions of the W. estate after the will and also after the testator's death, as the description of the subject of the gift was generic, being capable of increase or diminution, and no contrary intention appeared by the will within the Wills Act, 1837, s. 24.

Re Evans, Evans v. Powell (1), [1909] 1 Ch. 784, and *Re Horton, Lloyd v. Hatchett* (2), [1920] 2 Ch. 1, applied.

Notes. As to descriptions of property in a will see 34 HALSBURY'S LAWS (2nd Edn.) 236 et seq.; and for cases see 44 DIGEST 645 et seq. For the Wills Act, 1837, s. 24, see 26 HALSBURY'S STATUTES (2nd Edn.) 1345.

Cases referred to:

- (1) *Re Evans, Evans v. Powell*, [1909] 1 Ch. 784; 78 L.J.Ch. 441; 100 L.T. 779; 44 Digest 650, 4904.
- (2) *Re Horton, Lloyd v. Hatchett*, [1920] 2 Ch. 1; 89 L.J.Ch. 297; 123 L.T. 262; 64 Sol. Jo. 425; 44 Digest 649, 4893.
- (3) *Wagstaff v. Wagstaff* (1869), L.R. 8 Eq. 229; 38 L.J.Ch. 528; 44 Digest 649, 4891.
- (4) *Everett v. Everett* (1877), 7 Ch.D. 428; 47 L.J.Ch. 367; 38 L.T. 580; 26 W.R. 333, C.A.; 44 Digest 645, 4853.
- (5) *Re Champion, Dudley v. Champion*, [1893] 1 Ch. 101; 62 L.J.Ch. 372; 67 L.T. 694; 2 R. 162, C.A.; 44 Digest 649, 4888.
- (6) *Re Ashburnham, Gaby v. Ashburnham* (1912), 107 L.T. 601; 57 Sol. Jo. 28; 44 Digest 648, 4875.
- (7) *Re Portal and Lamb* (1885), 30 Ch.D. 50; 54 L.J.Ch. 1012; 53 L.T. 650; 33 W.R. 859, C.A.; 44 Digest 646, 4861.

Adjourned Summons.

Arthur Picton Saunders-Davies made his will, dated Sept. 5, 1921, and after appointing executors and trustees thereof, desired that his wife Mabel, so long as she remained his widow, should occupy Pentre or other the principal mansion house on his estate until his son should attain the age of twenty-five years, and bequeathed to her certain of his household effects. Then, after bequests of certain legacies, the will continued:

“I devise all my estate known generally as the Williamston estate situate in the Hundred of Roose in the county of Pembroke and in the town and county

A of Haverfordwest to which I have succeeded as tenant in tail under the will and codicils of Sir John Henry Scourfield (which entail I am about to bar) and also the investments and moneys representing the proceeds of sale of such parts of the said estate as have been sold and the proceeds of the sale of the farm of Broitgairn and Fishguard and the farm of Sychpant . . . and the proceeds of the residuary estate of the testator which were devised and bequeathed by him to the same uses and upon the same trusts as the Williamston estate to my wife in fee simple and absolutely."

B He then devised and bequeathed the residue of his real and personal estate, subject to the payment of his funeral and testamentary expenses and debts, to his trustees, on trust to pay to his wife as long as she should remain his widow the rents, profits, dividends and annual produce of his residuary estate until his son should have attained the age of twenty-five years, and after he should have attained that age, as to his said residuary estate, both real and personal, to the use of his said son in fee simple and absolutely; but if he should die without issue, then as to his residuary real estate to the use of his daughter Barbara Cecil Saunders-Davies in fee simple, and as to his residuary personal estate, to her absolutely, with an ultimate gift over in case she should die without issue. Under the limitations of the will and codicils of his uncle, Sir John Henry Scourfield, who died in 1876, the testator had before the date of his will become entitled as tenant in tail in possession to the Williamston estate and to £2,700, the proceeds of sale of such parts of that estate as had been sold and of Broitgairn farm; he was under the same limitations also entitled as tenant in tail in possession to the proceeds of sale of the residuary personal estate of the same testator, amounting to about £4,000; both of those sums were liable to be invested in the purchase of land to follow the limitations of the Williamston estate, and stood invested in the names of the trustees of Sir John Henry Scourfield's will for the purposes of the Settled Land Acts. The farm of Sychpant did not belong to the testator at all and no proceeds of that farm could be traced. The testator died on Nov. 18, 1922, having disentailed the properties to which he was entitled, as before stated, under the will and codicils of Sir John Henry Scourfield. Between the dates of his will and his death, the testator entered into contracts for the sale of other parts of the Williamston estate. In some cases, the sales were completed during his lifetime, the proceeds of which amounted to about £35,000, of which sum £32,000 was alleged to have been given by the testator in his lifetime to his wife and the remainder had been left on mortgage. In the other cases, the sales, not having been completed by the testator in his lifetime, were completed and conveyances executed by his executors, the proceeds of which sales coming to their hands amounted to about £39,000.

G This summons was taken out by the trustees of the will to determine whether the gift to the testator's wife comprised only the proceeds of the sales of the parts of the Williamston estate which had been sold before the date of the will, or included all the proceeds of the sales of those parts of that estate which were sold by the testator after the date of his will, including such of the proceeds of sale as were not paid until after his death.

H *H. F. F. Greenland* for the trustees.

I *Owen Thompson, K.C.*, and *J. G. Wood*, for the widow, referred to *Wagstaff v. Wagstaff* (3); *THEOBALD ON WILLS* (7th Edn.), pp. 130, 145, 146; *Everett v. Everett* (4), *Re Champion*, *Dudley v. Champion* (5), *Re Ashburnham*, *Gaby v. Ashburnham* (6), and *Re Horton*, *Lloyd v. Hatchett* (2).

C. E. E. Jenkins, K.C., and *Henry Johnstone*, for the son, referred to *Re Portal and Lamb* (7), *Re Ashburnham*, *Gaby v. Ashburnham* (6), *Re Evans*, *Evans v. Powell* (1), and *JARMAN ON WILLS* (6th Edn.), pp. 414, 415.

H. B. Vaisey, K.C., for the testator's daughter, *Barbara S. C. Davies*, the other residuary legatee, referred to *JARMAN ON WILLS* (6th Edn.), p. 411.

LAWRENCE, J.—In my opinion, the question raised on this summons is not free from doubt. The question, stated broadly, is whether certain proceeds of property sold since the date of the testator's death pass by the gift of the "proceeds of such parts of the real estate as shall have been sold." The scheme of the will is, to my mind, fairly plain. The testator devises an estate of considerable size called the Williamston estate, stating in the devise that he had succeeded to it as tenant in tail, under the will and codicils of Sir John Henry Scourfield, which entail he was about to bar. He also bequeaths the investments and moneys representing the proceeds of sale of such parts of the estate "as have been sold," and also the proceeds of sale of certain farms which he mentions, and the proceeds of the residuary personal estate of Sir John Henry Scourfield, to his wife in fee simple and absolutely. He also bequeaths to her furniture and household effects and articles of personal and household use, garden tools, &c., at the mansion house, Williamston. After reciting that he has made provision for his daughter Barbara Cecil, he gives the residue of his real and personal estate, which he calls "my residuary estate," subject to the payment of funeral and testamentary expenses and debts, to trustees on trust to pay the income to his wife during widowhood until his son should attain twenty-five years, and after he attains that age the son takes the whole of the residuary estate in fee simple and absolutely. That being the scheme of the will, it seems to me fairly obvious without any desire to beg the question which I have to decide, that the testator intended his wife to take everything that came to him under or by virtue of the will of Sir John Henry Scourfield.

The facts which have given rise to the question of construction, stated quite shortly, are as follows: [HIS LORDSHIP stated the facts, and continued:] In those circumstances, the question is what is the effect of s. 24 of the Wills Act, 1837, on the specific gift which the court has to construe? The section says:

"Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

According to the express wording of that section, the will is to speak and take effect generally, but "with reference to the real and personal estate comprised in it" as if it had been executed immediately before the death of the testator, as was clearly pointed out by LINDLEY, L.J., in *Re Portal and Lamb* (7). Bearing this in mind, the question which has to be considered is whether with reference to the real and personal estate comprised in the gift, viz., the Williamston estate and the proceeds of sale of such parts of that estate as had been sold—the will is to speak and take effect as if it had been executed immediately before the testator's death, so as to include the proceeds of sale which came into existence between the date of will and the date of the death, or whether a contrary intention appears by this will, so as to limit the gift of the proceeds of sale to such proceeds as were in existence at the date of the will.

EVE, J., having in the recent case of *Re Horton, Lloyd v. Hatchett* (2) examined in some detail the relevant authorities under this section, including most of those cited on the present occasion, I do not propose again to review those authorities, but will content myself with quoting the following passage from the judgment of that learned judge ([1920] 2 Ch. at p. 11):

"the testator must be taken to know that his dispositions will be construed with reference to the property comprised in them as if his will had been executed immediately before his death, and the possessive pronoun, the present tense, and the adverb 'now' being equally capable of being read as referring to the subject-matter then existing, they will in fact be so read, unless he makes clear his intention that his will should, in these respects, be construed as on the date he made it."

A Now if that be, as I think it is, the true principle, it applies, in my opinion, equally to the case where the past tense has been used in describing the subject-matter of the gift. A testator by his will bequeathing property which is capable of increase or decrease and describing such property by a generic term, such as "proceeds of sale" must in my judgment be taken to have known that with reference to that property, his will would be read as if it had been executed immediately before his death, and the past tense being equally capable of being read as referring to the subject-matter as existing at the date of his death, the court will, in fact, so read the will, and will not hold that the mere use of the past tense amounts to a contrary intention within the meaning of s. 24. The following passage in the judgment of JOYCE, J., in *Re Evans, Evans v. Powell* (1) ([1909] 1 Ch. at p. 786) is also worth quoting:

C "It is well settled that there may be such a specific description of the subject of a gift as to show that what was intended to pass, whether real or personal estate, was some particular thing in existence at the date of the will. When, however, the description is generic, as 'all my lands in the county of X.,' the subject of the devise being capable of increase or diminution, all the testator's lands in the county of X. at the date of his death will pass; and where there is such a particularity in the description of the subject of a gift as to show that it was some object in existence at the date of the will that was intended to pass, it is considered that there is sufficient evidence of a contrary intention to exclude the application of the provisions of s. 24."

D In the present case, the description of the subject-matter of the gifts is clearly generic, and not comparable to a gift of "my brown horse" (the illustration given by counsel for the testator's daughter) which latter is incapable of diminution or increase. That being so, and the past tense being equally applicable to the subject-matter of the gift at the date of the death of the testator, I am of opinion that s. 24 of the Wills Act applies, and the gift carries to the widow the proceeds of sale of all property sold since the date of the will, including the amounts left on mortgage, and the amounts which came to hand after the date of the testator's death.

F Solicitors: *Kerly, Sons & Karuth*, for *W. Evans George & Sons*, Newcastle Emlyn, South Wales; *Andrews, Wood, Purves & Sutton*; *Peacock & Goddard*, for *Eaton Evans & Williams*, Haverfordwest.

[Reported by GEOFFREY P. LANGWORTHY, ESQ., Barrister-at-Law.]

Re BLACKWELL. BLACKWELL v. BLACKWELL

[COURT OF APPEAL (Sir Ernest Pollock, M.R., Warrington and Sargant, L.J.J.),
December 15, 1925]

[Reported [1926] Ch. 223; 95 L.J.Ch. 172; 134 L.T. 367; 70 Sol. Jo. 366]

Will—Vesting—Real estate—Devise to eldest son (if any) “living at the time of my death absolutely upon his attaining the age of twenty-one years”—Maintenance during minority—Interest of son in real estate and accumulation of rents and profits contingent on attaining twenty-one.

A testator by his will made a specific devise of real estate to trustees on trust, subject to an interest in part thereof in favour of his wife during her widowhood, for the eldest of his sons (if any) “who shall be living at the time of my death absolutely upon his attaining the age of twenty-one years,” and “failing such son” on the trusts applicable to the residuary estate. There was a power to apply surplus income in maintenance of infants. The testator died in 1912, leaving one son six months old, who was unborn at the date of the will, and three daughters, and his widow re-married in 1917. Questions having arisen over claims and super tax in respect of the son's income, a summons was taken out to determine what interest the son took in the real estate on the death of the testator.

Held: the son took an interest on the testator's death in the real estate and the accumulation of rents and profits thereof, contingent on his attaining the age of twenty-one years.

Decision of TOMLIN, J., [1925] 1 Ch. 312, affirmed.

Notes. Considered: *Bickersteth v. Shann*, [1936] 1 All E.R. 227.

As to the vesting of gifts see 34 HALSBURY'S LAWS (2nd Edn.) 369 et seq., and for cases see 44 DIGEST 1031 et seq.

Cases referred to:

- (1) *Phipps v. Akers* (1842), 4 Man. & G. 1107; 5 Scott, N.R. 955; 134 E.R. 453; sub nom. *Phipps v. Ackers*, 9 Cl. & Fin. 583; 6 Jur. 745, H.L.; 44 Digest 1044, 8993.
- (2) *Goodtitle d. Hayward v. Whitby* (1757), 1 Burr. 228; 1 Keny. 506; 97 E.R. 287; 44 Digest 1047, 9018.
- (3) *Boraston's Case* (1587), 3 Co. Rep. 16a; 76 E.R. 664; 44 Digest 1041, 8972.
- (4) *Andrew v. Andrew* (1875), 1 Ch. D. 410; 45 L.J.Ch. 232; 34 L.T. 82; 24 W.R. 349, C.A.; 44 Digest 1046, 9009.
- (5) *Re Williams, Williams v. Williams*, [1907] 1 Ch. 180; 76 L.J.Ch. 41; 95 L.T. 759; 51 Sol. Jo. 68; 44 Digest 1098, 9481.
- (6) *Re Ussher, Foster v. Ussher*, [1922] 2 Ch. 321; 91 L.J.Ch. 521; 127 L.T. 453; 44 Digest 1098, 9483.
- (7) *Re Hume, Public Trustee v. Mabey*, [1912] 1 Ch. 693; 81 L.J.Ch. 382; 106 L.T. 335; 56 Sol. Jo. 414; 44 Digest 1108, 9589.
- (8) *Mansfield v. Dugard* (1713), Gibb. Ch. 36; 25 E.R. 26; sub nom. *Mansfield v. Dugard*, 1 Eq. Cas. Abr. 195; sub nom. *Mansfield v. Mansfield*, 2 Eq. Cas. Abr. 363, L.C.; 44 Digest 1041, 8975.
- (9) *Re Francis, Francis v. Francis*, [1905] 2 Ch. 295; 74 L.J.Ch. 487; 93 L.T. 132; 53 W.R. 571; 49 Sol. Jo. 536; 44 Digest 1040, 8969.

Appeal by the Crown, by special leave, from a decision of TOMLIN, J., on an originating summons.

The testator, Walter Reginald Blackwell, by his will dated Dec. 15, 1909, gave to his trustees his freehold estate at Oxhey, near Watford, on trust to allow his wife to reside there during her widowhood, and subject thereto he directed his trustees to hold the same together with all his freehold property at Bushey and his

A freehold premises No. 21, Soho Square, London, on trust for the eldest of his sons (if any) "who shall be living at the time of my death absolutely upon his attaining the age of twenty-one years," and, failing such son, he directed that the same should be held on the trusts concerning his residuary estate. The trusts of the residuary estate were, subject to certain annuities in favour of the testator's wife, for all the testator's children (including his eldest son) if more than one in equal shares and to be an interest or interests absolutely vested at his death. The will contained a power of advancement, and a power to apply the whole or such part as the trustees should think fit of the income of the share to which any infant should be "entitled or contingently entitled under this my will or any codicil thereto" in or towards his or her maintenance and education or otherwise for his or her benefit, and a direction to accumulate any surplus income, and to add it as capital to the property or share from which the same shall have arisen. The testator had no son at the date of the will, but when he died in 1912, he left surviving him his widow and four children, namely three daughters, and one son, the defendant T. A. W. Blackwell, then six months old. The widow of the testator remarried on April 28, 1917. The trustees had from time to time accumulated the whole of the net income derived from the specifically devised real estate. Because of an assessment to super tax on T. A. W. Blackwell, in respect of income of real estate specifically devised in trust for him, and of accumulations of such income, the trustees took out this summons in which the questions raised were: (i) Whether, according to the true construction of the will, the defendant, T. A. W. Blackwell, became on the testator's death, indefeasibly entitled in possession to the freehold estate in question, notwithstanding that he had not attained the age of twenty-one years; (ii) if not, whether he took a vested equitable interest therein in possession, liable to be diverted on his dying under the age of twenty-one years, or merely an equitable interest contingent on his attaining that age, and (iii) whether he took an interest of the like nature, whether vested or contingent, in the accumulations of the rents and profits of the specifically devised real estate. TOMLIN, J., held that the interest of the son was not vested at the testator's death, but contingent on his attaining the age of twenty-one years. The Crown were not parties to the summons below, but, being interested in the claim to super tax, appealed, by leave of the Court of Appeal, before which a revenue appeal from ROWLATT, J., had come, which had stayed the hearing of the appeal to have the question of construction decided.

Beebee (with him the Attorney-General (Sir Douglas Hogg, K.C.) and the Solicitor-General (Sir Thomas Inskip, K.C.)), for the Crown, referred to *Phipps v. Akers* (1), *Goodtitle d. Hayward v. Whitby* (2), *Boraston's Case* (3), *Andrew v. Andrew* (4), *Re Williams* (5), and *Re Usher* (6).

Sir H. Cunliffe, K.C., and Vernon for the daughters.

Dighton Pollock for the son.

R. G. Nicholson Combe for the trustees.

SIR ERNEST POLLOCK, M.R.—This is an appeal from a decision of TOMLIN, J., on an originating summons which was taken out under the following circumstances: Walter Reginald Blackwell died on Oct. 10, 1912, having made his will, dated Dec. 13, 1909. He left surviving him, his wife, one son, T. A. W. Blackwell, and three daughters, and all four children are minors. An assessment was made to super tax in respect of the interest which was taken by the son under the father's will, and, on an appeal to the commissioners, they decided that the income of the minor was not receivable by him, and they discharged the assessment. From that there was an appeal to ROWLATT, J., who, on July 7, 1924, upheld the commissioners, but on somewhat different grounds from those on which they acted. From ROWLATT, J.'s, decision there was an appeal, which came before this court on Nov. 24, 1924. It then appeared that, in order definitely to decide whether or not there was a liability in respect of the assessment, it would be necessary for us to know with certainty what was the right construction of the testator's will, and whether or

not his son T. A. W. Blackwell took a vested or contingent interest in certain lands which were the subject of the will. We, therefore, thought that the right course was to take a step which would secure a proper decision on the point of the true construction of the will, and so we adjourned the further hearing of the appeal, and the parties undertook that an originating summons should be taken out asking for a correct interpretation of the will. Accordingly, that procedure having been adopted, TOMLIN, J., on Feb. 4 of this year, came to his decision from which this appeal is now brought. He decided that the son became entitled to the real estate contingently only on his attaining the age of twenty-one. Counsel for the Crown has argued the case before us, because the Crown is interested in the matter, and has to protect the rights of the Revenue. I do not know what may be the actual decision, or what may be the rights of the parties in the appeal from ROWLATT, J. I have only referred to the fact that there is such an appeal in order to explain how this point arises for our decision to-day.

Counsel has presented to us an able and strenuous argument to show that TOMLIN, J., came to a wrong decision, and, speaking for myself, I am much indebted to him for his argument in which he has referred to a number of cases. The point must ultimately turn on the construction of the will, and the short passage which I will quote is this :

"I direct my trustees to hold my said Oxhey estate [that is an estate which was given on trust for his widow for life upon certain terms] and the land at the time of my death held therewith or otherwise situate in or near Watford aforesaid, including after the death or remarriage of my said wife my said house and grounds and the land surrounding the same, and also my property in the village and parish of Bushey, and any interest in No. 21, Soho Square, London, upon trust for the eldest of my sons (if any) who shall be living at the time of my death absolutely upon his attaining the age of twenty-one years and failing such son then I direct the same to fall into and be held upon the same trusts as are hereinafter declared concerning my residuary estate."

Counsel for the Crown has called our attention to a number of rules, but it is sufficient for my purpose to say that he has called attention to the rule as stated by HAWKINS ON WILLS (3rd Edn.), p. 282, as follows :

"In the construction of devises of real estate, it has long been an established rule for the guidance of the courts . . . that all estates are to be holden to be vested, except estates in the demise of which a condition precedent to the vesting is so clearly expressed that the courts cannot treat them as vested without deciding in direct opposition to the terms of the will."

He prays in aid of this argument, that, if that rule is followed, it appears that there is a leaning towards a construction of a will as giving a vested rather than a contingent interest, and it would appear that that observation or argument is well founded. We have, therefore, to decide whether or not the words

"for the eldest of my sons (if any) who shall be living at the time of my death absolutely upon his attaining the age of twenty-one years"

give a vested or contingent interest to the son. As a matter of fact there was not more than one son whose name I have already given, the other three children were daughters. But the possibility is indicated that there might have been several sons, some of whom might not be living at the death of the testator. It might be that a son secondly born to him, or thirdly born, might become the eldest son for the purpose of this trust.

Dealing first with *Boraston's Case* (3) (3 Co. Rep. 19a at p. 21b), it is clear that, in using words which are apparently words of time, you may find that, instead of being words of time, they are words of contingency, or you may find that words of contingency are words of time. It is there stated

A “so that these adverbs (*then* and *when*) in our case are demonstrations of the time when the remainder to Hugh shall take effect in possession, as in the said cases of a lease for life, and lease for years, and not when the remainder shall vest.”

B Counsel for the Crown says that these words of time inserted in the present case are words which have merely the effect of postponing the time when possession shall be taken by the son, but are not words of contingency. I do not, for my part, propose to go through the cases which have been cited or again to refer to the views which have been stated in and cited from *HAWKINS ON WILLS*. It is sufficient for my purpose to say that I agree with the reasoning of *TOMLIN, J.*, and the conclusion which he has reached.

C I will only refer to two matters by way of addition which have much affected my mind. It appears to me that *TOMLIN, J.*, has rightly construed this sentence as

“for the eldest of my sons (if any) who shall be living at the time of my death, and then absolutely upon his attaining the age of twenty-one years.”

D It appears to me that the effect of the construction for which counsel for the Crown contends would rule out the word “absolutely” and alter that sentence in a manner which is not justifiable. I can follow the argument that the word “absolutely” is not to be taken as meaning “absolutely” when you have regard to the rules under which you are bound, if possible—I will put it as high as that—to hold that there is an immediate vesting, and that one ought to decide in favour of the vesting unless there is a condition precedent to the vesting so clearly expressed that the court cannot treat the gift as vested without deciding in direct opposition to the terms of the will. Applying that rule, counsel says that the word “absolutely” is given too great prominence, and that, if one takes the clause as a whole and the other parts of the will including the direction as to residue and the like, the word “absolutely” does not stand as a barrier against the construction for which he contends. Giving full weight to that argument, the word “absolutely” does seem so to stand, and I think *TOMLIN, J.*, has come to a right conclusion in dividing the sentence in the manner he has done.

F Lastly, I make this observation: in *Re Ussher, Foster v. Ussher* (6), which was called to our attention and which was cited before the commissioners, the question arose as to the effect of a direction to trustees to apply the whole or such part as they might in their absolute discretion think fit of the income for the maintenance, education or benefit of the person presumptively entitled to the residuary estate. That case appears to me to have been decided on the direction contained in the will, and, as I pointed out in the course of the argument, it appears to me that in that case which was decided by *ASTBURY, J.*, and also in *Re Hume, Public Trustee v. Mabey* (7), decided by *PARKER, J.*, the fact that there was a direction loomed somewhat large in the ultimate decisions given. *PARKER, J.*, took the direction as having the same effect as a gift. If one could take the words in this will as being a direction, there would be parity of reasoning in counsel for the Crown’s argument, but it is clear that, both in the maintenance and advancement clauses, there is only a power to the trustees and that there is no direction, as there was in *Re Ussher* (6) and *Re Hume* (7). That may not be a strong point, but it is an observation which I think is worth making. It appears to me that, on the reasoning of *TOMLIN, J.*, with which I have already said I agree, and having regard to the difficulty I have in attributing a different meaning or interpretation to the will, that *TOMLIN, J.*, has come to a right conclusion, and, therefore, that the appeal must be dismissed.

I **WARRINGTON, L.J.**—I am of the same opinion. The question in my opinion, and in this I agree with *TOMLIN, J.*, is unfettered by any general rule, and the task of the court is to determine whether on the terms of the whole will, fairly read, the estate is vested or contingent. I say advisedly that we are unfettered by any general rule, but of course from that I except those rules which apply to all questions

of construction, such, for example, that words are to have their natural meaning unless there is a context which shows that they bear a different meaning. I think I may also refer to another rule as being in the same category: that the court is inclined to hold an estate to be vested rather than contingent, if the words of the will will allow it to do so. Now the two rules of the other and more special class of cases are suggested as binding the court in this case. Those two rules are expressed in the judgment of TINDAL, C.J., in *Phipps v. Akers* (1), in giving the opinion of the judges to the House of Lords. He is there dealing with the vesting of apparently contingent estates, and says (9 Cl. & F. at p. 591):

"And the cases on this subject appear to be resolvable into two classes: first, those in which the courts have relied on the circumstance that the estate, prior to the attainment of the age of twenty-one, has been given to some third person, either for the benefit of the devisee himself, as in *Goodtitle d. Hayward v. Whitby* (2), or for the benefit of some other persons to endure during the minority, as in *Boraston's Case* (3), and *Manfield v. Dugard* (8), and, secondly, those cases in which the estates are given over in the event of the devisee dying under twenty-one."

Then he cites certain cases, and for the future I suppose the only case likely to be cited on that point will be *Phipps v. Akers* (1) itself. Then he proceeds (*ibid.*):

"The first class of cases proceeds on the ground that the estate given to the devisee on his attaining twenty-one, is in fact only a remainder, taking effect in its natural order, on the determination of the preceding estates; and that the attaining of the prescribed age in such a case no more imports a condition precedent than any other words indicating that a remainderman is not to take until after the determination of the particular estates. The second class of cases goes on the principle that the subsequent gift over in the event of the devisee dying under twenty-one, sufficiently shows the meaning of the testator to have been that the first devisee should take whatever interest the party claiming under the devise over is not entitled to, which of course gives him the immediate interest, subject only to the chance of its being divested on a future contingency."

Now it is quite plain that the present case is not an instance of the second of those two classes of cases, for the reason that it is common ground, and I agree with the parties in this, that the direction that the estate is to fall into residue is not a gift over in the event of the testator's son failing to attain the age of twenty-one years. It is a gift over in the event of there being no such son at all, that is to say, no eldest son living at the time of the testator's death, the words being "failing such son, then I direct the same," and so forth. The case also, in my opinion, and herein I again agree with TOMLIN, J., does not fall within the first of the two classes of cases described by TINDAL, C.J. There is not, to adopt his words, a gift of the estate, prior to the attainment of the age of twenty-one years, to a third person either for the benefit of the infant devisee himself or for the benefit of some other persons. The gift in the will to the son in this case is an immediate gift, subject only to this, that, as regards a part of it, the gift cannot be enjoyed to the full until the death or second marriage of the testator's wife, because under a previous direction she is to enjoy the right to occupy the testator's residence and a certain limited area of land belonging thereto, so long as she remains his widow and has not married again. It is true that, in addition to enjoying the right actually to reside there, the widow, if she pleases, is given the right to receive the rents of the house and of that limited area of lands if she does not choose to reside; she is, in fact, to have the benefit of that, and the form which the gift to the son takes where the portions of land given to him are so described is in these terms:

"Subject to my wife's interest in my said house and grounds, I direct my trustees to hold my said Oxhey estate and the land at the time of my death held therewith or otherwise situate in or near Watford aforesaid, including

A after the death or remarriage of my said wife my said house and grounds and the land surrounding the same, and also my property in the village or parish of Bushey"

—this is something which has not been spoken of at all before—"and my interest in No. 21, Soho Square, London." It is to my mind plain that that is in truth an immediate gift, subject only to the right which the wife enjoyed, as I have said, during her widowhood. It is not a gift in remainder in the strict sense, or even if it is a gift in remainder it would only be so as to the very small part comparatively in respect of which the wife had the right of occupation.

B If the court is not fettered by either of the two rules which appear to be embodied in the two classes of cases to which I have referred, then the only question is whether there is sufficient context in this will to convert words which, according to their natural meaning, are words of contingency, into words which would confer an absolute interest, and merely postpone the period of the unfettered enjoyment of that estate. The word are "for the eldest of my sons . . . upon his attaining the age of twenty-one years." It is perfectly well settled, and the rule is expressed in the most recent times in *Re Francis* (9), that a gift on attaining the age of twenty-one years is, according to its natural meaning, a contingent gift, and that nothing goes to the taker until he attains the fixed age. We have then to find whether there is anything in the context which enables the court—I will not say compels it, because the court is inclined to take the course if it can—but enables the court to hold that gifts *primâ facie* contingent are really vested.

C I agree with TOMLIN, J., that I can find nothing in this rule, when once one gets rid of the supposed general rules which are said to control the unfettered expressions of our opinion, to indicate that this *primâ facie* contingent gift is anything but contingent. The power which the trustees have to let is not in terms confined to the minority of the testator's son. No doubt when he attains the age of twenty-one and becomes absolutely entitled, he can put an end, if he pleases, to the trustees' powers, but in terms the power to let extends to any part of the testator's real estate which is for the time being unsold; so the power to manage in the same way extends to unsold real estate for the time being. The power to maintain is merely the ordinary common form of power under which the person whose maintenance is in question has no absolute right to the application of any part of the income; it is merely a power

E "to apply the whole or such part as they he or she shall think fit of the annual income of the property or share to which any infant shall be entitled or contingently entitled under this my will or any codicil hereto"

G —followed by a direction to accumulate the remainder and to add it to the property from which it arose. It seems to me that these provisions of the will are perfectly neutral, but I am not forgetting that there is contained in them an expression, which, if it has any effect at all, tends to support the view that the gift of this estate to the son is a contingent gift, because the testator in the power of maintenance uses these words,

H "to apply the whole or such part as they or he shall think fit of the annual income of the property or share to which any infant shall be entitled under this my will or any codicil hereto."

I The interests which this child and the other children took in the residue were vested at the testator's death, and the only estate devised by the will, to which the son could be said to be contingently entitled is the estate in question. I do not attach much importance to it, but it is some indication.

Counsel for the Crown has relied on another small indication as supporting his view of the true construction, viz., that, when the testator directs his trustees to offer the premises No. 21, Soho Square, to his brother at a price representing twenty years' purchase of the net rental thereof, he provides that the brother's option is to be exercised "within one year from the date of my death"; and he says that

that indicates that the interest of the son is a vested interest at the death, but, in my opinion, that condition attached to the option is purely neutral. It throws no light on the effect of the gift of No. 21, Soho Square, to the son. If it were a vested gift still the gift would not be divested by the exercise by the testator's brother of that option; it is only an option to purchase, and the son, if that option is exercised, will become entitled to the purchase money. If the gift is contingent, still it may be that the testator would desire that his brother should exercise the option of turning that real estate into purchase money within a limited time. In my opinion, the fact that the testator has fixed that limit of time throws no light on the construction of the gift itself—less even than does the use of the words "contingently entitled" in the power of maintenance.

On the whole and for the reasons which I have endeavoured to express, and also so far as the supplementary reasons given by TOMLIN, J., are concerned, I think the conclusion at which he arrived was right, and that the gift of all the estates included in these words which I have already read is a contingent gift, contingent on the son attaining the age of twenty-one, and not a vested gift.

SARGANT, L.J.—I am of the same opinion. There can be no doubt that the gift to the eldest son on his attaining the age of twenty-one years, taken simpliciter, is not only a future gift, but a contingent gift, but there are, as was shown in *Phipps v. Akers* (1), two well-known classes of cases in which a gift *primâ facie* contingent may be turned into a vested gift. The first is the case where there is some intermediate gift, so that the words of futurity may be explained as being words of futurity only as in a gift in remainder, and the second is where there is a gift over if the primary beneficiary does not attain the age of twenty-one years. In the court below, the case was apparently argued on the second branch of the rule, and the second of the two classes of cases. I see that counsel for the son argued that the gift here was, on its true construction, a gift over on the eldest son living at the death failing to attain the age of twenty-one years, and it was to that that the learned judge mainly directed his attention. That now is given up. It is recognised by counsel for the Crown that the judge was right in saying that the occurrence of the word "absolutely" between the definition of the original beneficiary and the words "upon his attaining the age of twenty-one years," shows that the beneficiary contemplated was the eldest son who survived the testator, and that the words "and failing such son" meant not if the eldest son should not attain the age of twenty-one years, but if there should be no son surviving the testator; and that being so, counsel in his very careful and interesting argument, has directed his attention to the other branch of the rule, and has sought to show that here there is in fact a gift substantially in remainder, so that the words "upon attaining the age of twenty-one years" may be construed as being simply and solely words of futurity, not importing any contingency at all.

In my judgment, that is not the true construction of the will, and I agree with what TOMLIN, J., said, that there is here no intermediate interest within the rule in *Boraston's Case* (3). In the first place, as regards the life interest that is given to the wife in a part of the hereditaments devised to the eldest son, there is a direct gift with intermediate words, and then come the words "including after the death or remarriage of my said wife my said house and grounds and the land surrounding same," that is to say, the property with regard to which she was given the right of residence or letting during her widowhood. It seems to me that that portion of the estate is treated rather as a less important part, as an accessory, and that the real substance of the gift is the gift of the whole in possession to the son, but subject as to a part only, and what is contemplated, apparently as a minor part, to the right of the wife to occupy. Therefore, I do not think that that right of the wife can amount to an intermediate estate within the principle of *Boraston's Case* (3), and the cases that followed it. But then it is said that, nevertheless, there is to be implied a sufficient and intermediate estate for this reason, that the

A trustees have a general power of maintenance and a general power of application of such part of the rents and profits, not merely of the general residue in which the son has a share, but also of this particular real estate for the benefit of the son, and that that is sufficient to constitute what is an intermediate estate. In my opinion, that is not so. I think that a mere power of application of this sort cannot be held to amount to an intermediate estate so as to have the effect on construction of making that which is in terms the present gift to the son construable as a gift in remainder, so as to satisfy the word "upon." It seems to me that, in these cases, it really is of some importance to consider the general structure of the will, and the order in which the different gifts occur. Here the gift to the son is a main, definite, principal gift in possession, and it is not until a long way further on in the will when the questions of advancement, maintenance, letting and so on, are being considered, that these provisions as to the maintenance of the son and of the daughters of the testator or the younger children are inserted. In my opinion, such a power, amounting as it does, not to a direction at all, but to a mere power, although no doubt it might extend to the whole income of the property, cannot be of real value in considering whether, in the construction of the original gift, the word "upon" is really a word which has reference to futurity only because of an intermediate estate, or is a word connoting contingency. I think that the learned judge was quite right in saying, although he had not the advantage of the arguments presented to us, that there is here really no intermediate interest for the purposes of satisfying the rules in *Boraston's Case* (3), and the cases that follow that case. That being so, I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Solicitor, Inland Revenue; Charles Stevens & Drayton.*

[*Reported by H. LANGFORD LEWIS, Esq., Barrister-at-Law.*]

VAN NIEVELT GOUDRIAN & CO. STOOMVAART MAATSCHAPPIJ v. C. H. FORSLIND & SON

[COURT OF APPEAL (Bankes, Scrutton and Atkin, L.JJ.), May 4, 1925]

[Reported 133 L.T. 457; 41 T.L.R. 481; 69 Sol. Jo. 559; 16 Asp. M.L.C. 521;
30 Com. Cas. 263]

H *Shipping—Charterparty—Lay days—Unloading—Inclusion of period of delay before obtaining a berth for discharging—Custom of the port.*

I By charterparties printed in the Scanfin form, to which certain typed additions were made, vessels were chartered to carry pit props from the Baltic to West Hartlepool. Clause 13 of the printed form provided that the cargo should be discharged in the customary manner as fast as the vessel could deliver during the ordinary working hours of the port, and by cl. 15, should the vessel not be discharged with dispatch in the manner provided, demurrage was to be paid at the rate of £40 per day. By cl. 26 the cargo was "to be loaded and discharged according to the custom of the ports, but not less than the average rate of 100 fathoms per weather working day, Sundays and holidays excepted, reversible." At West Hartlepool the docks were owned by the railway company, and vessels could only discharge their cargo in their turn at the berths assigned to them by the railway company. When the vessels arrived at West Hartlepool they found the port congested, with the result that there was delay

in discharging their cargoes. In an action by the shipowners claiming demurrage,

Held: clause 26 imposed on the charterers the obligation to discharge in a fixed time, and, the vessel being an arrived ship when she arrived within the limits of the port of West Hartlepool, the obligation of the charterers to discharge ran from the date of such arrival.

Leonis Steamship Co., Ltd. v. Rank, Ltd. (No. 1) (1), [1908] 1 K.B. 499, applied.

Notes. Referred to: *Roland-Linie Schiffahrt G.m.b.H. v. Spillers, Ltd.*, [1957] 1 Q.B. 109; *Agrimpey Hungarian Trading Co. for Agricultural Products v. Sociedad Financiera De Bienes Raices S.A.*, [1957] 3 All E.R. 626.

As to the time for loading and discharge of cargo see 30 HALSBURY'S LAWS (2nd Edn.) 337 et seq., and for cases see 41 DIGEST 567 et seq.

Cases referred to:

- (1) *Leonis Steamship Co., Ltd. v. Rank, Ltd.* (No. 1), [1908] 1 K.B. 499; 77 L.J.K.B. 224; 24 T.L.R. 128; 52 Sol. Jo. 94; 13 Com. Cas. 136, C.A.
- (2) *Hulthen v. Stewart & Co.* (1901), 17 T.L.R. 283; 6 Com. Cas. 65; affirmed [1902] 2 K.B. 199; 71 L.J.K.B. 624; 86 L.T. 397; 18 T.L.R. 429; 50 W.R. 538; 7 Com. Cas. 139, C.A.; affirmed [1903] A.C. 389; 72 L.J.K.B. 917; 88 L.T. 702; 19 T.L.R. 513; 9 Asp. M.L.C. 403; 8 Com. Cas. 297, H.L.; 41 Digest 547, 3746.
- (3) *The Felix* (1868), L.R. 2 A. & E. 273; 37 L.J. Adm. 48; 18 L.T. 587; 17 W.R. 102; 3 Mar. L.C. 100; 41 Digest 525, 3538.

Appeal from a decision of ROWLATT, J.

The plaintiffs, who were shipowners of Rotterdam, claimed demurrage from the defendants, timber merchants of West Hartlepool, in respect of two steamships, the *Alkaid* and the *Bellatrix*, which had been chartered by the plaintiffs, as owners, to the defendants for the purpose of bringing cargoes of pit props from the Baltic to West Hartlepool. The defendants denied that demurrage was due, and claimed dispatch money. The steamers were chartered by charterparties, the printed chart of which was in the Scanfin form to which certain additional typed clauses were added. Clause 13 of the printed part provided that the cargo should be discharged

"in the customary manner as fast as the vessel can deliver during the ordinary working hours of the port on the quay and/or into lighters and/or craft and/or wagons and/or into bogies and thereon stowed and/or stacked as customary at the port of discharge, the consignees having the right to select any one or more of these alternatives if customary and available at the time of discharge."

Clause 15 provided that, should the vessel not be discharged with dispatch in the manner provided, demurrage should be paid at the rate of £40 a day. Clause 26, which was another of the typed clauses, provided:

"Cargo to be loaded and discharged according to the custom of the ports, but not less than the average rate of 100 fathoms per weather working day, Sundays and holidays excepted, reversible."

Clause 24, which was one of the typed additional clauses, provided that the owners should pay the charterers dispatch money for all time saved in loading and discharging at the rate of £20 per day. When the vessels arrived at West Hartlepool the port was much congested, and great delay occurred before they could reach discharging berths. The docks at West Hartlepool were owned by The London and North-Eastern Rail. Co., and vessels could only discharge at the berths allotted to them by the railway company, and had to wait their turn. The plaintiffs accordingly claimed demurrage for the time during which the steamers were waiting for berths at which to discharge, and said that the steamer was an arrived ship ready to discharge from the time she arrived in port, and that the lay days commenced to run from that date. The defendants contended that the vessel was not an arrived

A ship until she had reached the quay, the custom of the port of West Hartlepool being that vessels were always discharged at the quay, and that the lay days only commenced to run from then.

ROWLATT, J., having given judgment for the plaintiffs, the defendants appealed.

Bernard Campion, K.C., and F. Kingsley Griffith, for the defendants, the charterers.

R. A. Wright, K.C., and G. R. Mitchison, for the plaintiffs, the shipowners.

BANKES, L.J.—In this class of case it seems to me, on the authorities, that there are two questions which have to be answered, and those two questions depend on the construction of the charter. The first question is this: When did the vessel become an arrived ship? and the second: having fixed the date when she became an arrived ship, does the charterparty provide for a discharge within a fixed number of days after the date of arrival, or for a discharge within a reasonable time after the date of arrival? The result on the claim of demurrage may be entirely different. I think that that is a true view of the position. That is made quite plain by PHILLIMORE, J.'s, judgment in *Hulthen v. Stewart & Co.* (2), which went to the House of Lords and was ultimately affirmed there. In that case, PHILLIMORE, J., calls attention to the distinction between the cases where the provision of a charterparty is for a loading or discharge within a fixed time, or for loading or discharge within a reasonable time. The learned judge, after having given his decision in reference to that particular charter, says:

"I have considered all the cases which have been referred to in the course of the arguments, but a certain number of them appear to me to have no application to the present case. I refer to those cases in which the charterparty provides for the ship to be discharged in a fixed number of days. Cases such as these are governed by entirely different considerations from the present."

The questions one has to answer in this case, therefore, are (a) when was this vessel an arrived ship? The charter provided and provided only, that she was to proceed to West Hartlepool; and I think that the decision in *Leonis Steamship Co., Ltd. v. Rank, Ltd.* (No. 1) (1) decides beyond all question that this vessel was an arrived vessel when she arrived within the limits of the port of West Hartlepool; and, copies of the bills of lading having been given, she was an arrived ship as from that time.

Then (b), does the charterparty provide for a delivery within a fixed number of days, or within a reasonable time? I do not know whether that matter was gone into in the court below. I do not think ROWLATT, J., refers to it, and the point turns entirely, as it seems to me, on the true construction to be placed on cl. 26. Does cl. 26 impose on the charterer the obligation to discharge in any fixed time or within a fixed number of days? It does not say so in terms, but it seems to me that the terms are so clear that you are able to arrive at a fixed time by a simple calculation. The provision is that the cargo is to be discharged (quite true, according to the custom of the port), but at "not less than the average rate of 100 fathoms per weather working day." It seems to me, therefore, if one calculates the quantity of cargo and considers how many weather working days were taken to discharge that cargo at that minimum rate of 100 fathoms per weather working day, one does arrive at a fixed number of days. Under those circumstances, it seems to me that the obligation of the charterer here was to discharge within that time or pay demurrage. I am unable to give effect to the argument which has just been addressed to us that because, under cl. 13, an option is given to the charterer to require the vessel to discharge in one of four ways, therefore she was not an arrived ship when she arrived at West Hartlepool. That point seems to me to be entirely covered by *Leonis Steamship Co., Ltd. v. Rank, Ltd.* (No. 1) (1). The other point whether the charterer is to discharge within a reasonable time or within a fixed time depends on the construction of cl. 26. In my opinion, it is a charter for

discharge within a fixed time. For these reasons I think that the decision of ROWLATT, J., was right, and that the appeal must be dismissed with costs. A

SCRUTTON, L.J.—I have listened to counsel for the defendants' interesting and ingenious argument with great care, and with a certain amount of hope that it might convince me, because I recognised a superior and improved version of the argument which I had unsuccessfully presented to the Court of Appeal in *Leonis Steamship Co., Ltd. v. Rank, Ltd.* (No. 1) (1), but though I have listened with all the care I can, it appears to me that this case is decided by the judgment of this court in that case. As long as I can remember there has been controversy between shipowner and charterer as to who is to bear the risk of waiting at a port for a berth. On the one hand the charterer has said: "How ridiculous it is that my time for loading or discharging should begin before I have got into a berth where I can load or discharge; and until the ship gets to the place where I can load or discharge it is absurd to make me pay for time waiting to get there." On the other hand, the shipowner has said: "You have your cargo at the port, and it is for you to make arrangements for the berth; and if you cannot get a berth, why should my ship be waiting about at my expense when it is due to the fault of your arrangements that you cannot get a berth." There was a series of cases which adopted the charterer's view where the charter ran in the form of proceeding to a berth as ordered; then there was a class of cases to proceed to a dock; then there was the case to which counsel for the defendants referred. The argument was that the charter says one is to load in the customary manner, and the customary manner is at a berth; so that the clause means that you have to go to a berth, and the lay days, therefore, do not begin until one is at a berth in the dock. That argument was rejected. Then there came a series of absolutely conflicting cases as to what was to happen. If the charter was simply to go to a dock, did the lay days begin when one got to the place where ships were waiting to load; or as the charterer had the right, not expressly under the charter but implied in the decision in *The Felix* (3), to say to what berth in the port the vessel should go, was it not the fact that the lay days did not begin until the ship had got to that berth? In *Leonis Steamship Co., Ltd. v. Rank, Ltd.* (No. 1) (1), counsel at that time specialising in commercial cases did, I think, cite to the Court of Appeal every case that had ever been decided on the point, with the result that the court said: B C D E F

"When you have ordered a ship to go to a port the lay days begin when the ship is at the freighter's disposal within the commercial area of the named place." G

KENNEDY, J., expressly approves ([1908] 1 K.B. at p. 523) of the passage in CARVER'S CARRIAGE BY SEA (4th Edn.) pp. 751, 752, 760:

"When the place named is a port, or other wide district, the lay days begin when the ship is ready, and at the freighter's disposal, within the named place in its commercial sense; though she may not be in a position to take in or discharge cargo, and though she may not be at the wharf, dock, or other part of the place to which the charterer may have properly required her to go." H

I take the *Leonis Steamship Co., Ltd. v. Rank, Ltd.* (No. 1) (1) case to decide that it is not enough that, under the decision in *The Felix* (3), the charterer has the right to say: "Proceed to this berth to load." That does not postpone the time when the lay days begin until the time when the ship has reached the berth to which the charterer has a right to order her. She is to proceed to the port, and when she has got to the port the lay days begin. I argued to the contrary, and I have forgotten whether I thought I was right or not, but I argued it with great vigour, and my argument failed. As I have said, I am afraid the improved version of the argument which counsel for the defendants has addressed to us must also fail, because we are bound by the decision in *Leonis Steamship Co., Ltd. v. Rank,* I

A *Ltd. (No. 1) (1)*. With regard to the point as to dispatch money, I respectfully think that there is nothing in that.

B **ATKIN, L.J.**—This is a question which is continually arising and about which there is a long line of cases. I think we are precluded by authority from giving effect to counsel for the defendants' argument. It appears to me plain that, in considering this question, the first matter one has to look at is what is the contract between the parties—what are the clauses in the charterparty which deal with demurrage—because demurrage, after all, is only a conventional sum agreed between the parties as compensation to the shipowner for the delay in either loading or discharging his ship beyond a specified time. In every case the first thing that you have to look at is what have the parties expressly agreed on in the matter; and in C any case one has to determine what they have agreed as to the discharge by the charterer, the time for discharge, the place of discharge and when the time begins. That matter is not necessarily concluded by merely examining the clauses which impose on the ship the obligation to proceed to a berth. One does not necessarily determine the provisions as to the amount of demurrage merely by considering what point the ship should proceed to, whether to a port, a dock or a berth, though D that matter is one which, no doubt, has to be considered.

I think that the authorities compel us to hold that, when the parties have agreed that a ship is to be either loaded or discharged in a fixed time, or a time fixed by reference to a stated standard, then the obligation of the charterer to load begins when the ship has arrived at her contract destination. It is material to consider whether the ship is an arrived ship or not, but that, of course, may be varied. In E fact, the parties might agree to some other time at which the lay days are to commence; as they sometimes do agree in a charterparty so far as loading, at any rate, is concerned, that the obligation to load is only to commence at the expiration of a certain notice which is to be given when the ship is an arrived ship.

In *Hulthen v. Stewart & Co. (2)*, there was a charterparty which seems to me in substance to be a charter in precisely the same form as the printed clauses in this F charterparty. There there was an obligation on the charterer to load in the customary manner, very much in the form expressed in the relevant clause here. In that case, it was decided by PHILLIMORE, J., and the House of Lords obviously thought it right, that the obligation on the charterer to load did not arise until the vessel had, in fact, got her berth. If counsel for the defendants had to deal with the printed G clause alone, I think there would be a great deal to be said for him. It is to be noted that in *Leonis Steamship Co., Ltd. v. Rank, Ltd. (No. 1) (1)* there was an express provision as to when the lay days were to begin, which, of course, would relieve the court of any difficulty; but in this case there is to my mind a fixed time for loading, and, if so, the case comes within what was said by LORD MACNAGHTEN in *Hulthen v. Stewart & Co. (2)* ([1903] A.C. at p. 394):

H "It is, I think, established that, in order to make a charterer unconditionally liable, it is not enough to stipulate that the cargo is to be discharged 'with all dispatch,' or as 'fast as steamer can deliver,' or to use expressions of that sort. In order to impose such a liability the language used must in plain and unambiguous terms define and specify the period of time within which delivery of the cargo is to be accomplished."

I The question is whether cl. 26 does define in plain and unambiguous terms the period of time within which the delivery of the cargo is to be accomplished. To my mind, cl. 26 does; it varies the printed clause, and puts a contractual obligation on the charterer. It says:

"Cargo to be loaded and discharged according to the custom of the ports, but not less than the average rate of 100 fathoms per weather working day, Sundays and holidays excepted, reversible."

It appears now that the object of that clause was to vary the provisions of the

printed clause, and to turn that which was a customary rate into a fixed rate. Thus, we have a fixed rate charterparty. *Leonis Steamship Co., Ltd. v. Rank, Ltd.* (No. 1) (1) is, no doubt, a leading decision, and the decision in that case is that the time for loading commences when the ship is an arrived ship, and she is an arrived ship when she gets into the port. In those circumstances, it appears to me that the decision of the learned judge was right, and the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Bell, Brodrick & Gray*, agents for *Harrison & Son*, West Hartlepool; *Botterell & Roche*, agents for *Botterell, Roche & Temperley*, West Hartlepool.

[Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.]

SMITH v. MARTIN

[COURT OF APPEAL (Bankes and Atkin, L.JJ.), February 25, 1925]

[Reported [1925] 1 K.B. 745; 94 L.J.K.B. 645; 133 L.T. 196]

Building Contract—Form issued by Royal Institute of British Architects—Construction.

A building contract entered into between the building owners and the builder provided that the builder should erect a certain number of houses, and it embodied certain conditions which were in the form in general use issued by the Royal Institute of British Architects. Condition 31 provided that should the building owner not pay the builder any sum certified by the architect within the time limited by the contract, the builder was to be at liberty to determine the contract and recover from the building owner payment for all work executed. By condition 32, in case any dispute or difference should arise between the building owner and the builder as to the construction of the contract or as to any matter arising thereunder, such dispute or difference was to be referred to arbitration, but "such reference . . . shall not be opened until after the completion of the works." During the progress of the work the architect gave to the builder a certificate for £600 conditional on certain defective work being rectified. The building owners having refused to pay the amount of the certificate, the builder determined the contract under condition 31. Thereupon arbitration proceedings were commenced while the works were still uncompleted, and the arbitrator made an award in favour of the builder for the amount due to him under the contract.

Held: the words in condition 32 "until after the completion of the works" meant until after the completion of the whole of the works contracted for, and, therefore, the arbitration was premature and the arbitrator had no jurisdiction to make his award.

Notes. The R.I.B.A. form of building contract has been revised. In the 1939 (revised 1956) copy, condition 32 referred to in the present case is replaced by condition 26.

As to arbitration clauses in building contracts see 3 HALSBURY'S LAWS (3rd Edn.) 519 et seq., and for cases see 7 DIGEST 430 et seq.

Case referred to:

(1) *Pethick Bros. v. Metropolitan Water Board* (1911), Hudson Building Contracts (7th Edn.) p. 531, C.A.; 2 Digest (Repl.) 491, 427.

Appeal from a decision of LUSH, J., at chambers.

By a contract dated Jan. 24, 1924, and made between W. A. Martin and D. Ospalak, the building owners, and A. P. Smith, the builder, it was agreed that the

A builder should erect for the building owners thirty-six houses at Alperton at a cost of £690 per house. The contract which was in the form in general use issued by the Royal Institute of British Architects, provided, inter alia,

B “(1) The works shall be carried out in accordance with the directions and to the reasonable satisfaction of the architect, in accordance with the signed drawings and specification. . . . (4) The contractor shall provide everything necessary for the proper execution of the works. . . . (9) The contractor shall, on the request of the architect, immediately dismiss from the works any person employed thereon by him who may, in the opinion of the architect, be incompetent. . . . (26) If the contractor . . . shall suspend the works . . . the employer shall take such steps as in the opinion of the architect may be reasonably necessary for completing the works without undue delay or expense. . . . (31) Should the employer not pay the contractor any sum certified by the architect within the times respectively named in clause 30, the contractor shall give written notice to the employer of the non-payment, and should the employer not pay any such sum within the period of days from the date of delivery of such notice . . . the contractor shall be at liberty to determine the contract by notice in writing to the architect, and to recover from the employer payment for all work executed. (32) Provided always that in case any dispute or difference shall arise between the employer, or the architect on their behalf, and the contractor, either during the progress of the works or after the determination, abandonment, or breach of the contract, as to the construction of the contract, or as to any matter or thing arising thereunder, or as to the withholding by the architect of any certificate to which the contractor may claim to be entitled, then either party shall forthwith give to the other notice of such dispute or difference, and such dispute or difference shall be referred to arbitration. . . . Such reference, except on the question of certificate, shall not be opened until after the completion or alleged completion of the works, unless with the written consent of the employer or architect and the contractor. . . .”

F The builder having commenced the work in April and May, complaints were made by the architect that certain portions of the work were defective and notice was served on the builder requiring him to make it good. On May 10, the architect gave the builder a certificate for £600, which was stated to be conditional for its efficacy on the builder previously rectifying the defective work. The builder having neglected to rectify the defective work, the building owners refused to pay the amount of the certificate. Thereupon the builder gave notice to the building owners under condition 31 requiring them to pay the money, and, on the building owners failing to comply with that notice, refused to do any more work under the contract and determined the contract. Acting under condition 32, the builder caused an arbitrator to be appointed, and the arbitration commenced on Oct. 27. On Dec. 12, the arbitrator made his award in favour of the builder for £1,156 11s. 6d. H The building owners refused to pay the amount awarded on the ground that the arbitrator had no jurisdiction, inasmuch as the arbitration proceedings had been commenced before the works had been completed. The builder on the other hand contended that “the works” had been completed so far as he was obliged to complete them. The builder having applied to the master for an order for the enforcement of the award, the master made an order under s. 12 of the Arbitration Act, 1889, and that order was affirmed by LUSH, J., on appeal. I

The building owners appealed.

Croom-Johnson for the building owners.

R. Fortune for the builder.

BANKES, L.J.—It is with very great regret that I am about to pronounce the decision at which I have arrived, and the reason is that it is so plain on the arbitrator’s award and the affidavits that in this unfortunate dispute it is the

builder who is in the right and the building owners who are in the wrong. The only point that we have to decide is whether the learned judge below was right in giving the builder leave to enforce an award summarily, which had been given in his favour. If one thing is quite plain, it is that an arbitrator cannot give himself jurisdiction by deciding in his favour some preliminary point on which his jurisdiction depends. The only doubt that I had in my mind at all in the matter was whether, having regard to the form of this contract, it might not possibly be said that the parties had, in the special provisions they had made, given the arbitrator jurisdiction even to deal with such a point as that when they give him jurisdiction to deal with disputes arising on the construction of the contract. But attention has been called to *Pethick Bros. v. Metropolitan Water Board* (1), in which I myself was counsel, it appears, and in which this very point was raised and eventually decided against the contention which I was then endeavouring to make.

The position is shortly this: There was a contract between these parties for the building of a certain number of houses, and the contract provided that certain conditions were to be read and construed as forming part of the contract. When we come to look at the conditions, we find that the expression "the works" is constantly used throughout them as meaning the whole of the work contemplated by the contract, whether executed by the builder or, in certain events, completed by the building owner through the employment of some other builder. The first condition provides that "The works shall be carried out in accordance with the directions and to the reasonable satisfaction of the architect"—that is all the work. Condition 4 provides that "The contractor shall provide everything necessary for the proper execution of the works," meaning the whole work. Condition 5 provides that "The contractor shall conform to the provisions of any Act of Parliament relating to the works," again, the whole of the works. Condition 9 provides "The contractor shall, at the request of the architect, immediately dismiss from the works any person," and so forth, again, the whole of the works. Coming to condition 26, there is a passage in that condition which plainly indicates that the word "works," or the expression "the works," as used in these conditions covers the whole of the works, whether carried out by the builder or someone else in the event of his default, because in condition 26 there is to be found the provision "and the employer shall take such steps as in the opinion of the architect may be reasonably necessary for completing the works"; that is, completing the works after the builder has ceased to have anything to do with them.

Bearing that in mind, one approaches this arbitration clause, condition 32, which provides that any dispute or difference is to be referred to arbitration, but subject to this provision that "such reference, except on the question of certificate"—and this is not a dispute as to certificate—"shall not be opened"—that is, not commenced—"until after the completion or alleged completion of the works, unless with the written consent of the employer or architect and the contractor."

It seems to me, as a matter of construction, that these parties have agreed, whether it works disastrously to the builder or not, that the arbitration which is provided for, or contemplated, by, this condition is not to be opened until the works, that is, the whole of these contemplated works, are completed. One can quite understand from the building owner's point of view the advantage of inserting such a clause as this, because he does not want to have to put his hand in his pocket and pay a possibly defaulting builder something until the works are completed, and it is ascertained what really is the position as between him and the builder who has ceased to continue the execution of the works. On the other hand, one could quite well realise that such a clause may work out very hardly to a builder, and he may be kept out of money which is justly due to him, for months or even years, unless he takes some other course of endeavouring to secure payment. But we cannot deal with anything except the plain language of the contract, and if the plain language is, as I think it is, that this arbitration was begun prematurely, it follows that the arbitrator had no jurisdiction, and, in these circumstances, I

A think it is quite plain that leave should not be given to enforce this award summarily. The appeal must be allowed with costs here and below.

ATKIN, L.J.—I also regret, in the circumstances, to have to agree. The question turns on a contract in the ordinary form of the Institute and on the well-known arbitration clause in that contract. It appears to me plain that the clause is drawn

B so that in most circumstances—though not in all circumstances—there shall be no arbitration until after the completion of the works. To my mind, it is quite plain, as a matter of construction, that by "completion of the works" it means the completing of the whole of the works which are the subject-matter of the contract, whether by the original contracting party or by anybody else. That that is the use of the language in the contract is, I think, plain by reference to the conditions

C that my Lord has referred to, to which I may add the expression in condition 17 as to defects after completion: "Any defects . . . which may appear in three months from the completion of the works are to be made good," and the constant reference in condition 26 to the employers taking steps to complete the works and on completion of the works the architect to certify the amount of the expenses, and the employer not to be liable on account of the proper use of the plant for the

D completion of the works, and so on. It is said that that works a great hardship on a builder who has determined a contract, and properly determined a contract under condition 31. It may involve a hardship, but, on the other hand, the very experienced persons who drew this contract may think that, on the whole it was better not to make that an exception. It may very well be that, in estimating the value under condition 31 of what is called "payment for all works executed,"

E the persons who had to estimate the value of that work might have to take into account matters which could not be finally determined until after the completion of the whole works. For instance, there might be defects in the works executed which it would be difficult to gauge the importance of until after completion, and matters might well arise which, even to come to a proper estimate of the value of work under condition 31, would require completion, and for that purpose, it may be

F that the parties drawing this clause thought that, on the whole, it is better that you should have only one arbitration in one set of circumstances.

I should also point out that this provision which limits the arbitration to an arbitration begun after the completion of the works does not extend to a question relating to the certificate. That is provided for under the condition. The party may dispute the withholding by the architect of any certificate to which he may

G claim to be entitled. Therefore, it appears to me very possible that a contractor who has determined in these circumstances may very well say: "I ought to have got a certificate, and that amount is due to me," and conceivably if you get an award that he ought to have a certificate, it may be that there are means of suing on the certificate. However, it does not seem to me to be necessary to deal with the difficulties which arise, or the way of meeting them. All that we have to do

H is to deal with an action of contract such as we have before us. It appears to me plain that the meaning of this contract, with the exception of the reference to the special manner mentioned, namely, the question as to a certificate, is that the reference is not to be opened until the completion of the whole works. It is admitted that the works had not been completed at the time this arbitration took place, and, therefore, it appears to me that the reference was contrary to the

I provisions of the contract and without authority.

For these reasons it appears to me impossible to say that this award should be summarily determined, and this point was quite clearly taken before the arbitrator. This appeal must be allowed with costs here and below, and the application to enforce the award must be dismissed.

Appeal allowed.

Solicitors: *Lake & Son; Simon, Haynes, Barlas & Ireland.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

SACK v. JONES

[CHANCERY DIVISION (Astbury, J.), January 21, 22, 23, 26, February 18, 19, 1925]

[Reported [1925] Ch. 235; 94 L.J.Ch. 229; 133 L.T. 129]

Easement—Support—Adjoining houses—Party wall—Subsidence of one house—Drag on party wall—Damage to other house—Liability of owner of subsiding house.

The plaintiff and the defendant were the owners of adjoining houses. Between the houses there was a party wall over which the parties had joint easements. The plaintiff alleged that, owing to lack of underpinning and repair, the defendant's house was subsiding, dragging the party wall over and damaging the plaintiff's house, and she claimed a declaration that the defendant's house was bound to give lateral support to her house and injunctions restraining the defendant from withholding or withdrawing such support and allowing her house to be a nuisance.

Held: on the evidence, the plaintiff had not discharged the onus of establishing that it was something in connection with the defendant's house that had caused the damage to the plaintiff's house; even if that had been established, the defendant would not, in the particular circumstances, be liable.

Colebeck v. Girdlers' Co. (1) (1876), 1 Q.B.D. 234, and *Jones v. Pritchard* (2), [1908] 1 Ch. 630, applied.

Notes. Referred to: *Macpherson v. London Passenger Transport Board* (1946), 175 L.T. 279.

As to the easement of support see 12 HALSBURY'S LAWS (3rd Edn.) 606 et seq., and for cases see 19 DIGEST 172, 173.

Cases referred to:

- (1) *Colebeck v. Girdlers' Co.* (1876), 1 Q.B.D. 234; 45 L.J.Q.B. 225; 34 L.T. 350; 40 J.P. 596; 24 W.R. 577, D.C.; 19 Digest 173, 1223.
- (2) *Jones v. Pritchard*, [1908] 1 Ch. 630; 77 L.J.Ch. 405; 98 L.T. 386; 24 T.L.R. 309; 19 Digest 43, 229.
- (3) *Browne v. Flower*, [1911] 1 Ch. 219; 80 L.J.Ch. 181; 103 L.T. 557; 19 Digest 180, 1302.
- (4) *Broder v. Saillard* (1876), 2 Ch.D. 692; 45 L.J.Ch. 414; 40 J.P. 644; 24 W.R. 1011; 36 Digest (Repl.) 288, 360.
- (5) *Todd v. Flight* (1860), 9 C.B.N.S. 377; 30 L.J.C.P. 21; 3 L.T. 325; 7 Jur. N.S. 291; 9 W.R. 145; 142 E.R. 148; 31 Digest (Repl.) 381, 5094.
- (6) *A.-G. v. Roe*, [1915] 1 Ch. 235; 84 L.J.Ch. 322; 112 L.T. 581; 79 J.P. 263; 13 L.G.R. 335; 34 Digest 749, 1230.
- (7) *Dalton v. Angus* (1881), 6 App. Cas. 740; 46 J.P. 132; 30 W.R. 191; sub nom. *Public Works Comrs. v. Angus & Co.*, *Dalton v. Angus & Co.*, 50 L.J.Q.B. 689; 44 L.T. 844, H.L.; 19 Digest 7, 4.
- (8) *Chauntler v. Robinson* (1849), 4 Exch. 163; 19 L.J.Ex. 170; 14 L.T.O.S. 107; 31 Digest (Repl.) 380, 5082.
- (9) *Hughes v. Percival* (1883), 8 App. Cas. 443; 52 L.J.Q.B. 719; 49 L.T. 189; 47 J.P. 772; 31 W.R. 725, H.L.; 7 Digest 300, 240.
- (10) *Lyttelton Times Co., Ltd. v. Warners, Ltd.*, [1907] A.C. 476; 76 L.J.P.C. 100; 97 L.T. 496; 23 T.L.R. 751, P.C.; 31 Digest (Repl.) 145, 2846.
- (11) *Pomfret v. Ricroft* (1669), 1 Wms. Saund. 321; 2 Keb. 543, 569; 1 Sid. 429; 1 Vent. 26, 44; 85 E.R. 454; 19 Digest 80, 482.
- (12) *Richards v. Rose* (1853), 9 Exch. 218; 2 C.L.R. 311; 23 L.J.Ex. 3; 22 L.T.O.S. 104; 18 J.P. 56; 17 Jur. 1036; 156 E.R. 93; 19 Digest 42, 223.

Witness Action.

The plaintiff, Miss Alice Glazebrook Sack, was the owner of a leasehold house, No. 89, Torbay Road, Kilburn, in the county of Middlesex, which was held under

A a lease from the Ecclesiastical Commissioners for England, dated May 17, 1888, for a term of ninety-six years from June 24, 1887. The defendant, Mrs. Rachel Jones, was the owner of the adjoining leasehold house, No. 91, Torbay Road, aforesaid, which was held for the same term under a lease granted at the same time. No. 91 was the end house at the north end of the row of houses and was bounded on the north side by an external flank wall. The wall between Nos. 89 and 91 was a party wall. No. 89 was occupied by the plaintiff herself, but No. 91 was sublet to a tenant. For some time past cracks and fractures had appeared in No. 89, both in the party wall and elsewhere, which had lately increased. The purlin below the roof which ran at right angles to the party wall had moved away, and was now only supported on the corbel by about half-an-inch. The roof had shifted, showing daylight between it and the wall. The party wall was found to be out of plumb to the extent of an inch and a half on the side of No. 91. The plaintiff and her technical advisers came to the conclusion that this was caused by the drag of No. 91 on No. 89. It was found that the north flank wall of No. 91 was leaning outwards and was out of plumb to the extent of between an inch and two inches. This appeared to be caused by a subsidence of the flank wall, which was built on a clay soil. The plaintiff and her advisers believed that, unless this flank wall was underpinned, the subsidence would continue and would drag over the party wall further, and cause further damage to No. 89. A long correspondence took place between the parties, but the defendant declined to take any steps to underpin the flank wall and denied that it was the cause of the damage to No. 89. The plaintiff then commenced this action, claiming a declaration that No. 91 was bound to afford lateral support to No. 89, and, in particular, to maintain the party wall stable and perpendicular, and also an injunction to restrain the defendant from withholding and withdrawing such support, and from causing or permitting the party wall to be deflected from the perpendicular by the tension of No. 91, and otherwise interfering with the plaintiff's enjoyment of the party wall, and also for an injunction to restrain the defendant from permitting No. 91 to be in such disrepair as to be a nuisance to the plaintiff, and from using No. 91 so negligently as to injure No. 89; for an order directing the defendant to restore the party wall to the perpendicular, and for damages. The defendant denied that she was under any obligation to afford to No. 89 lateral or other support, or that she had caused to the plaintiff or No. 89 any damage whatsoever. At the trial, the plaintiff called two surveyors, a builder, and the builder's manager, who all gave evidence as to the damage to No. 89 and the falling out of plumb of the flank wall and party wall, and that it was the subsidence of the flank wall which had pulled over the party wall and caused the damage. The defendant called three architects who were of opinion that the flank wall was probably built out of the plumb, as the houses were not well built, and that there had been there no subsidence; that it was the party wall itself which had subsided and caused the damage; and that there was not a sufficient tie between No. 91 and the party wall for No. 91 to exercise a pull sufficient to affect No. 89.

Topham, K.C., and *R. F. Roxburgh*, for the plaintiff, referred to *Browne v. Flower* (3), *Broder v. Saillard* (4), *Todd v. Flight* (5), *GALE ON EASEMENTS* (9th Edn.), p. 45, *A.-G. v. Roe* (6), *Dalton v. Angus* (7), and *Colebeck v. Girdlers' Co.* (1).

Archer, K.C., and *J. D. Israel*, for the defendant, referred to *Chauntler v. Robinson* (8), *Colebeck v. Girdlers' Co.* (1), *BULLEN AND LEAKE'S PRECEDENTS OF PLEADINGS* (8th Edn.), pp. 469, 505; *Jones v. Pritchard* (2), *Hughes v. Percival* (9), *Dalton v. Angus* (7), and *Lyttelton Times Co., Ltd. v. Warners, Ltd.* (10).

ASTBURY, J., having discussed the evidence, held that the plaintiff had not discharged the onus of establishing that it was something in connection with No. 91 that had pulled over the party wall and caused the damage to No. 89; that it was impossible to come to any definite conclusion as to the cause of the condition of the party wall and of the plaintiff's house; and that, as far as the case necessitated

the proof of any fact, the plaintiff failed, and continued: But, even assuming that the facts were as the plaintiff alleges, namely, that her party wall is being pulled over by the subsidence of the defendant's house and flank wall, she would have no justification in law for maintaining this action. Both parties have joint easements of support as far as this party wall is concerned; but, having regard to the authorities, the plaintiff is unable to rely on her easement of support as entitling her to any remedy.

The plaintiff suggests, however, that the defendant has committed an actionable nuisance by allowing her own house to fall away from the plaintiff's house and drag it down. The only authority that comes within measurable distance of this proposition is *A.-G. v. Roe* (6). There a limestone quarry in land immediately adjoining a public highway had been excavated, and the excavator had left a ledge of limestone on which he had built a wall alongside the road which served as a retaining wall for the subsoil of the road and as a fence wall above its surface. Part of the wall collapsed and fell into the quarry, and in consequence a considerable part of the subsoil of the road and its surface also fell in, and the then quarry owner was held liable for a common law nuisance. That case is a very long way from the present. In *Broder v. Saillard* (4), the flank wall of the plaintiff's house was rendered damp by the percolation, through an adjacent artificial mound of earth, of moisture from a stable which had already been built thereon when the defendant took possession. This was decided to be an actionable nuisance. That case is not in point.

In the present case, the plaintiff and the defendant purchased their houses from a common owner to be occupied as residences, and the defendant has done nothing more than allow her tenant to reside in her house in accordance with the common intention of all parties at the time when the leases were made. Now, notwithstanding that the defendant's house is subject to an easement of support in favour of the plaintiff's house, the defendant is not under any obligation to the plaintiff to keep her own house in repair for that purpose. In *Colebeck v. Girdlers' Co.* (1) the defendants were the owners of two houses in a street, numbered 38 and 40, and of a gateway under No. 40 and adjoining No. 38. In 1857, they demised No. 38 for a term of twenty-one years; the lease containing a covenant by the lessee to repair all walls and party walls belonging to the premises. In 1865, they granted a lease of No. 40 to the plaintiff for a term of eleven years subject to a similar covenant to repair. The wall on the side of the gateway separating it from No. 38 was a party wall between the gateway and No. 38 to the height of the first floor. The plaintiff's house, No. 40, was built so as to extend in part over the top of the gateway and to rest on this party wall, and to be supported by it. His covenant to repair did not extend to this wall, and there was no covenant by the defendants to keep it in repair. In 1874, it was discovered that the walls of the part of No. 40 over the gateway were giving way. The damage was owing to the failure of support from the party wall, which had bulged in consequence of the pressure on it from the plaintiff's premises. It was held that there was no implied covenant on the part of the defendants to support the plaintiff's premises, although it might be an answer to an action on the plaintiff's covenant to repair, that the repair had been rendered impossible by the neglect of some precedent obligation on the part of the defendants. In that case there was a direct contractual relation between the plaintiff and the defendants under the lease, but there was no covenant by the defendants to repair. *MELLOR, J.*, said (1 Q.B.D. at p. 241):

"The plaintiff brought his action against the defendants to recover damages sustained by reason of the failure, as he alleged, of the defendants efficiently to support the house so demised by them to him. The question which we have to decide is whether, in the absence of an express covenant, there is, under the circumstances of the case, any implied covenant or grant on the part of the defendants to support and maintain the wall in question, so as to prevent

A any sinking, or bulging, or other structural injury to the plaintiff's house by reason of the failure of such wall."

Then later on he said :

B "It may be open to doubt whether the support of the plaintiff's house and the party wall was, strictly speaking, in the nature of an easement or not, but assuming that the right of support in this case is in the nature of an easement, founded on implied grant, it is well established that there is no obligation to repair on the part of the owner of the servient tenement, but the owner of the dominant tenement must repair, and that he may enter on the land of the owner of the servient tenement for that purpose : *Pomfret v. Riccroft* (11). It was admitted by the defendants' counsel that they could in no respect do anything to withdraw or affect the support rendered by the party wall to the plaintiff's house; but he contended that no other or further obligation could be implied against them, and, this being our opinion, the defendants are entitled to judgment."

D That is a far stronger case than the present, because, even if there were any pull in this case, it can only have arisen by reason of subsidence of the defendant's house and flank wall in the ordinary course of nature, without any action on the part of the defendant. That there is no liability on the servient owner to repair in a case of this kind is also apparent from *Chauntler v. Robinson* (8) and *Dalton v. Angus* (7).

In *Jones v. Pritchard* (2), PARKER, J., dealing with an ordinary party wall, said :

E "Subject, however, to the easements of which the grant or reservation will be so implied, the grantor and grantee, being respectively absolute owners of their respective divided moieties of the wall, may respectively deal with such moieties in such manner as they please. Thus, if, for example, it is within the contemplation of the parties that the grantee shall support the roof of the house he intends to build upon that moiety of the wall which is comprised in the grant, the other moiety of the wall will be subject to an easement of lateral support for the benefit of the roof when erected; and similarly the grantee's moiety of the wall will pass to him subject to the easement of lateral support for the benefit of the grantor's roof if supported by his half of the wall. If authority is wanted for the above propositions, I think it will be found in *Richards v. Rose* (12) and the recent case of *Lyttelton Times Co., Ltd., v. Warners, Ltd.* (10). The latter case seems to show that if a grantor is doing, on land retained by him, only what it was at the time of the grant in the contemplation of the parties that he should do, and is guilty of no negligence or want of reasonable care or precaution, he cannot be liable for nuisance entailed upon the grantee. And, of course, where the grantee is occasioning a nuisance to the grantor by doing on the land granted what it was at the time of the grant in the contemplation of the parties that he should do, and there is no negligence or want of care or precaution, the case is an a fortiori one."

H Later on PARKER, J., said :

I "... it appears to me that, apart from any special local custom or express contract, the owner of a servient tenement is not bound to execute any repairs necessary to ensure the enjoyment or convenient enjoyment of the easement by the owner of the dominant tenement. The grantor of a right of way over a bridge is not by common law liable, nor does he impliedly contract, to keep the bridge in repair for the convenience of the grantee. On this principle neither party is in the present case subject to any liability if, by reason of natural decay or other circumstances beyond his control, his half of this wall falls down or otherwise passes into such a condition that the easement thereover becomes impossible or difficult of exercise."

The present case follows a fortiori, as the defendant has done nothing but allow her tenant to occupy her house. A

The plaintiff also relies on the fact that, if an owner allows part of his house actually to fall on to his neighbour's land, he is liable to an action for trespass or nuisance. That proposition is not contested. The plaintiff then contends that the owner is equally liable if he withdraws support by allowing his house to fall away from and pull over his neighbour's house, but no authority has been produced in support of that contention. The defendant here has done nothing at all. Her tenant resides in her house, which is in a good state of repair. This action is brought by reason of the belief of the plaintiff and her advisers that her house is being pulled over by the defendant's house. That hypothesis has not been established, but, if it had been established, I do not think that, in the particular circumstances, the defendant would be in any way liable. In my opinion, the action fails, and must be dismissed with costs. B C

Solicitors: *Frank Daphne; Donaldson & Co.*

[Reported by E. K. CORRIE, Esq., *Barrister-at-Law.*]

YORKSHIRE, EAST RIDING, COUNTY COUNCIL v. SELBY BRIDGE PROPRIETORS

[CHANCERY DIVISION (Russell, J.), June 9, 10, 11, 29, 1925]

[Reported [1925] 1 Ch. 841; 95 L.J.Ch. 86; 133 L.T. 628;
41 T.L.R. 602; 69 Sol. Jo. 775; 23 L.G.R. 547]

Bridge—Substitution of bridge and approaches for ferry and approaches—Bridge and approach vested in owners of bridge—Right of owners of land adjoining approach to access over approach.

The approaches to Selby Bridge over the River Ouse became, under the Selby Bridge Act, 1791, vested in the defendants, the owners of the bridge which was then substituted for a ferry. The defendants claimed that the public road to York over the bridge, so far as it comprised the approach to the bridge, was their private property, and that they had the right to exclude from access to it all persons except such as went thereon with the intent of crossing the River Ouse and paying toll. The plaintiffs owned land adjoining one of the approaches to the bridge. G

Held: as the Selby Bridge Act substituted for the old highway, consisting of the approaches to the ferry plus the passage over the river, a highway consisting of the approaches to the bridge plus the bridge, and the old approaches to the ferry were highways to which adjoining owners were entitled to access from their adjoining land, the substituted way was no less a public highway, and, therefore, the plaintiffs were entitled to free access to and from their land adjoining the approach over and along the approach. H I

Notes. As to right of access to a highway by adjoining owners, see 19 HALSBURY'S LAWS (3rd Edn.) 78 et seq.; and for cases see 26 DIGEST 332 et seq.

Cases referred to:

- (1) *Pain v. Partrich* (1691), Carth. 191; 3 Mod. Rep. 289; 1 Show. 248; Comb. 180; Holt. K.B. 6; 90 E.R. 715; sub nom. *Payne v. Partridge*, 1 Salk. 12; Show. 255; 26 Digest 452, 1677.

- A (2) *Letton v. Goodden* (1866), L.R. 2 Eq. 123; 35 L.J.Ch. 427; 14 L.T. 296; 30 J.P. 677; 14 W.R. 554; 24 Digest (Repl.) 1142, 36.
- (3) *Hammerton v. Earl of Dysart*, [1916] A.C. 57; 85 L.J.Ch. 33; 113 L.T. 1032; 80 J.P. 97; 31 T.L.R. 592; 59 Sol. Jo. 665; 13 L.G.R. 1255, H.L.; 24 Digest (Repl.) 1146, 70.
- (4) *Davison v. Gill* (1800), 1 East, 64; 102 E.R. 25; 26 Digest 459; 1754.

B **Witness Action.**

One of the roads leading from London to York passes through Selby. At Selby the road crosses the Ouse to Barlby by means of a swing bridge, the property of the defendants whose title was acquired in 1791 under the Selby Bridge Act (31 Geo. 3, c. 60), enacted for the purpose of substituting a bridge for the ferry as a means of passage across the river. The material parts of the Act are as follows: It recites that the building of a bridge near the ferry will be of great public utility, that Lord Petre is seised in fee simple of the ferry and the landing places on both sides, and that persons thereafter named are willing at their own cost to build a bridge over the Ouse near the ferry, and that Lord Petre has consented to give up his rights in the ferry for the recompense thereafter mentioned. Then follow the enacting sections which, so far as material, consist of the following provisions. By s. 1, the persons named are incorporated as the Company of Proprietors of Selby Bridge. By s. 2, the company is empowered to build a bridge near the ferry over the Ouse and to make a proper approach to the bridge on each side, "such approaches, not exceeding the distance of 200 yards therefrom, shall to all intents and purposes be considered as part of the bridge." For the purposes aforesaid, the company was authorised (inter alia) to alter any highways or make any new roads leading to the bridge not exceeding 40 ft. By s. 40, it is provided that the bridge and approaches should be vested in the company, and by the same section power is conferred on the company to take for portage, as or in the name of a toll or duty before any passage over the bridge should be permitted, in lieu of tolls over the ferry, the several sums therein mentioned. By s. 48, the rights of the ferry are vested in the company. By s. 52, it is provided that, if and when the bridge becomes impassable, the company shall provide a proper and convenient ferry. Section 69 saves all rights. By 1891 some houses had been built at Barlby on the York side of the bridge abutting on the approach, with entrances leading on to it. Subsequently more houses were built, and by 1908 a large number of houses fronting and opening on to the approach (called Victoria Avenue) on the east side, and fronting on to Thomas Street and George Street (which leads into Victoria Avenue) had been built. Barlby was rapidly growing. Between 1913 and 1917 the number of houses was about trebled. The west side of Victoria Avenue along the approaches was filled with houses opening on to it, and side streets of houses were built opening into it on the west side, corresponding to Thomas Street and George Street on the east. With this rapidly growing population educational needs arose. Accordingly, the plaintiffs acquired a piece of land abutting on Victoria Avenue within the 200 yards approach for the purpose of erecting thereon a school for the education of the Barlby children. They had erected such a school, but the defendants, the Board of Proprietors of Selby Bridge, advanced the following claim, namely, that Victoria Avenue, for a distance from the bridge of 200 yards, was their private property from which they had the right to exclude all persons who did not go thereon with the intent of crossing the bridge and paying the proper toll. Thereupon this action was brought by the plaintiffs, who asked for a declaration that as owners of the plot of land, they were entitled to free and unimpeded access to it without payment of toll except for the passage of Selby Bridge. The defendants counter-claimed for a perpetual injunction against the plaintiffs from trespassing on the approach and from pulling down and removing any fences erected thereon.

F. H. Maugham, K.C., and F. E. Farrer, for the plaintiffs, referred to PRATT

AND MACKENZIE'S LAW OF HIGHWAYS (17th Edn.) p. 151; WOOLRYCH'S LAW OF WAYS (2nd. Edn.) p. 363; *Pain v. Partrich* (1), *Letton v. Goodden* (2), and per LORD PARKER in *Hammerton v. Earl of Dysart* (3).

F. E. Bennett, K.C., and *W. Copping*, for the defendants, referred to *Davison v. Gill* (4).

RUSSELL, J.—The defendants claim that the road to York for a distance of 200 yards from the York side of the bridge is their private property, and that they have a right to exclude from access to it all persons except such as go thereon with the intent of crossing the river Ouse and paying toll. The defendants in this action limit their claim to the approach on the York side of the bridge, but it is difficult to appreciate why their claim, if valid, is not equally valid as to the approach on the Selby side of the bridge. The title of the defendants to the bridge is founded on the Act, 31 Geo. 3, c. 60. At that date, 1791, there existed a ferry over the Ouse from Selby in the West Riding to Barlby in the East Riding, that is to say, the way from London to York ran at this point along the approach to the ferry in the East Riding, and thence along the road to York. It is conceded by the plaintiffs, for the purposes of this action, that the approach on the York side of the Ouse was made by the defendants to the full extent of 200 yards.

The defendants' claim appears to me to be a startling one. It remains to be seen whether, though startling, it is well-founded. The answer seems to me to depend, in the first instance, on the question whether the approach is or is not a highway. The defendants say that the approach in question is by the Selby Bridge Act vested in them. This is undeniable. But the approach may be vested in them and still be a highway. This they concede; but they further argue that the approach is not a highway, and for this reason. They contend (and this is the basis of their argument) that, by the Act, the bridge and its approaches are substituted for the ferry boat, and that, just as the former owner of the ferry was entitled to exclude from the ferry boat any person not intending to cross the river in it, and pay the appropriate toll, so are they entitled to exclude from the approach any persons not intending to cross the bridge and pay the appropriate toll. According to the defendants' contention, no Barlby child may (except with their permission and on such terms as they may dictate from time to time) enter or leave the plaintiffs' school by the approach road. The short answer is that the basis of the contention has no foundation.

The Selby Bridge Act substitutes one highway for another highway. The old highway at the material point consisted of the approaches to the ferry, plus the passage across the river. The substituted highway consists of the approaches to the bridge, plus the bridge. The ferry boat was only a physical means by which the passage along the highway across the river could be effected. The old approaches were highways to which adjoining owners would be entitled to access from their adjoining land. The substituted approaches are highways to which adjoining owners have similar rights of access. The defendants' claim is accordingly both startling and ill-founded. From a perusal of this Act, it is, in my opinion, manifest that the bridge was a substitute in all respects for the ferry; and that, if the way leading from Selby to York across the ferry was a public highway, the substituted way was no less a public highway. That the old way across the ferry was a highway is clear from the following citation from WOOLRYCH'S LAW OF WAYS, (2nd Edn.), p. 363:

"The same principle which compels us to call a bridge or a river a common highway, applies to a ferry, for it is a common passage, which is no more than a common highway."

To this may be added LORD PARKER's statement in *Hammerton v. Earl of Dysart* (3) ([1916] 1 A.C. 57 at p. 79):

"A ferry may thus be regarded as a link between two highways on either side of the water, or as part of a continuous highway crossing the water."

A The result is that I make the following order : In the action I make the declaration that the plaintiffs as owners of their parcel of land adjoining the approach, and all others lawfully entering or leaving the said parcel, are entitled to free and unimpeded access to and from the said parcel over and along the said approach, and that toll-free, except only for right of passage over Selby Bridge if and when they exercise such right of passage. I grant no injunction, but I give liberty to apply for an

B injunction as and when occasion arises; and I order the defendants to pay the costs of the action. The counterclaim I dismiss with costs.

Solicitors : *Bockett, Stunt & Bockett*, for *Robert Procter*, Beverley; *H. J. S. Woodhouse & Co.*

[Reported by GEOFFREY P. LANGWORTHY, Esq., *Barrister-at-Law.*]

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Re WETHERED. Ex parte SALAMAN

[CHANCERY DIVISION (P. O. Lawrence, J.), October 19, November 16, 1925]

[Reported [1926] Ch. 167; 95 L.J.Ch. 127; 134 L.T. 264; 70 Sol. Jo. 324;

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[1925] B. & C.R. 265]

Bankruptcy—Property available for distribution—Debt due to bankrupt in course of business at commencement of bankruptcy—Judgment debt—Protection of bona fide transaction, without notice—Agreement for valuable consideration—Postponement of enforcement of debt—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 38 (c), s. 45 (b) (d).

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A debt became due from S. to the bankrupt in the course of his business for which, in December, 1923, the bankrupt recovered judgment. Later, S. became further indebted to the bankrupt. In January, 1924, the bankrupt assigned both debts to O. W. in consideration of money advanced to him by O. W. The assignment contained a covenant that, in the event of O. W. refraining from giving notice of the assignment to S., the bankrupt would, on payment by S., immediately hand the sum paid to O. W. In February, 1924, the bankrupt committed an act of bankruptcy. In March, 1924, J., who acted as solicitor for both the bankrupt and O. W. arranged with S. that he should pay the aggregate amounts by monthly instalments, the first instalments to be allocated to the later of the two debts and the remainder to the judgment debt. The first instalment was to be paid in cash, and the remaining instalments were to be paid by promissory notes payable to the bankrupt or order. At that time neither J., nor O. W., nor S., knew that the bankrupt had committed an act of bankruptcy or that a bankruptcy petition had been filed against him. In September, 1924, a receiving order was made against the bankrupt, on receiving notice of which J. gave notice to S. of the assignment of the debts. In October, 1924, the applicant was appointed trustee in the bankruptcy. In April, 1925, O. W. died. The trustee in bankruptcy claimed that the debts comprised in the assignment were at the commencement of the bankruptcy in the possession, order or disposition of the bankrupt in his business by the consent of the true owner in such circumstances that the bankrupt was the true owner thereof, and, therefore, formed part of the bankrupt's property divisible among his creditors under the Bankruptcy Act, 1914, s. 38 (c). O. W.'s executor, who was made a respondent, alleged that so much of the debt as became merged in the judgment was taken out of the order and disposition clause, and that the deposit of the promissory

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notes by the bankrupt with O. W. was a transaction for valuable consideration within s. 45 (d) of the Act of 1914.

Held: (i) the judgment debt did not change its nature on judgment being obtained, but remained a debt due to the bankrupt in the course of his business within s. 38 (c) of the Act of 1914, and, therefore, was divisible among the bankrupt's creditors; (ii) there was evidence from which it could be inferred that there was an agreement to postpone enforcing the debt owing by the bankrupt to O. W. at the time of the deposit of the promissory notes with O. W.; that was sufficient consideration within the meaning of s. 45 (d) of the Act of 1914; and, therefore, the trustee's claim to the money covered by the promissory notes failed: *Wigan v. English and Scottish Life Assurance Association* (1), [1909] 1 Ch. 291, applied; (iii) even if the trustee was entitled to recover the instalments paid after the date of the receiving order, the amount paid before that date was protected by s. 45 (b) of the Act of 1914.

Notes. As to property of a bankrupt available for distribution amongst creditors see 2 HALSBURY'S LAWS (3rd Edn.) 404 et seq., and for cases see 5 DIGEST (Repl.) 679 et seq. For the Bankruptcy Act, 1914, s. 38 and s. 45, see 2 HALSBURY'S STATUTES (2nd Edn.) 373, 382.

Cases referred to :

- (1) *Wigan v. English and Scottish Life Assurance Association*, [1909] 1 Ch. 291; 78 L.J.Ch. 120; 100 L.T. 34; 25 T.L.R. 81; 12 Digest (Repl.) 239, 1793.
- (2) *Rutter v. Everett*, [1895] 2 Ch. 872; 64 L.J.Ch. 845; 73 L.T. 82; 44 W.R. 104; 39 Sol. Jo. 689; 2 Mans. 371; 13 R. 719; 5 Digest (Repl.) 831, 7104.
- (3) *Re Neal, Ex parte Trustee*, [1914] 2 K.B. 910; 83 L.J.K.B. 1118; 110 L.T. 988; 58 Sol. Jo. 536; 21 Mans. 164; 5 Digest (Repl.) 831, 7106.
- (4) *Re Lankester, Ex parte Price* (1875), 10 Ch. App. 648; 33 L.T. 113; 23 W.R. 844; 4 Digest (Repl.) 433, 3845.
- (5) *Graham v. Furber* (1853), 14 C.B. 134; 23 L.J.C.P. 10; 22 L.T.O.S. 119; 2 W.R. 39; 18 Jur. 61; 2 C.L.R. 10; 139 E.R. 56; 5 Digest (Repl.) 823, 6948.
- (6) *Re O'Brien, Ex parte Montague* (1876) 1 Ch.D. 554; 34 L.T. 197; 24 W.R. 309, C.A.; 5 Digest (Repl.) 848, 7139.

Motion.

The relevant facts as stated by his Lordship in his judgment were as follows: The bankrupt was a stockbroker carrying on business in the City of London. He had a client named Saunders who became indebted to him in respect of Stock Exchange transactions. On Dec. 18, 1923, the bankrupt recovered judgment against Mr. Saunders for £903 1s. In addition to this indebtedness Mr. Saunders became indebted to the bankrupt in the sum of £316 10s. 2d., representing the balance on the mid-December, 1923, Stock Exchange account. In January, 1924, the bankrupt borrowed the sum of £500 from his cousin, the late Mr. Oliver Wethered (hereinafter called "the testator"). As a security for this loan, the bankrupt executed an assignment in favour of the testator dated Jan. 15, 1924, of the two debts of £903 1s. and £316 10s. 2d. owing by Mr. Saunders. The assignment contained a covenant by the bankrupt with the testator that, in the event of the latter refraining from giving notice to Mr. Saunders of the assignment, the bankrupt would, on receiving payment of the debts, or any part of them, immediately hand the cheque or any other form of payment to the testator. An understanding had been arrived at between the bankrupt and the testator that the latter should not give notice of the assignment, unless absolutely necessary for his protection. Both the testator and the bankrupt were clients of Mr. Percy Edward Jeffs (a member of the firm of Messrs. Bingham & Co., solicitors, of Capel House, New Broad Street, in the City of London), and Mr. Jeffs acted for both parties in the negotiation of the loan of £500 and in the preparation and execution of the assignment of Jan. 15, 1924. Acting on the understanding between the bankrupt and the testator, Mr. Jeffs

A abstained from giving notice to Mr. Saunders of the assignment, and no such notice was, in fact, given prior to the receiving order. On Feb. 27, 1924, the bankrupt committed an act of bankruptcy by not complying with a bankruptcy notice, and on the same day the bankruptcy petition, on which the receiving order was ultimately made, was filed. In March, 1924, Mr. Jeffs, on the instructions of both the testator and the bankrupt, made an agreement with Mr. Saunders' solicitors as to the liquidation of Mr. Saunders' two debts, the terms of which agreement appeared from three letters passing between Mr. Jeffs' firm and Mr. Saunders' solicitors, dated March 5, 6, and 31, 1924. The substance of this agreement was as follows: Mr. Saunders was to pay the aggregate amount of his two debts and Mr. Jeffs' costs by the following monthly instalments payable on the fourteenth day of each month, namely, £15 a month up to Sept. 14, 1924, £20 a month thereafter up to June 14, 1925, and £25 a month thereafter until the total amount was paid off. The first eighteen instalments and £18 1s. 3d., part of the nineteenth instalment, were to be allocated to the payment of Mr. Jeffs' costs, which had been agreed at £36 11s. 1d., and then to the payment of the debt of £316 10s. 2d., amounting in the aggregate to £353 1s. 3d., and the remainder of the instalments were to be allocated to the payment of the judgment debt of £903 1s. The first instalment of £15 was to be paid in cash, and, in order to cover the remaining eighteen instalments allocated to Mr. Jeffs' costs and to the debt of £316 10s. 2d., amounting to £353 1s. 3d., Mr. Saunders was to make and deliver eighteen promissory notes payable to the bankrupt "or order" as follows: six notes of £15, nine notes of £20, two notes of £25, and one note of £18 1s. 3d. In the event of any instalment not being paid, the whole of the balance to become payable. At the date when this agreement was come to, the understanding between the bankrupt and the testator as to not giving notice of the assignment of Jan. 15, 1924, was still in force, and Mr. Jeffs, with the knowledge and assent of the testator, conducted and concluded the negotiations with Mr. Saunders' solicitors in the name of the bankrupt without disclosing the assignment. At this time, neither Mr. Jeffs nor the testator was aware that the bankrupt had committed an act of bankruptcy, or that a bankruptcy petition had been filed against him. The testator, having died, could not, of course, be called to deny knowledge or notice, but the irresistible inference was that he at this time was also unaware of the act of bankruptcy and of the filing of the bankruptcy petition. On the conclusion of the agreement with Mr. Saunders, the eighteen promissory notes were sent by Mr. Saunders' solicitors to Mr. Jeffs, who handed them to the testator and told him to get the bankrupt to endorse them. The testator, however, at once handed the promissory notes back to Mr. Jeffs with instructions to collect them on his behalf, telling Mr. Jeffs that he (the testator) would ask the bankrupt to call at Mr. Jeffs' office to endorse them. As the bankrupt failed to call, Mr. Jeffs sometime later rang him up on the telephone and asked him to come to his office and endorse the notes which he promised to do. In spite of this promise, however, the bankrupt did not call, and the promissory notes were never in fact endorsed by him. Mr. Saunders paid the amount of each promissory note when it fell due to Mr. Jeffs, who, after first satisfying his costs out of the moneys so received, paid a portion of the remainder over to the testator. Mr. Jeffs stated in the witness-box that, as between the bankrupt and the testator, he had received these moneys (except in so far as they represented his costs) on behalf of the testator and not on behalf of the bankrupt. On the payment of the amount of each promissory note, Mr. Jeffs returned the note which had been so discharged to Mr. Saunders for cancellation. On Sept. 18, 1924, a receiving order was made against the bankrupt on the petition which had been filed on Feb. 27, 1924, which latter date was the date of the commencement of the bankruptcy. At the date of the receiving order, Mr. Saunders had paid and the testator had received from Mr. Jeffs sums amounting in the aggregate to £90 in respect of the debt of £316 10s. 2d. Neither Mr. Jeffs nor the testator knew or had notice that the bankrupt had

committed an act of bankruptcy, or that a bankruptcy petition had been filed against him until the receiving order was advertised in "The Times" of Sept. 24, 1924, and thereupon Mr. Jeffs at once gave notice to Mr. Saunders of the assignment of Jan. 15, 1924. On Sept. 25, 1924, an order for adjudication was made, and on Oct. 7, 1924, the applicant was appointed trustee, which appointment was, on Oct. 11, duly certified by the Board of Trade. The testator died in April, 1925, and the respondent was the executor of his will.

On Aug. 28, 1925, the trustee launched this motion claiming a declaration that the two debts comprised in the assignment of Jan. 15, 1924, by the bankrupt to the testator were, at the commencement of the bankruptcy, in the order or disposition of the bankrupt in his business by the consent and permission of the true owner under such circumstances that the bankrupt was the true owner thereof, and, therefore, formed part of the property of the bankrupt divisible amongst his creditors. At that date the amounts of the first seventeen promissory notes had been paid to Mr. Jeffs, and subsequently on Sept. 18, 1925, the amount of the eighteenth promissory note for £18 1s. 3d., which fell due on Sept. 14, 1925, was paid to Mr. Jeffs. Of the moneys so received by Mr. Jeffs in respect of the debt of £316 10s. 2d. he had paid to the testator the sum of £164 10s. 2d. and had in hand the balance.

Edward Clayton, K.C., and *G. H. Beyfus* for the trustee, referred to *Rutter v. Everitt* (2), *Re Neal, Ex parte Trustee* (3), and *Re Lankester, Ex parte Price* (4).

C. E. E. Jenkins, K.C., and *Tindale Davis* for the respondent, referred to *WILLIAMS ON BANKRUPTCY* (13th Edn.), p. 272, and *Graham v. Furber* (5).

P. O. LAWRENCE, J., stated the facts, and continued: The first question which arises for determination is whether the judgment debt of £903 1s. forms part of the property of the bankrupt divisible amongst his creditors, or whether it belongs to the respondent as part of the testator's estate. The solution of this question turns entirely on whether or not this judgment debt was a debt due to the bankrupt in the course of his business. If it was, it is not disputed that it was, at the commencement of the bankruptcy, in the order or disposition of the bankrupt in his business by the consent and permission of the true owner under such circumstances that the bankrupt was the reputed owner thereof. It is contended that Mr. Saunders' original indebtedness, which admittedly arose in the course of the bankrupt's business, was extinguished by the judgment which the bankrupt obtained, and that the debt owing on such judgment cannot properly be termed a debt due to the bankrupt in the course of his business. I confess to having considerable difficulty in appreciating the grounds for this contention. No doubt the reason for the distinction drawn in s. 38 (c) of the Bankruptcy Act, 1914, between debts due to a bankrupt in the course of his business and the bankrupt's other choses in action is because a bankrupt is more likely to obtain credit in his business on the faith of the former than on the faith of the latter. For the purpose of ascertaining whether any particular debt sustains the character of a debt due to a bankrupt in the course of his business within the meaning of s. 38 (c), it seems to me that the relevant enquiry is not whether the debt is a simple contract debt or a judgment debt, but whether the debt is one which is due to the bankrupt in respect of a transaction entered into by him in the course of his business. In my judgment, the fact of obtaining a judgment against a debtor who owes money in respect of a business transaction, although it converts his indebtedness into a judgment debt, does not change the character of his indebtedness from a debt due to the bankrupt in the course of his business to a debt due to the bankrupt not in the course of his business. The basis of the judgment is an indebtedness arising out of a transaction in the course of business, and, therefore, it seems to me that the judgment debt is just as much a debt in the course of business as the original debt on which it is founded. I am of opinion, therefore, that the judgment debt of £903 1s. is a debt due to

A the bankrupt in the course of his business and forms part of the property of the bankrupt divisible amongst his creditors.

As regards the debt of £316 10s. 2d., an altogether different, and, in my opinion, more difficult, question arises for decision. It is admitted by the respondent that this debt was due to the bankrupt in the course of his business, and that, at the commencement of his bankruptcy, it was in the order and disposition of the bankrupt in his business by the consent and permission of the true owner under such circumstances that he was the reputed owner thereof. It is, however, contended that the making and delivery of the promissory notes by Mr. Saunders, coupled with the deposit of such notes by the bankrupt with the testator, had the effect of taking the amounts of such notes out of the reputed ownership clause of the Bankruptcy Act. If the notes had been made, delivered and deposited before the commencement of the bankruptcy, I think that the amounts thereof would not have been in the order and disposition of the bankrupt within s. 38 (c), as it is settled law that a debt owing on a negotiable instrument does not come within that section, because the legal title to the debt passes by the delivery of the negotiable instrument without notice to the debtor. Moreover, had the deposit of the notes with the testator as a security for the debt taken place before the commencement of the bankruptcy, such a deposit undoubtedly would have operated to give the testator a good equitable charge on the notes which he could enforce against the bankrupt and his trustee: see *Re O'Brien, Ex parte Montague* (6).

D In the present case, however, the question arises whether the agreement between the bankrupt and Mr. Saunders and the subsequent deposit by the former of the notes with the testator, constituted valid transactions as against the trustee in bankruptcy in view of the fact that they were entered into after the commencement of the bankruptcy. The trustee has not hitherto attacked the agreement with Mr. Saunders. Indeed, on this motion he is in a way seeking to obtain the benefit of it. Mr. Saunders, apparently, had no notice of an available act of bankruptcy committed by the bankrupt when he entered into the agreement and when he made and delivered the notes. Therefore, if attacked, he could presumably avail himself of the protection afforded by s. 45 of the Bankruptcy Act, 1914.

E In the circumstances, the respondent contends that the deposit by the bankrupt of the notes with the testator (who also had no notice of an available act of bankruptcy) was a transaction for valuable consideration within s. 45, and that he, too, is entitled to avail himself of the protection afforded by that section. In my opinion, this contention is well founded. In the circumstances, the deposit of the promissory notes amounts clearly to a transaction for valuable consideration. Leaving out the consideration afforded by the mere existence of the advance, there is in this case, G I think, sufficient evidence which entitles me to infer that there was an agreement, at all events, to postpone enforcing the debt owing by the bankrupt to the testator entered into on the part of the testator at the time of the deposit of the notes. H Even if it were too great an inference to draw from the facts that there was an agreement between the testator and the bankrupt that, in consideration of the deposit of the promissory notes, the testator would accept repayment of his advance of £500 by instalments and would not enforce the payment of his advance so long as Mr. Saunders paid the amount of the notes as they became due, yet it is quite clear that the testator, on the strength of the deposit of the promissory notes, did, in fact, forbear to sue the bankrupt, and did, in fact, give him time, and did, in fact, accept payment by instalments of the amounts of the promissory notes as and when they were paid. Adopting the language of PARKER, J., in *Wigan v. English and Scottish Life Assurance Association* (1), those facts appear to constitute a sufficient consideration, though in a sense they are an ex post facto consideration, for the deposit of the notes. I am, therefore, on the whole, of the opinion that the defence of the respondent ought to prevail, and that the trustee is not entitled to succeed on this part of his motion.

I There is one further point which I ought to mention as to the £90 paid to the

testator before the receiving order. Whatever may be said as to the payments made by Mr. Saunders after the receiving order, it seems to me clear that the payment of the £90 was a payment protected by s. 45 (b), and that, even if I am wrong as to the rest of the debt of £316 10s. 2d., the trustee cannot succeed as to the £90.

In the result, I hold that the trustee is entitled to a declaration that the judgment debt of £903 1s. formed part of the property of the bankrupt divisible amongst his creditors and to the appropriate consequential relief. The trustee's claim in respect of the debt of £316 10s. 2d. will be dismissed. As the trustee has succeeded in part and failed in part, I think that the proper order to make is the trustee should have his costs out of the estate, and that the respondent should bear his own costs.

Solicitors: *Isadore Goldman & Son; Hays, Roughton & Dunn.*

[Reported by GEOFFREY P. LANGWORTHY, Esq., Barrister-at-Law.]

HYMAN v. STEWARD

[KING'S BENCH DIVISION (Salter and Greer, JJ.), April 30, May 8, 1925]

[Reported [1925] 2 K.B. 702; 94 L.J.K.B. 715; 133 L.T. 315;
41 T.L.R. 501; 69 Sol. Jo. 677; 23 L.G.R. 556]

Rent Restriction—Possession—Change of character of premises—Premises let as dwelling-house and shop—Permanent use of part for residence and part for business—Change to occasional user for residence—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 12 (2), (6).

The defendant was tenant of premises let at a yearly rent, within the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and consisting of a shop with living room behind on the ground floor, a kitchen in the basement, and two bedrooms, a sitting-room, and a store in the upper portion of the premises. In the tenancy agreement the premises were described as "all that shop and dwelling-house." When the defendant entered into possession he used the residential part as a permanent residence. Later, he moved his home elsewhere, and, instead of there being a constant and complete user as a dwelling-house, there was only such occasional user of the residential part of the dwelling-house, while other parts were used for business purposes and some parts were not used at all. The landlord claimed possession on the ground that there had been a change of user so as to alter the character of a dwelling-house with which the premises had been impressed and that the premises were, therefore, no longer protected by the Act.

Held: a partial change in the user of premises let as a dwelling-house protected by the Rent Acts was not sufficient of itself to deprive the premises of the protection of the Rent Acts, and, therefore, the landlord was not entitled to possession.

Quære: (SALTER, J.) whether mere use or disuse of the demised premises without the landlord's consent can either take a house out of the Act or bring it within the Act.

Notes. Section 12 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, does not apply to houses controlled by the Rent and Mortgage Interest Restrictions Act, 1939, s. 3, Sched. 1.

A As to what constitutes a dwelling-house for the purpose of the Rent Acts see 23 HALSBURY'S LAWS (3rd Edn.) 746 para. 1501, and for premises ceasing to be used as a dwelling-house see, *ibid.*, 808 para. 1587, and for cases see 31 DIGEST (Repl.) 640 et seq. For the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, see 13 HALSBURY'S STATUTES (2nd Edn.) 981.

Cases referred to :

- B** (1) *Phillips v. Barnett*, [1922] 1 K.B. 222; 91 L.J.K.B. 198; 126 L.T. 173; 38 T.L.R. 39; 66 Sol. Jo. 124; 20 L.G.R. 1, C.A.; 31 Digest (Repl.) 674, 7695.
 (2) *Williams v. Perry*, [1924] 1 K.B. 936; 93 L.J.K.B. 521; 131 L.T. 471; 40 T.L.R. 539; 68 Sol. Jo. 617; 22 L.G.R. 471, D.C.; 31 Digest (Repl.) 649, 7528.
C (3) *Prout v. Hunter*, [1924] 2 K.B. 736; 93 L.J.K.B. 993; 132 L.T. 193; 40 T.L.R. 868; 69 Sol. Jo. 49; 22 L.G.R. 746, C.A.; 31 Digest (Repl.) 639, 7467.

Appeal from Sheffield County Court.

The plaintiff, who was the landlord, brought an action against the defendant, the tenant, for the possession of certain premises at Sheffield on the ground that the premises had lost their character as a dwelling-house and the protection of the Rent Acts, by reason of a subsequent change of user for business purposes by the tenant. The premises consisted of a shop with a living-room behind on the ground floor, a kitchen in the basement and two bedrooms, a sitting-room and a store in the upper portion. In 1912 they were let to the defendant at a rent of £71 per annum, and the defendant and his wife entered into possession immediately. Up to 1918 they both resided and carried on business there, but in 1918 they went to live in another house and did not reside on the premises after that date. They continued, however, to carry on business in the shop, and continued to have most of their meals in the room behind the shop; while their son, who managed the business, slept on the premises at first several times a week, and afterwards at regular, though less frequent, intervals. Evidence was given that prior to the commencement of this action the defendant was making arrangements for one of his employees to sleep regularly on the premises. The county court judge held that he had no sufficient evidence before him of an alteration of the character of dwelling-house, which the premises obtained in 1912, by reason of subsequent change of user, and gave judgment for the defendant. The landlord appealed.

G *Mortimer, K.C.*, and *Coddington*, for the landlord, referred to *Phillips v. Barnett* (1), *Williams v. Perry* (2), and *Prout v. Hunter* (3).
Cave, K.C., and *Willoughby Jardine* for the tenant.

Cur. adv. vult.

H May 8. **SALTER, J.**—The question in this case is whether the demised premises were a dwelling-house to which the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, applied at the date of the action. The county court judge held that they were a dwelling-house, and the question is whether he was wrong in law.

I The premises on the ground floor consist of a shop and a living-room behind it. There is a kitchen in the basement, and above the ground floor there are a sitting-room, two bedrooms, and a storeroom. The premises were demised to the defendant by the then owner by a tenancy agreement in writing dated Oct. 21, 1912, and under it they were described as "all that said shop and dwelling-house," &c. The rent was £71 per annum. The tenancy commenced on Aug. 13, 1912, and was determinable by either side by six months' notice in writing to expire on Aug. 13 in any year. Some time in the summer of 1912 the defendant and his wife entered into possession of the premises and remained there till 1918, residing in the residential portion of the house and carrying on business in the shop. In 1918 they moved to another house and have not since lived on the premises. They continued to carry on their business in the shop and are still doing so. They also continued to have their meals, except breakfast, in the room behind the shop, and their son, who

managed the business and was kept late at work, used to sleep on the premises from two to four times a week. That continued until the beginning of 1923, after which, until the commencement of these proceedings, he used to sleep there about once a week. On every occasion on which he slept there he had his breakfast as well as his other meals on the premises. Cooking utensils were kept in the room behind the shop. After the defendant and his wife ceased to reside on the premises in 1918, parcels of stock were kept from time to time in the front sitting-room, and "empties in the back bedroom. There was, therefore, no change at any time in the user of the shop as contemplated by the tenancy agreement. As regards the residential part of the premises, instead of constant and complete user as a dwelling-house, there has been occasional user which has never ceased. There has also been a partial user of the residential part of the premises for business purposes, while part of them has not been used for any purpose.

On these facts the county court judge found that there was before him no sufficient evidence of change of user to alter the character of dwelling-house with which the premises were impressed by the tenancy agreement. He says in his judgment,

"The use of the premises as a dwelling-house has been in abeyance, but the defendant informs me that Holmes (an employee of the defendant) is going to live there. If Holmes does not, and the case comes before me again, I may find that the character of the premises has been changed, but at the present I do not think there is sufficient evidence of conversion to take the premises out of the Act."

The defendant had given evidence that, before the commencement of the proceedings, he made arrangements for Holmes, who was one of his employees, to live on the premises. There is no question that the premises at the time of the letting were a dwelling-house within the Act of 1920. The case has been argued on the footing that the premises were such a dwelling-house from 1912 to 1918, but ceased to be such by reason of the events which have occurred since 1918. Notwithstanding s. 12 (6) of the Act of 1920, there are cases in which dwelling-houses to which the Act applies can cease to belong to that class. For example, in the case of the destruction of the identity of the premises (*Phillips v. Barnett* (1)), or where the landlord has regained possession and has re-let the premises for non-residential use (*Williams v. Perry* (2)). Again, if premises are let or sub-let furnished, they enter a class expressly excluded from the Act. There remains the question whether, apart from these cases, the tenant can, by mere disuse or by use of the premises for non-residential purposes without the landlord's consent, take the demised premises out of the class of dwelling-houses to which the Act applies during the continuance of the tenancy. It may be said that the second proviso to sub-s. (2) of s. 12—

"The application of this Act to any house or part of a house shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade, or professional purposes"

—suggests that the use by the tenant of the whole of the demised premises for business purposes would take the premises out of the protection of the Act. I doubt whether the tenant, by his mere use or disuse of the demised premises, without the landlord's knowledge or consent can either take a house out of the Act or bring a house within the Act. It is not, however, necessary to decide this question in the present case. Assuming that the tenant can by mere user of the demised premises convert them from premises to which the Act applies to premises to which the Act does not apply, it is obvious that such user must be complete and unmistakable. Here there was ample evidence on which the county court judge could refuse to find that such conversion had been proved. There was, therefore, no error in law and this appeal must be dismissed.

GREER, J.—I agree. The action was brought to recover possession of premises known as 117, South Street Moor, Sheffield. The defence was that, as none

A of the conditions imposed by s. 5 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, had been complied with, the defendant, the tenant, was entitled to retain possession. The county court judge had to inquire whether, at the time that the action was brought, the premises were a dwelling-house to which the 1920 Act applied. To answer that question reference must be made to the provisions of s. 12 (2):

B "This Act shall apply to a house or a part of a house let as a separate dwelling, where either the annual amount of the standard rent or the rateable value does not exceed—(a) in the metropolitan police district, including therein the City of London, £105; (b) in Scotland, £90; and (c) elsewhere, £78, and every such house, or part of a house, shall be deemed to be a dwelling-house to which this Act applies."

C Then comes three provisos, the second of which is as follows:

"The application of this Act to any house or part of a house shall not be excluded by reason only that part of the premises is used as a shop or office, or for business, trade or professional purposes."

D When the premises in this case were first let they were used partly as a shop or office and it was intended that they should be so used after the commencement of the tenancy. They continued to be so used for a number of years, while the rest of the premises was used as a residence. It is quite clear that the premises then came within proviso (ii) to s. 12 (2) of the Act. It was, however, argued that, although the premises, when originally let, came within the proviso, the tenant was protected by the Act only so long as he used the premises partly as a shop and partly as a dwelling-house; and that, as it had been proved that at the time the action was brought he had entirely ceased to use any part of the premises as a dwelling-house, he no longer came within the proviso and the protection of the Act.

E The words of the statute create very considerable difficulties of interpretation. If one looks at sub-s. (2) of s. 12 apart from the proviso, it appears that one ought to ascertain whether or not the premises come within the Act, by seeing what were the terms of the letting. If one looks at the proviso, however, it seems as if one should look, not to the terms of the letting, but to the use to which the tenant has been putting the house. If the facts of this case had really raised that question there might have been considerable difference of opinion. I confine myself to saying that if there were a complete change of user, so that the tenant had ceased altogether to use the premises as a dwelling-house and had used the whole of them for trade or business purposes, I am inclined to think that the premises would have been taken out of the provisions of the Act and could be described only as premises which were used for business purposes. If the landlord did not interfere and was in any way estopped by his acquiescence from preventing the use for business purposes, it would be right to describe them as premises let for business purposes and not as premises let partly as a dwelling-house. However that may be, the facts of the present case do not raise that question, because we cannot say here that the county court judge was wrong in coming to the conclusion that the facts proved fell short of showing a cessation of the user of these premises as a dwelling-house and a change to user as business premises. For these reasons I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Torr & Co.* for *Oxley & Coward*, Rotherham; *Jackson & Jackson*, for *J. W. Fenoughty*, Sheffield.

[Reported by T. R. F. BUTLER, Esq., Barrister-at-Law.]

CANTIERE NAVALE TRIESTINA v. RUSSIAN SOVIET NAPHTHA EXPORT AGENCY

[COURT OF APPEAL (Sir Ernest Pollock, M.R., Atkin and Sargant, L.JJ.), February 26, 27, March 2, 1925]

[Reported [1925] 2 K.B. 172; 94 L.J.K.B. 579; 133 L.T. 162;
41 T.L.R. 355; 69 Sol. Jo. 443; 16 Asp. M.L.C. 501]

Shipping—Demurrage—Liability of charterers—Absolute undertaking to load in specified time—Ship not permitted by port authorities to stay in port to load—Vis major—Frustration—Exceptions in charterparty—Prima facie for benefit of shipowner.

An Italian ship was chartered to proceed to a Russian port and there to load a cargo. After she had arrived at the port of loading and had given notice of readiness, she was compelled by the authorities in the port, acting in obedience to an instruction by the Soviet government in Moscow to stop the admittance of Italian steamers to the port and generally suspend commercial relations with Italy, to leave before any cargo could be loaded. Later, she was allowed to return to the port of loading, and, after a few days, to load. An exceptions clause in the charterparty excepted, inter alia, "arrest and restraint of princes, rulers and people." Upon a claim by the owners for demurrage based upon the contention that the lay days ran continuously after the notice of readiness to load had been given,

Held: on the the construction of the charterparty as a whole the exceptions clause enured for the benefit of the shipowners and not for that of the charterers; there being an absolute undertaking by the charterers to load in a given number of days, (i) time ran while the ship was away from the port of loading although, for that reason, she was not able to load, and although her absence from the port was not due to any fault on the part of the charterers; (ii) the charterers could not be excused from their liability to pay demurrage on the ground that the performance of the charter had been made impossible by the exercise of a vis major; and (iii) the prohibition against loading, which appeared to be uncertain, capricious, and temporary in its character, did not render the charterparty illegal or frustrate it; and, therefore, the contention of the shipowners was correct and they were entitled to succeed in their claim.

Per ATKIN, L.J.: The question whether exceptions in a charterparty avail for the protection of the charterer or only for that of the shipowner is a pure question of construction. Prima facie the exceptions in the charter are put in for the benefit of the shipowner.

Notes. Considered: *Compania Crystal de Vapores of Panama v. Herman and Mohatta (India), Ltd.*, [1958] 2 All E.R. 508.

As to exceptions in a charterparty and demurrage see 30 HALSBURY'S LAWS (2nd Edn.) 315-357, and for cases see 41 DIGEST 407 et seq., and 558 et seq.

Cases referred to

- (1) *Thiis v. Byers* (1876), 1 Q.B.D. 244; 45 L.J.Q.B. 511; 3 Asp. M.L.C. 147; sub nom. *Tiis v. Byers*, 34 L.T. 526; sub nom. *Thiess v. Byers*, 24 W.R. 611; 41 Digest 540, 3676.
- (2) *Budgett & Co. v. Binnington & Co.*, [1891] 1 Q.B. 35; 60 L.J.Q.B. 1; 63 L.T. 742; 39 W.R. 131; 7 T.L.R. 15; 6 Asp. M.L.C. 592, C.A.; 41 Digest 553, 3609.
- (3) *William Alexander & Sons v. Aktieselskabet Dampskibet Hansa*, [1920] A.C. 88; 88 L.J.P.C. 182; 122 L.T. 1; 35 T.L.R. 709; 63 Sol. Jo. 788; 14 Asp. M.L.C. 493; 25 Com. Cas. 13, H.L.; 41 Digest 540, 3668.
- (4) *Postlethwaite v. Freeland* (1880), 5 App. Cas. 599; 49 L.J.Q.B. 630; 42 L.T. 845; 28 W.R. 833; 4 Asp. M.L.C. 302, H.L.; 41 Digest 539, 3666.

- A** (5) *Tyne and Blyth Shipping Co. v. Leech, Harrison, and Forwood*, [1900] 2 Q.B. 12; 69 L.J.Q.B. 353; 48 W.R. 590; 16 T.L.R. 197; 44 Sol. Jo. 296; 5 Com. Cas. 155; 41 Digest 567, 3913.
- (6) *Armement Adolf Deppe v. John Robinson & Co., Ltd.*, [1917] 2 K.B. 204; 86 L.J.K.B. 1103; 116 L.T. 664; 14 Asp. M.L.C. 84; 22 Com. Cas. 300, C.A.; 41 Digest 529, 3568.
- B** (7) *Barrie v. Peruvian Corp., Ltd.* (1896), 13 T.L.R. 101; 2 Com. Cas. 50; 41 Digest 408, 2537.
- (8) *Re Newman and Dale Steamship Co. and British and South American Steamship Co.*, [1903] 1 K.B. 262; 72 L.J.K.B. 110; 87 L.T. 614; 9 Asp. M.L.C. 351; 8 Com. Cas. 87, 41 Digest 408, 2538.
- C** (9) *Aktieselskabet General Gordon v. Cape Copper Co.* (1921), 91 L.J.K.B. 112; 26 Com. Cas. 289, C.A.; 41 Digest 407, 2536.
- (10) *Ford v. Cotesworth* (1868), L.R. 4 Q.B. 127; 9 B. & S. 559; 38 L.J.Q.B. 52; 19 L.T. 634; 17 W.R. 282; 3 Mar. L.C. 190; affirmed (1870) L.R. 5 Q.B. 544; 39 L.J.Q.B. 188; 23 L.T. 165; 18 W.R. 1169, Ex.Ch.; 41 Digest 532, 3602.
- D** (11) *Cunningham v. Dunn* (1878), 3 C.P.D. 443; 48 L.J.Q.B. 62; 38 L.T. 631; 3 Asp. M.L.C. 595, C.A.; 41 Digest 449, 2816a.
- (12) *Blight v. Page* (1801), 3 Bos. & P. 295, n.; 127 E.R. 163, N.P.; 41 Digest 454, 2849.
- (13) *Barker v. Hodgson* (1814), 3 M. & S. 267; 105 E.R. 612; 41 Digest 454, 2851.
- (14) *Embiricos v. Sydney Reid & Co.*, [1914] 3 K.B. 45; 83 L.J.K.B. 1348; 111 L.T. 291; 30 T.L.R. 451; 12 Asp. M.L.C. 513; 19 Com. Cas. 263; 41 Digest 409, 2548.
- E** (15) *Geipel v. Smith* (1872), L.R. 7 Q.B. 404; 41 L.J.Q.B. 153; 26 L.T. 361; 20 W.R. 332; 1 Asp. M.L.C. 268; 41 Digest 411, 2558.
- (16) *Andrew Millar & Co., Ltd. v. Taylor & Co., Ltd.* [1916] 1 K.B. 402; 85 L.J.K.B. 346; 114 L.T. 216; 32 T.L.R. 161; 60 Sol. Jo. 140, C.A.; 12 Digest (Repl.) 445, 3371.
- F** (17) *Ralli Bros. v. Compañía Naviera Sota y Aznar*, [1920] 2 K.B. 287; 89 L.J.K.B. 999; 123 L.T. 375; 15 Asp. M.L.C. 33; 25 Com. Cas. 227; sub nom. *Sota and Aznar v. Ralli Bros.*, 36 T.L.R. 456; 64 Sol. Jo. 462, C.A.; 11 Digest (Repl.) 435, 791.
- (18) *Metropolitan Water Board v. Dick, Kerr & Co.*, [1918] A.C. 119; 87 L.J.K.B. 370; 117 L.T. 766; 82 J.P. 61; 34 T.L.R. 113; 62 Sol. Jo. 102; 16 L.G.R. 1, H.L. 12 Digest (Repl.) 456, 3410.
- (19) *Porteus v. Watney* (1878), 3 Q.B.D. 227; 47 L.J.Q.B. 367; 26 W.R. 512; affirmed 3 Q.B.D. 534; 47 L.J.Q.B. 643; 39 L.T. 195; 27 W.R. 30; 4 Asp. M.L.C. 34, C.A.; 41 Digest 563, 3880.
- (20) *Straker v. Kidd* (1878), 3 Q.B.D. 223; 47 L.J.Q.B. 365; 26 W.R. 511; 41 Digest 563, 3880.

H **Appeal** from an order of ROCHE, J., on a Special Case stated by an umpire in an arbitration.

The facts, as stated by ROCHE, J., in his judgment, were that the ship chartered was an Italian tank steamer called the *Dora*. She was chartered, under a charterparty dated Oct. 16, 1922, by a body carrying on business in Russia which was found by the umpire to be a corporation or legal entity independent of, in the sense that it was separate from, the government of that country, although its management was under the control and direction and superior authority of the government of the country, which was said to have nationalised the industry in which the corporation carried on business. That industry was the oil industry and the charterparty was for a loading of a cargo of oil in the tank steamer *Dora* at the port of Batoum. The ship arrived at Batoum on Nov. 8. Notice of readiness to load was given at 8 a.m. on that day, and under the charterparty the lay days began to run at 2 p.m. However, at the time in question there was some dispute of a diplomatic nature between

the Russian government and Italy, and on Oct. 31, 1922, a telegram had been sent from Moscow to the Soviet authorities at Batoum as follows :

"In view of the aggressive policy of the Italian government, such as arresting our goods, you are requested to close at once the branch of Lloyd Triestino; not to send the goods to Italy; to stop the chartering of Italian steamers; to stop the admittance of Italian steamers to our ports; and to suspend generally any commercial relations with Italy. This decision is made in accordance with Narkominodal. Please confirm fulfilment. Oct. 31. (Sgd.) ASSISTANT COMMISSIONER FOR FOREIGN TRADE FROUMKIN."

Accordingly, the authorities at Batoum sent the ship away after she had been at Batoum for some hours and had given notice of readiness to load. She went away under protest and after some negotiations with the authorities, and, being ordered to leave, not merely the port, but Russian waters she went to the nearest neutral port, Constantinople. After certain negotiations she returned to Batoum on Nov. 25. The loading was not begun until Dec. 2, and it was finished on Dec. 5. The lay days, reckoned under cl. 5 of the charterparty ended on Nov 18, and the shipowners claimed demurrage under cl. 8. The most material provisions of the charterparty were as follows :

"(5) Two hundred and sixteen running hours (Sundays and holidays excepted), weather permitting, shall be allowed the charterers for loading and discharging, the charterers having the right of loading and discharging during the night, paying all extra expenses. . . . (7) The laying days shall commence from the time the steamer is ready to receive or discharge her cargo, the captain giving six hours' notice to the charterers' agents, berth or no berth. (8) The demurrage shall be payable at the rate of £130 per day, but if by accident a delay should take place at port of loading or discharge by fire or breakdown of machinery of charterers, the rate of demurrage shall be reduced to £65 per running day for the time so lost and pro rata for part of a day. (9) The act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates, assailing thieves, arrest and restraint of princes, rulers and people, collisions, stranding and other accidents of navigation excepted, even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners or other servants of the shipowners. Ship not answerable for losses through explosions, &c."

ROCHE, J., held that through no breach of contract on the part of the shipowners, but by a misfortune which was, certainly as regards the shipowners, covered and excused by the exceptions clause, the ship had to go away from the port, and during that period the lay days could not count for the benefit of the owners of the ship. The shipowners appealed.

Raeburn, K.C., and *Sinclair Johnston*, for the shipowners.

Cloughton Scott, K.C., and *Langton*, for the charterers.

Cur. adv. vult.

March 2. The following judgments were read.

SIR ERNEST POLLOCK, M.R.—This is an appeal from a judgment of ROCHE, J., given on Dec. 8 on a Special Case stated by the umpire in an arbitration. The claim is by shipowners for demurrage under a charterparty dated Oct. 16, 1921, by which the Italian tank steamer *Dora* belonging to the Cantieri Navale Triestina was chartered to the defendants. The umpire held the defendants liable for demurrage, subject to the question for the court of the true construction of the charterparty in relation to the facts stated by the umpire. ROCHE, J., held that the charterers were not liable to pay to the shipowners the full amount claimed, but were only liable for £411 13s. 4d. The owners appeal claiming that the award in their favour shall stand and the charterers cross-appeal, claiming that they are not liable for any sum for demurrage.

A It is important to refer to certain clauses of the charterparty and to give a short summary of the relevant facts stated in the Special Case. Clause 5 of the charterparty is as follows :

B "Two hundred and sixteen running hours (Sundays and holidays excepted), weather permitting, shall be allowed the charterers for loading and discharging, the charterers having the right of loading and discharging during the night, paying all extra expenses."

By cl. 7 :

"The laying days shall commence from the time the steamer is ready to receive or discharge her cargo, the captain giving six hours' notice to the charterers' agent, berth or no berth."

C Clause 8 provides that demurrage shall be payable at the rate of £130 per running day. Clause 9 contains exceptions, acts of God, perils of the sea, arrest and restraint of princes, rulers, and people, and so on. The question is whether the umpire was correct in his view that the lay days began on Nov. 8 and ran continuously and that none of the exceptions apply to excuse the charterers from liability. In my judgment, and subject to what I am going to say hereafter, that view is correct.

D The contract contained in the charterparty is absolute. It contains the phrase in cl. 7 :

"The laying days shall commence from the time the steamer is ready to receive or discharge her cargo . . . berth or no berth."

E Hence the vicissitudes which incurred are *prima facie* deemed to be at the cost of the charterers. Counsel for the shipowners cited three cases which establish, if cases are needed to establish such a principle: *Thiis v. Byers* (1), *Budgett & Co. v. Binnington* (2) and *William Alexander & Sons v. Aktieselskabet Dampskibet Hansa* (3). The liability generally is stated there first of all by LORD FINLAY, i.e., the charterer

F "is answerable for non-performance of the engagement if he has agreed to load or unload within a fixed period of time whatever the nature of the impediments unless they are covered by exceptions in the charterparty or arise through the fault of the shipowner or those for whom he is responsible."

G LORD SHAW, quoting a passage from LORD SELBORNE in *Postlethwaite v. Freeland* (4) (5 App. Cas. at p. 608) says ([1920] A.C. at pp. 97, 98) :

"If by the terms of the charterparty he [the charterer] has agreed to discharge it within a fixed period of time that is an absolute and unconditional engagement for the non-performance of which he is answerable whatever may be the nature of the impediments which prevent them from performing it and which cause the ship to be detained beyond the time stipulated."

H It is clear that the onus lies on the charterer to get rid of that liability which could have been provided for in the exceptions. ROCHE, J., held that the words which are found in the well known book by SCRUTTON, L.J., on CHARTERPARTIES AND BILLS OF LADING (11th Edn.) art. 129, can be used here to excuse the charterer in respect of the period of time during which the vessel has left Batoum and was at Constantinople. The words in the text are :

I "If the ship has to be removed from the port or becomes unfit for loading or discharging, e.g., by reason of a collision the period of such removal or unfitness will be cut out from the period of demurrage."

For that proposition *Tyne and Blyth Shipping Co. v. Leech, Harrison, and Forwood* (5) is cited. It is not suggested that that case is a decision to that effect. What is pointed out is that in that case a demand was not made for demurrage during days when the vessel was absent from the port of loading, that absence being

due to a collision which she had suffered, and it is said that that attitude was adopted in that case because by acquiescence between the parties there could be derived some authority for the proposition that where there absence of the vessel during part of the lay days has occurred through some outside and extraneous cause demurrage ought not to be charged as against the charterer. ROCHE, J., in his judgment, referring to that case, said :

"The second observation that I desire to make is that the authority cited for that proposition is *Tyne and Blyth Shipping Co. v. Leech, Harrison, and Forwood* (5) and that the decision in that case is on some other matter, and that so far as the proposition [laid down in the text-book] is concerned it is founded if at all on that case, on the fact that counsel for the ship did not venture or care to claim in respect of a period in which the vessel was absent from the port. Therefore I think the proposition must rest and stand or fall on its own merits. In my opinion, the proposition is sound, and, whatever be the cause, the owners of a ship which goes away from the port where she is to be loaded before she is loaded cannot during period of her absence from the port say that the lay days can count."

That statement embodies a very wide proposition indeed. ROCHE, J., invites acceptance of the proposition on the ground that it rests on its own merits. Personally, without some definite authority binding on this court, I could not accept so wide a proposition, a proposition for which, so far as I can discover, there is no absolute authority, and which appears to me to run counter to the general rule of law which I have repeated in the passages which I have read from the case which was before the House of Lords—*William Alexander & Sons v. Aktieselskabet Dampskibet Hansa* (3). It appears to me, therefore, that the judgment of ROCHE, J., which is based on the acceptance of that proposition cannot stand.

But counsel for the charterers said that, apart from that ground on which ROCHE, J., gave his judgment, the charterers can be excused from liability on several grounds. The first was, he said, that the vessel was not in fact a ready ship, that is to say, although she had reported at Batoum and had given notice that she was ready to load, a notice which at the end of six hours expired and introduced a corresponding liability, that, having regard to the difficulties which began on or about 2 p.m. on Nov. 8, it cannot be said that the *Dora* was a ready ship. We have to take the facts as found by the umpire. He has intended to find that the lay hours under the charterparty began to run from 2 p.m. on Nov. 8. In effect that means that he held that the vessel was a ready ship at 8 a.m. on that day, and it appears to me that we are bound by that finding. I think that in law the umpire was right, and that the position of the *Dora* is, if not governed by, well illustrated by, *Armement Adolph Deppe v. John Robinson & Co., Ltd.* (6). In that case where there was a term equivalent to this, namely, that the ship was under an absolute liability, berth or no berth, when she had reached the place of loading, that she should be immediately made ready as soon as she could go alongside, it was held that lay days commenced to run. Having regard to the findings in the award and the law applicable to these findings it appears to me that the umpire was right in holding that the lay hours began as from 2 p.m. on Nov. 8.

The next point is that the exception clause, act of God, restraint of princes, &c., applies mutually for the benefit of shipowners and charterers, and, inasmuch as what prevented the *Dora* from loading was a restraint of rulers and people, the charterers are entitled to rely on that clause. In support of that our attention has been called to three cases—*Barrie v. Peruvian Corpn. Ltd.* (7), a decision of MATTHEW, J., and a decision of BINGHAM, J., in *Newman and Dale Steamship Co. and British and South American Steamship Co.* (8). In regard to these two cases it is plain that they are based on the fact that the exceptions clause was a very particular one, not what might be called the more ordinary form, and I cannot apply the reasoning of those cases to establish the fact that cl. 9 of the present

A charterparty is a mutual clause. The third case referred to was *Aktieselskabet General Gordon v. Cape Copper Co.* (9), the headnote of which runs as follows (26 Com. Cas. 289):

B “In deciding whether a particular provision in an exceptions clause in a charterparty applies in favour of both shipowner and charterer, or applies only in favour of one or other party to the exclusion of the other, regard must be had to the exact wording of the clause in question and to the construction of the charterparty as a whole, and no assistance can be obtained from the decisions of other cases unless the circumstances in those other cases were substantially identical.”

C That decision is binding on us, and it appears to lay down, if it was necessary to lay down, the rule that in all these cases one must look at the particular clause which has to be construed, and that little assistance is to be found from other clauses which may have been construed otherwise. I come back, therefore, to look at this clause itself. I do not think, as I have said, it is covered by, or that any assistance is to be derived from, *Barrie v. Peruvian Corp'n. Ltd.* (7) or *Newman and Dale Steamship Co. and British and South American Steamship Co.* (8), and looking at the clause itself I come to the conclusion it enured for the benefit of the shipowners only and not for the benefit of the charterers. I do not think, therefore, that the charterers are excused by virtue of the exceptions of cl. 9.

E Then counsel for the charterers said that in this case both parties were really prevented by vis major, so that neither party could complete the contract, that the action of the Russian government in sending the vessel away from Batoum was such an overriding act as to render the liability of the charterers far different from what it was ever intended to be, either by the express terms of the charterparty or terms which must be implied. For that he quoted *Ford v. Cotesworth* (10) and *Cunningham v. Dunn* (11). I think it important to say a word or two about these two cases. *Ford v. Cotesworth* (10) was a case in which there was a difficulty in the vessel getting to her destination in consequence of a possible visit of the Spanish fleet to the fort of Callas. It is important to observe that in that case there was no positive undertaking to load or discharge cargo in a given number of days, and the application there made of vis major to excuse delay is expressly stated by MARTIN, B., to be applicable because there was no positive undertaking to load or discharge in a given number of days. By his express words he does not intend to alter the general liability as I have stated it. He says:

G “In this case there is only an implied contract on the part of the defendants, for there is no positive contract whatever on their part.”

H Having put this case into the category where there is only an implied contract and no positive undertaking he applied the rule of vis major. So in *Cunningham v. Dunn* (11), which follows *Ford v. Cotesworth* (10), there is again no absolute contract, and the basis of the decision appears to have been that both parties were conscious of the fact that the vessel, if she took as dead weight munitions of war, would have a difficulty and possibly an over-riding difficulty, in entering a Spanish port. That knowledge, being knowledge on the part of both parties to the contract, it was possible to imply a term in the contract under which there should be no liability if this difficulty known to both sides became vital to the enterprise. In effect the two cases amount to this, that where both parties are prevented by vis major so that neither party is ready to perform his contract, then neither party can sue the other, that is, in a case where there is no absolute contract on the part of the charterer, and in a case where the term which has to be considered is at best one of implication only. These cases stand, but it is not to be forgotten that there are two well-known older cases, *Blight v. Page* (12) and *Barker v. Hodgson* (13). In both of these cases the charterer, who had entered into an absolute contract, was held to be liable. LORD ELLENBOROUGH says in *Barker v. Hodgson* (13):

"Is not the freighter the adventurer who chinks on the voyage, and is to furnish, at all events, the subject-matter out of which freight is to accrue? The question here is on which side the burthen is to fall."

He comes to the conclusion that, the contract which had been entered into by the charterer being one in which no relief was given by the exceptions, on him rested the liability for the delay. These two cases, and *Ford v. Cotesworth* (10) and *Cunningham v. Dunn* (11) have been said to stand together on the ground that in the last two there was no absolute contract for a fixed number of days for loading or discharging, whereas there was in the two earlier cases. Further, I cannot find that in *Ford v. Cotesworth* (10) or *Cunningham v. Dunn* (11), in the application of the doctrine of vis major, there is a general doctrine to be applied which would excuse the charterer in what, after all, is a vicissitude or difficulty not unlikely to occur at a Russian port and one which might have been foreseen, for both during the war and since the war difficulties arising from port prohibitions have not been uncommon.

Next it is said by the charterers that the contract became illegal, that there was an illegality which would prevent them from carrying out their duty under the terms of the charterparty. It appears to me it is important to consider the nature of these acts which created the illegality as stated in the award. It appears that there was a somewhat uncertain attempt to put in force a port regulation and it is not every apparent illegality which is to be so treated. In *Embiricos v. Sydney Reid & Co.* (14) SCRUTTON, J., said of a restraint of princes :

"It was, in the language of LUSH, J., in *Geipel v. Smith* (15), likely to continue so long and so to disturb the commerce of merchants as to defeat and destroy the object of a commercial adventure like this. If there is such a likelihood and probability the fact that unexpectedly the restraint is removed for a short time does not involve that the parties should have foreseen this unexpected event and proceeded in the performance of an adventure which at one time seemed hopelessly destroyed."

In *Andrew Millar & Co., Ltd. v. Taylor & Co., Ltd.* (16) it was held that where a prohibition of export had been imposed the plaintiff should have waited a reasonable time before repudiating the contract in order to see whether this prohibition was of such a nature as was likely to continue and to prevent the agreement being carried out within a reasonable time. It appears to me that the difficulty which arose at Batoum, which is claimed to be an illegality, is one to which it was not possible immediately to attribute any characteristic—certainly not the necessary characteristic—of an illegality and having regard to the cases I have referred to and applying the sort of tests that ought to be applied to see what was its nature, it appears to me that the charterers cannot claim that this port regulation and prohibition made the contract illegal or frustrated it or made it illegal for them to continue their contract in the sense that they were discharged from that obligation.

The last case relied on by the charterers was *Ralli Bros. v. Compania Naviera Sota y Aznar* (17). That is a case in which it was held that a prohibition, or rather a regulation, of the Spanish government which provided that no freight should be paid at a rate in excess of 875 pesetas per ton applied and made it impossible and illegal to carry out the terms of the contract as entered into. But, in my judgment, that case does not govern the present. It is important to recall that the decision related to a part of the contract which was vitally affected by the law of Spain. By the contract the owners and consignees of a cargo were to pay freight, one moiety on the arrival of the ship at Barcelona, the other moiety on the discharge of the cargo. An action was brought by the Spanish owners against the English charterers where liability had been reserved, and LORD STERNDALÉ said :

"I think the clauses as to place of payment constitute part of the obligation to pay and are not merely instructions."

A WARRINGTON, L.J., said :

"There is no absolute obligation on the part of the charterers that they will themselves pay but only that payment shall be made in a particular way—namely by foreigners at a foreign port. . . . I think it must be held that it was an implied condition of the obligation of the charterers that the contemplated payment by Spaniards to Spaniards in Spain should not be illegal by the law of that country."

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SCRUTTON, L.J., said :

"I accept the contention of the shipowners that the charterers remain liable for freight in spite of the provision that half of it was to be paid by the receivers. But I think they remain liable to pay Spanish currency at the Spanish port of discharge to the Spanish company resident in Spain."

C
He adds that so to pay it for the carriage of goods is illegal by the law of Spain. The court were considering the effect of illegality on the totality of the contract left to be performed. WARRINGTON and SCRUTTON, L.JJ., were treating it as the contract although in origin it was part of a larger contract contained in the charterparty. The citation of *Metropolitan Water Board v. Dick, Kerr & Co.* (18) and what is said ([1920] 2 K.B. at p. 301) seems to point to this view being the dominant view in the minds of the lords justices, also the broad decision stated by SCRUTTON, L.J. (*ibid.* at p. 304), that that proposition is to be confined to a contract the main consideration of which is found to be or to become illegal. But, whether that be the true explanation or not, I cannot accept the view that the capricious and uncertain manner in which a port regulation was enforced created an illegality in the sense referred to in the cases quoted. Still less did it cause a frustration of the enterprise. Neither can I hold that *Ralli Bros. v. Compania Naviera Sota y Aznar* (17) applies to this case. It does not alter the clear and definite liability of the charterers under such a charterparty as this, which contains a fixed time for loading or discharging, berth or no berth, to pay demurrage if the lay hours are exceeded in a manner not excused by other conditions or exceptions of the contract. The statement of law to which I have referred in *William Alexander & Sons v. Aktieselskabet Dampskibet Hansa* (3) still remains and it seems to me, for these reasons the charterers have not shown that they are excused from their liability to pay to the shipowners. When I consider the various grounds put forward on behalf of the charterers I do not find any which excuses them under a charter like this from their liability to pay when they have failed to load within the time limited by the lay hours. In these circumstances it seems to me that ROCHE, J.'s judgment must be set aside, the appeal allowed, and judgment entered for the shipowners for £3,168 15s. with costs.

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ATKIN, L.J.—This is a claim for demurrage brought by the owners of an Italian ship against the defendant company on a charter by which the defendants chartered the ship to proceed to Batoum and there load a cargo of oil. The charter was a fixed time charter and provided for a rate of demurrage with no restriction upon the time during which the rate of demurrage was payable. The defendants were found by the arbitrator to be an independent entity—that is to say, independent of the Russian government, though it is plain that they were very closely associated with the Russian government, and are found by the award to be in fact controlled by the Russian government. But for the purpose of this case we have to treat the matter as if the defendants were an ordinary commercial company.

The first question arises by reason of the vessel being absent from the port of Batoum for a period from Nov. 8 until Nov. 25, and it is said that the absence of the vessel during that period prevented the lay days from running from and expiring in that period. I think, so far as this matter is concerned, it must be taken on the footing as found by the arbitrator, that notice of readiness had been given under the charterparty on the morning of Nov. 8, and that the lay days had begun to run

somewhere about 2 p.m. on that day. Therefore, for the purpose of this case, we are considering a period in which the lay days had begun to run but had not expired before the ship absented herself from the port. She absented herself from the port because she was constrained to do so by a display of force on the part of the executive authority at the port of Batoum, and we have to consider the defence that is raised as to the illegality arising from the circumstances in which she was compelled to leave.

The first point, however, is a simple one and quite independent of illegality. The judge says this in substance. The ship arrives at the port and gives her notice and the lay days begin to run, but if the ship absents herself from the port, then the lay days no longer run, because it is a condition of their running that the ship should be present in the port, not, of course, that she should be at the berth and in fact loading, but that she should in fact be at the port. That is a very simple proposition, and the question is whether that is in accordance with the law relating to shipping transactions. It appears to me there is no authority at all for the proposition, and it is quite contrary to the propositions of law that have been established for a great number of years and have the authority of the House of Lords. The judge bases himself upon a statement in a text-book of which certainly I should be the last person to deny the authority—SCRUTTON ON CHARTERPARTIES AND BILLS OF LADING (11th Edn.) art. 129, p. 342, where it is stated that

“if the ship has to be removed from the port or becomes unfit for loading or discharging, e.g., by reason of a collision, the period of such removal or unfitness will be cut out from the period of demurrage.”

For that is cited *Tyne and Blyth Shipping Co. v. Leech, Harrison, and Forwood* (5). That made its appearance for the first time in the text-book after the decision of that case. With the greatest respect, I think that case is no authority at all for the proposition for which it is cited. In that case the *City of Newcastle* had been chartered to load a cargo of ore at Poti on a fixed time charter and fixed time for demurrage. The vessel arrived on Feb. 11, when the lay days began to count, and ten running days for loading expired on Feb. 24, but no quay berth was available. On March 4, while lying at anchor in Poti Roads, still waiting for a berth, another vessel collided with and damaged her, and on March 7 she proceeded to Constantinople for repair. If she had remained she would have got a berth by March 8 and completed her loading by March 16. On April 19 she again arrived at Poti, but lost her turn again. The plaintiffs claimed demurrage from Feb. 24 to March 4, and from April 19 to June 10, a period of fifty-two days, but not for the period when the *City of Newcastle* was incapacitated by reason of the collision. The defendants admitted liability for the demurrage they would have been liable to pay on the supposition that she would have got a berth on March 8. The decision of the judge was that the plaintiffs were entitled to recover. He held that when she returned to Poti she again went on demurrage. He said :

“I think that, although no claim has been made on either side in respect of the period during which the vessel was away at Constantinople, the period of demurrage was resumed without any break in the continuity of the obligation when she got back to Poti, and that it lasted for the time claimed for in this action.”

So far from that being an authority that the absence of the ship prevents demurrage from being claimed, it appears to me to be a direct authority that in some cases, at any rate, the absence of the ship does not prevent demurrage from being claimed. The judge quotes the quite familiar instance of a ship being driven from a port by stress of weather, being obliged to run away from the port and being obliged to go there again. In these circumstances, in a fixed time charter I should have thought there could be no doubt at all that demurrage was payable on the principle for which there is ample authority, that in such a charter there is an absolute obligation on the charterer to load the vessel within the time that is stipulated for loading her,

A and that he is not excluded from doing that by any cause unless it is a cause for which he has stipulated in a properly drawn exception from such absolute liability, or unless it arises by reason of the shipowners' default.

B It is hardly necessary to cite authority for it, but there happens to be a very recent authority in the House of Lords in reference to the matter: *William Alexander & Sons v. Aktieselskabet Dampskibet Hansa* (3). It is a Scottish case. There a vessel was chartered to proceed to Archangel and load a cargo of timber and thereafter to proceed with the cargo to Ayr. The charterparty provided that the cargo was to be loaded and discharged at the rate of not less than 100 standards per day, whether berth available or not, "always provided the steamer can load and discharge at this rate," and that, in the event of the steamer being detained beyond the time stipulated as above for loading and discharging, demurrage should be paid at £70 per day and pro rata for any part thereof. The ship duly arrived at Ayr, and if the discharge had been carried out at the stipulated rate it would have been completed in six and one-third days, but owing to a shortage of labour at the port, it occupied thirteen and one-third days. The shipowner claimed seven days' demurrage. LORD FINLAY said ([1920] A.C. at p. 94):

D "On this appeal a great many cases were cited laying down the rule that if the charterer has agreed to load or unload within a fixed period of time (as is the case here, for certain *est quod certum reddi potest*) he is answerable for the non-performance of that engagement, whatever the nature of the impediments unless they are covered by exceptions in the charterparty or arise through the fault of the shipowner or those for whom he is responsible. I am here adopting in substance the language of SCRUTTON, L.J., in his work upon charterparties and bills of lading, art. 131 of the authorities. I will mention only *Budgett & Co. v. Binnington & Co.* (2), and I will refer specially to the judgment in that case given by LORD ESHER. Although no authority upon the point was cited which would in itself be binding upon your Lordships' House, there has been such a stream of authority to the same effect, that I think it would be eminently undesirable to depart in a matter of business of this kind from the rule which has been so long applied, even if your Lordships felt any doubt as to the propriety of these decisions in the first instance. I myself have no doubt as to their correctness, and I understand that this is the opinion of all your Lordships."

G Therefore, it appears to me unless the charterers can show that the absence of the ship arose from a default of the shipowners, and that they plainly cannot do, or unless they show that the matter is covered by an exception in the charterparty, and I think they have failed to do that, they are liable unless they can succeed upon the further ground of illegality which is not mentioned in the House of Lords because it did not arise. Perhaps I may put the matter in another way. It is said that the time should not run while the vessel was away from the port, because during the time obviously the vessel was not ready and willing to load. That appears to be disposed of by the authority I have mentioned which indicates that it is not an implied condition of the right of a shipowner to demurrage in these circumstances that she should be ready and willing to load, and, if authority were needed, that express point is dealt with in *Budgett & Co. v. Binnington & Co.* (2) by LINDLEY, L.J., as follows:

I "This stipulation is in terms unconditional, and it has frequently been called an absolute contract, by which I understand an unconditional contract. What we have to consider is whether there is any implied condition attached to this contract. It is argued that there is such a condition, and that it may be expressed by saying that the shipowner shall be able and willing to do his part in the unloading and that, if he is not so able and willing, the freighter is relieved from the consequences of a breach on his part. Such a statement is far too wide; for, if it were true the cases of *Thiis v. Byers* (1), *Porteus v.*

Watney (19) and *Straker v. Kidd* (20), would have been improperly decided. I agree that there is an implied term in the contract, and that is, that the shipowner shall not prevent the freighter from performing his part of the contract; and if it is shown that this has happened, the freighter is discharged."

Indeed, if one comes to think of it, there can be no reason why the absence of the ship from the harbour, once she has left and the lay days have begun to run, without any fault on the part of the owner, should prevent demurrage from running. A ship may be prevented from loading by causes quite outside the will of either the shipowner or charterer, and yet the charterer is still liable for demurrage. It appears to me to make no difference whether the vessel is in harbour fifty yards away from a berth and cannot get to the berth or whether she is fifty miles away. In either case the charterer has undertaken to load and is liable for the delay because he has entered into a contract to load the ship within a certain time, and if he does not he pays a fixed sum for the delay. In these circumstances I am quite unable to agree with the judge in the views that he took as to the absence of the ship from the port.

But that compels us to decide another point on the question of illegality. It is said the reason why the vessel was away from the port was that in fact it was illegal for her to take on board a cargo at all, and it was illegal also for her to remain in the harbour. It is said that this illegality operated for a period before she arrived at the port. It operated when she arrived so as to prevent her being an arrived ship, it prevented her from being ready to load, and it prevented her owners, at any rate for the period during which she was absent, from being able to say that there was a valid contract running obliging the charterer to load so that the lay days apparently would not expire while she was absent. The judge has not decided this point, deeming it unnecessary to decide it. In that respect it appears to me he cannot have accepted the full argument of the charterers, because there is no doubt that, if there is illegality, it is a plea which is not confined to the period of absence from the port, and, indeed, the strongest way of putting it for them is to say that the illegality operated so as to prevent the lay days from ever running. That is the matter that we have to consider. The point about illegality is really based on a decision of the Court of Appeal in *Ralli Bros. v. Compania Naviera Sota y Aznar* (17), which is a famous case because it related to the most valuable cargo that was carried during the war of 1914-18. It was there said that by Spanish law it was illegal to pay more. As far as I can see no one ever suggested that the effect of the illegality in that case was to destroy the contract or to invoke the doctrine of frustration. It was merely a defence to that portion of the contract relating to freight. SCRUTTON, L.J.:

"I should prefer to state the ground of my decision more broadly and to rest it on the ground that where a contract requires an act to be done in a foreign country, it is, in the absence of very special circumstances, an implied term of the continuing validity of such a provision that the act to be done in the foreign country shall not be illegal by the law of that country."

It is said that in the circumstances of this case it was illegal for the charterers to load or for the shipowners to put on board the cargo at the time when the vessel arrived, and that the contract was subject to the implied term that it no longer continued valid. In the view I take of this case the question does not arise, because, to my mind, whatever the bearing of the doctrine of illegality upon a contract to load and to pay demurrage it depends upon proving illegality, and I think in this case nothing that could be considered illegal within the meaning of the rule has been proved. Illegality at foreign law is a question of fact, and we must take the facts as found by the learned umpire. It appears to me that all the facts he has found are these. There appears to have been about this time some temporary cause of diplomatic friction between Russia and Italy, and a communication emanated from the executive department of the Russian government at Moscow

A addressed to the Soviet authorities at Batoum that in view of the aggressive policy of the Italian government they were to stop the admittance of Italian steamers to the port, and suspend generally any relations with Italy. It appears to me that is a piece of executive action on the part of the executive authorities at Batoum, and it certainly produced no very certain results as far as the executive authorities at Batoum were concerned. There is no doubt that when
B the vessel first arrived she was told there were difficulties; she was not to communicate with the shore, and she must go away. The master remonstrated and said he must get his clearance. Thereupon he was allowed opportunities of getting clearance. He was allowed to wait for a certain time, and then he was told that the order was withdrawn, and that there was no difficulty. He went on shore, gave notice to the charterers' agents. It must always be remembered that
C the charterers were in very close touch with the particular executive authorities who issued this order, and the charterers' agents accepted notice of readiness to load and said they would load as soon as they had finished loading another steamer then at the berth. The notice of readiness expired about two o'clock on that particular day, and thereupon the executive authorities again began to assert themselves, but again with somewhat uncertain effect. Eventually military force arrived,
D and the ship was told to go. The whole result of that appears to me merely to indicate that here was action of the executive authority, uncertain, somewhat capricious, and temporary in its character, and it appears to me very far removed from such illegality as is said ought to be assumed to be the subject of an implied term by the parties at the inception of the contract of charterparty. It is precisely the kind of conduct which is ordinarily covered by what is known as "restraint of
E princes." I do not say that restraint of princes may not operate because of the contract becoming illegal according to the law of the port, but it certainly is not co-terminous with illegality, and in this case I find no illegality at all.

In these circumstances it seems to me unnecessary to consider the further questions that would arise if it had been illegal. Therefore, I do not decide the point. I merely reserve the question as to what would be the effect on a contract
F to load in a certain time for a temporary illegality appearing either when the ship first arrived or commencing to operate when she had arrived and after the lay days had begun, each of which may give rise to difficult considerations of law. I agree with the Master of the Rolls that it is unnecessary to consider *Ford v. Cotesworth* (10) and *Cunningham v. Dunn* (11). *Cunningham v. Dunn* (11) seems to have been misunderstood. It is not a claim by a shipowner against a charterer in
G respect of an absolute obligation by the charterer to load a ship, but it is a claim by a charterer against the ship for not staying to be loaded in a case where there was no permanent illegality preventing the charterer from putting the chartered cargo on board the chartered ship, and, as no one had ever contended that the absolute obligation imposed on a charterer was extended to a ship, it was an ordinary case of a charterer claiming damages against a ship for not staying to be loaded
H when it could be proved that, if the ship had stayed, the charterer would not have been able to put a single ton of cargo on board. How any plaintiff could recover in those circumstances it is impossible to understand.

That brings me to a third point argued, which the judge found it unnecessary to decide although he had expressed an opinion on it in favour of the shipowners, namely, that here the exceptions were mutual, that there was an exception of
I restraint of princes which relieved the charterers from being under an obligation to load the ship. That question turns on the construction of the charterparty and there are only two clauses I need refer to on that matter. [His Lordship read cl. 8 and 9 and continued] : The question arises whether the exceptions in cl. 9 are inserted only in favour of the shipowners or whether they are inserted in favour of the charterers. There is no rule, each charter has to be considered on its merits, and it is a question of construction looking at the charterparty as a whole whether or not the exceptions operate in favour of the charterer as well as the shipowner.

The best decision I have found is in *Aktieselskabet General Gordon v. Cape Copper Co.* (9) and the judgment of SCRUTTON, L.J., decided in 1921. In that case it was held that the exceptions clause, which very closely corresponded with the exceptions clause in this case did not operate in favour of the charterers. SCRUTTON, L.J., said :

"The question in this case is one which ever since I was at the Bar has been argued with considerable heat by counsel concerned in it—whether or not certain provisions in the charterparty avail for the protection of the charterer or only for the protection of the shipowner. In my view it is quite impossible to lay down any general rule which will enable that question to be answered. Charterparties vary infinitely in their terms. In the view of the history of the matter you cannot answer the question without a careful study of the terms of the particular charterparty concerned; and a decision on that particular charterparty will only govern charterparties in a very similar form."

I think that is the right view, and, in my opinion, it would be wrong to lay down any general rule. It is a pure question of construction. *Primâ facie* the exceptions are put in for the benefit of the shipowner. Looking at the contract in the present case it appears to me that the general exceptions are so broad that they can be more reasonably applied to the shipowners' liability than to the charterers' liability. It seems to me construing this contract as a whole, that the exceptions are not mutual, and that the charterers are only able to excuse themselves for time lost by reason of the express causes mentioned in cl. 8. Therefore, they are not excused. The result is that the award of the arbitrator is right in awarding the full amount of demurrage claimed, and the appeal must be allowed.

SARGANT, L.J.—The award involves the finding of fact that the lay days or hours began at 2 p.m. on Nov. 8. The ship is found to be an arrived ship, i.e., ready to discharge, at 8 a.m. on Nov. 8, when notice to that effect was given to the charterers. The lay days or hours would therefore begin six hours later, namely, at 2 p.m., and the award contains a definite statement to that effect at the end of cl. 5. That being so, the finding that "about 2 p.m. and thereafter till 11.30 p.m. there were uncertain and contradictory orders given by the authorities," does not, in my judgment, negative the definite previous finding that the lay hours began at 2 p.m. The events which subsequently happened certainly did not amount to a frustration of the enterprise or a putting an end to the contract of affreightment, and the only question left is, in the words of LINDLEY, L.J., in *Budgett & Co. v. Binnington & Co.* (2), on whom does the risk fall. Here there is to start with an absolute or unconditional contract by the charterers to load and unload within a definite number of hours, 216 running hours—nine days—and failure to comply with this absolute contract *primâ facie* makes the contracting party liable for the resulting loss unless there is some qualification in the charterparty of this absolute contract. The mere absence of the vessel from the port during the lay days does not, I think, exclude this absolute contract. The only relevant qualification must be one introduced by the general exception clause. As to this clause two questions arise, namely, first, whether the cause of the delay is within the words of the clause, and, secondly, whether this clause applies here in favour of the charterers. As to the first question, I think that the delay was due to restraint of princes, rulers, and peoples within the terms of cl. 9—the general exception clause. This position was accepted by counsel for the shipowners, and it is to be remarked that such a restraint necessarily in many cases involves anyone resisting it in an illegality. I cannot see that any illegality is shown in this case otherwise than such as would have been involved in a resistance to the executive. But, on the other hand, I am of opinion that cl. 9 is not a clause in favour of the charterers, so far at any rate as a claim for demurrage is contained. It is true that the second half of cl. 9 applies in terms to the ship only, and it was contended that this shows by way of contrast that the exceptions in the first part of the clause are not in favour of the owners

A only. There are other clauses in the contract excusing the charterers (particularly as to claims for demurrage) which cover some of the same ground as cl. 9 and are more particular in their operation: see specially cl. 8 and also cll. 14 and 15.

Solicitors: *Thomas Cooper & Co.*; *Wynne-Baxter & Keeble.*

[*Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.*]

C CARRINGTON MANUFACTURING CO., LTD. v. SALDIN

[KING'S BENCH DIVISION (Lord Hewart, C.J.), March 27, April 3, 1925]

[*Reported 133 L.T. 432; 41 T.L.R. 455*]

Landlord and Tenant—Covenant—Sub-letting without consent—Forfeiture—Sub-tenant admitted under agreement for lease—Sub-letting, unknown to landlords, before execution of lease—Conveyancing Act, 1881 (44 & 45 Vict., c. 41), s. 14 (6).

E By s. 14 (1) of the Conveyancing Act, 1881: "A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach."

F By an agreement in writing dated Jan. 10, 1923, by which the plaintiffs agreed to let to the defendant premises, the defendant covenanted not to assign, underlet, or part with possession of the premises or any part of them without the consent in writing of the plaintiffs. There was a proviso for re-entry and determination of the term in the event of a breach of this covenant. The defendant entered into possession of the premises on Jan. 10, 1923. On or about April 3, 1923, the defendant, without the knowledge of the plaintiffs, sublet parts of the premises to different persons. On July 24, 1923, the lease contemplated in the agreement was executed. It was expressed to begin on March 25, 1923, and was for a term of fourteen years. The last payment of rent was made on Oct. 22, 1923, and on or about that date notice of the underletting came to the knowledge of the plaintiffs who then sought to exercise their right of re-entry under the lease on the ground that the covenant against underletting had been broken.

H **Held:** the rights and obligations of the parties were the same in all respects as they would have been if the lease had been executed immediately after the agreement and before the subletting, and, therefore, the plaintiffs were entitled to re-enter and take possession of the premises.

I *Walsh v. Lonsdale* (1), (1882), 21 Ch.D. 9, applied.

Notes. The Conveyancing Act, 1881, s. 14 (1), has been replaced by s. 146 (1) of the Law of Property Act, 1925.

As to relief against forfeiture see 23 HALSBURY'S LAWS (3rd Edn.) 674 et seq., and for covenants against assignment or underletting see *ibid.* p. 629 et seq. and for cases see 31 DIGEST (Repl.) 512 et seq., 412 et seq. and 30 DIGEST (Repl.) 415-417. For the Law of Property Act, 1925, s. 146, see 20 HALSBURY'S STATUTES (2nd Edn.) 739-750.

Cases referred to :

- (1) *Walsh v. Lonsdale* (1882), 21 Ch.D. 9; 52 L.J.Ch. 2; 46 L.T. 858; 31 W.R. 109, C.A.; 30 Digest (Repl.) 415, 590.
- (2) *Swain v. Ayres* (1888), 21 Q.B.D. 289; 57 L.J.Q.B. 428; 36 W.R. 798; 4 T.L.R. 609, C.A.; 30 Digest (Repl.) 416, 596.

Action tried by LORD HEWART, C.J., without a jury.

The plaintiffs, the Carrington Manufacturing Co., claimed to recover from the defendants possession of the premises known as 133A, Upper Street, Islington, by reason of the breach of a covenant in a lease dated July 24, 1923, against underletting or parting with the possession of the premises or any part thereof without the consent in writing of the plaintiffs first had and obtained. They further claimed mesne profits and damages for breach of covenant. The facts appear in the judgment.

A. R. Kennedy, K.C., and C. B. Guthrie, for the plaintiffs.

Courthope Wilson, K.C., and J. P. Eddy, for the defendants.

LORD HEWART, C.J., delivered the following judgment. In this case the plaintiffs are the Carrington Manufacturing Co., Ltd., and the defendants are Lewis Saldin, one Malines, and one Biderman. The defendants Malines and Biderman have already consented to judgment. The action is brought to recover possession of certain premises known as 133A, Upper Street, Islington, on the ground that the defendant has committed breaches of a covenant contained in a lease dated July 24, 1923, not to underlet or part with the possession of the premises or any part thereof without the consent in writing of the lessor first had and obtained. The defence of the defendant Lewis Saldin, is in substance that there was no breach of covenant as alleged or at all and, alternatively, that if there was, the alleged forfeiture was waived by the plaintiffs before the beginning of the action.

The material history of these premises begins with a head lease dated Oct. 27, 1919, whereby the premises were demised by Mrs. Eliza Haynes to Mr. Israel Bloohn for a term of nineteen years beginning on Sept. 19, 1919. On Jan. 8, 1923, the trustee in the bankruptcy of Israel Bloohn assigned that lease to the plaintiffs. On Jan. 10, 1923, the plaintiffs and the defendant Saldin made an agreement in writing which began by setting out *mutatis mutandis* the provisions of the head lease. It contained and repeated in so many words the covenant in the head lease against assigning, underletting, or parting with the possession of the premises or any part of them without the consent in writing of the lessor. It repeated also in so many words a clause of re-entry entitling the lessor to re-enter on the premises and to determine the term in case of breach by the defendant of the covenant against underletting. The agreement also contained the following further terms signed by the defendant or his agent :

"In consideration of your handing me the keys of the above premises I undertake to execute a counterpart lease to the above form and pay the costs thereof.

It is agreed that I am to have the premises rent free up to March 25, 1923."

On the faith of that agreement the keys of the premises were handed to the defendant Saldin, and I find as a fact that the possession of the premises was accordingly given to him on Jan. 10, 1923. The lease contemplated in the agreement was not executed until July 24, 1923, and the term expressed in the lease began from March 25, 1923, and was for a period of fourteen years. The last payment of rent was made by this defendant to the plaintiffs under that lease on Oct. 22, 1923, and at that time I find as a fact that the plaintiffs had no knowledge, direct or indirect, of any breach of covenant committed by this defendant. Afterwards it appeared that there had been a series of underlettings without the knowledge or the consent of the plaintiffs. There was, first, an underletting of a portion of the demised premises by the defendant Saldin to one Lubin; secondly, at or about the same time there was a further underletting by Lubin of certain portions of the demised premises to the defendants Malines and Biderman. Lubin, Malines, and

A Biderman entered into possession on or about April 3, 1923. On some date after Oct. 22, 1923, the underletting came to the knowledge of the plaintiffs. From first to last, in the correspondence, the defendant Saldin, took up the attitude that he had unintentionally done what he ought not to have done and that he regretted it, and he said that he would do his best to put it right. There was no suggestion that he was entitled to do what he did, or that he did it to the knowledge or with the consent of the plaintiffs or any agent of theirs. The case that was put forward at the trial was, in my opinion, an insincere afterthought.

B Two points were urged against the defendant Saldin. It was contended (i) that, as the underletting complained of took place before the execution of the lease there had been no breach of covenant, and, therefore, the plaintiffs could have no right of forfeiture; and (ii) that service of notice of the breach of covenant was necessary under s. 14 of the Conveyancing Act, 1881, and that there had been no sufficient notice to satisfy the provisions of that section. There is, in my opinion, no substance in the first point. In the leading case of *Walsh v. Lonsdale* (1) SIR GEORGE JESSEL, M.R., said (21 Ch.D. at p. 14):

D "There is an agreement for a lease under which possession has been given. Now since the Judicature Act the possession is held under the agreement. There are not two estates as there were formerly, one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one court, and equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance. That being so, he cannot complain of the exercise by the landlord of the same rights as the landlord would have had if a lease had been granted. On the other hand, he is protected in the same way as if a lease had been granted; he cannot be turned out by six months' notice as a tenant from year to year. He has a right to say: 'I have a lease in equity, and you can only re-enter if I have committed such a breach of covenant as would, if a lease had been granted, have entitled you to re-enter according to the terms of a proper proviso for re-entry'."

E In the present case relief was capable of being given by specific performance at the suit of either party up to the time when the defendant sublet part of the premises, and was capable, of being given at the suit of the plaintiffs after that time. More-over, in the application of the principles laid down in *Walsh v. Lonsdale* (1), where a lease has in fact been granted in pursuance of the agreement, I am of opinion that the question whether relief was capable of being given by specific performance does not arise. The necessity for this condition is superseded by the fact of the lease having been granted. If it were not so, a person might enter into an agreement to take a lease with a covenant not to sublet and a proviso for re-entry on breach of such covenant with the intention of breaking his agreement, and then, having entered into possession under the agreement, might immediately sublet to a most undesirable tenant without the landlord's consent and snap his fingers at the landlord because afterwards the landlord executed a lease in ignorance of such subletting. In my view, the rights and obligations of the parties in this case are the same in all respects as they would have been if the lease had been executed immediately after the agreement and before the subletting. There is nothing in the decision in *Swain v. Ayres* (2) which is inconsistent with this view.

I HIS LORDSHIP then dealt with another point which, owing to the change effected by s. 146 (8) (i) of the Law of Property Act, 1925, in the law as enacted in s. 14 (6) of the Conveyancing Act, 1881, no longer calls for report.

Judgment for plaintiffs.

Solicitors: *Walter Martin & Co.; Teff & Teff.*

[Reported by T. W. MORGAN, ESQ., Barrister-at-Law.]

BENTLEY v. O'SULLIVAN

[KING'S BENCH DIVISION (Bankes and Scrutton, L.JJ., sitting as additional judges),
March 12, 1925]

[Reported 133 L.T. 189; 41 T.L.R. 374; 69 Sol. Jo. 509]

Practice—Judgment or order—Correction of error—"Slip rule"—Application "with extreme caution"—Report of special referee—Drafted in deliberate terms—Intention of referee not carried out—R.S.C., Ord. 28, r. 11.

R.S.C., Ord. 28, r. 11 (the "slip rule"), which provides that errors arising in judgments or orders from any accidental slip or omission may at any time be corrected without an appeal should be applied with extreme caution. Where, therefore, a special referee acted deliberately, even though he did not realise that what he was doing did not carry out his full intention, he had no jurisdiction under the rule to alter his report after it had been filed. Where an alteration purports to be made under the "slip rule" it should be made by a separate order, showing date and full particulars.

Notes. As to correcting clerical or accidental mistakes in judgments or orders see 22 HALSBURY'S LAWS (3rd Edn.) 786-788, and for cases see DIGEST, Practice, 472 et seq.

Case referred to :

(1) *Doswell v. Norton* (1902), 18 T.L.R. 228; Digest Practice 475, 1557.

Appeal from so much of the judgment of a special referee as adjudged that the defendant should pay to the plaintiff costs on the High Court scale.

A plaintiff sued for work done and money expended by him as architect on behalf of the defendant. A summons was taken out under Ord. 14, and the master made an order giving the defendant conditional leave to defend and ordering that the action should be referred to a special referee. The referee found for the plaintiff for the amount claimed and directed judgment to be so entered, and ordered that the defendant should pay "all costs of the action and of the reference, or such costs as may be allowed on taxation." He did not make an order certifying that the costs were to be on the High Court scale. Judgment was entered accordingly on Aug. 7, 1924. The plaintiff carried in his costs, and the objection was taken that, as there was no certificate, he was not entitled to costs on the High Court scale. In October, 1924, the referee was asked to alter his report by inserting after the words "costs to be taxed" the words "on the High Court scale." As he had always intended to give the plaintiff High Court costs, he thought the case came within the "slip rule" and made the required amendment. The report, and subsequently the judgment, were altered accordingly. The defendant appealed on the ground that the referee had acted outside his jurisdiction. By R.S.C., Ord. 28, r. 11 :

Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court or a judge on motion or summons without an appeal.

Serjeant Sullivan, K.C., and H. C. Dickens, for the defendant.

C. H. Thorpe, for the plaintiff.

BANKES, L.J.—This unfortunate dispute arises in the following way. The plaintiff brought an action against the defendant to recover the amount of certain fees. Proceedings were taken under Ord. 14, and Master Jelf made an order that if the defendant paid into court within ten days from the date of the order the sum of £73 13s. 3d., which was the whole amount sued for, the defendant should be at liberty to defend the action. Undoubtedly that part of the order raises the

A question whether in the events that have happened the costs were not regulated by provision (2) of s. 11 (1), of the County Courts Act, 1919. I say nothing more about that, but undoubtedly an order made in that form does raise this question. The order then continued by consent that when the money was so paid the whole action should be referred to a named referee who

B "shall have all the powers of certifying and amending of a judge of the High Court of Justice, and shall direct judgment to be entered and otherwise deal with the whole action pursuant to Ord. 36."

C The matter went before the referee, who made his report in favour of the plaintiff for the full amount of his claim. Both parties were represented by counsel and an application for costs on the High Court scale was made by counsel for the plaintiff. D The question of the scale of costs was, therefore, presented to the mind of the referee. He, however, ordered that "the defendant shall pay all costs in the action and in the reference, or such costs as may be allowed on taxation." No doubt, the referee meant to give the plaintiff full taxed costs, but unfortunately he made no order certifying for costs on the High Court scale, and when the particulars of costs were carried in for taxation, the objection was taken that the plaintiff had no certificate for costs on the High Court scale. The matter was referred back to the referee, who was asked to amend his report by inserting "costs on the High Court scale." I assume that the referee was convinced that the case came within Ord. 28, r. 11, and that he had jurisdiction to act as he did. He proceeded to make the amendment.

E It would be unwise to lay down rules purporting to be of universal application, but Ord. 28, r. 11, should be applied with extreme caution, because it would be of the worst example if that rule were loosely used for the purpose of altering a mistake, a purpose for which it was never intended. If ever *Doswell v. Norton* (1) comes before the Court of Appeal for consideration, it will be a question to be argued whether that case can be supported. In the present case the facts show that there has been no "accidental slip or omission"; what was done was done deliberately. F The referee did not realise in making his original order that it was not carrying out his full intention. But he made the order deliberately, and had, therefore, no jurisdiction to make the amendment.

That really disposes of the dispute between the parties, but I must pass to what seems to be a very grave irregularity in the way in which the matter was dealt with. The referee deposited his report in court on Aug. 6, 1924, and it became part of the G court records. Nobody should then be allowed, of his own motion and without any record being made, to come to the office and alter the court records. Yet in this case the referee was allowed to alter his report by adding the words "on the High Court scale," without making any entry as to the date or the circumstances. To all appearances the amendment was part and parcel of the original record of the court. It was highly irregular to misrepresent the real circumstances in this H way, especially as the irregularity was carried into the record itself. The judgment was drawn up on Aug. 7 and typed, except that after the words "the defendant shall pay all costs in the action" the following words were written in "on the High Court scale." They were not initialled, and there was no record of the entry. That was a complete misrepresentation of the circumstances. The court records should be handed on to posterity as complete records. If a special referee has I authority to act under the "slip rule," the alteration should be made by a formal order altering or amending the original order. I think, therefore, the special referee had no jurisdiction to do what he did in this case and, incidentally, the way in which it was done was quite irregular. Justice will be done by allowing the appeal and directing the judgment to be amended by striking out the words "on the High Court scale." There will be no costs of this appeal.

SCRUTTON, L.J.—I entirely agree with what has been said as to the irregularity of such a practice as was resorted to in this case. There was nothing to show

when or in what circumstances the alteration in the report was made. The other side was not present when the alteration was made. It was a grave irregularity for officers of the court to alter the record of a public department without showing why this was done. The next question is whether the special referee had any jurisdiction to make the alteration. By the County Courts Act, 1919, s. 11 (1), proviso (i), a referee may allow costs on the High Court scale or on such one of the county court scales as he may direct, and by proviso (ii) in an action founded on contract, if the plaintiff obtains an order under Ord. 14, to sign judgment for £20 or upwards either unconditionally or unless that sum is paid into court or to the plaintiff's solicitor, he shall, "unless otherwise ordered by the court or a judge, be entitled to costs on the High Court scale." The special referee here had to consider these two points. He found for the plaintiff, and his note concludes "costs on the High Court scale." He says that the defendant agreed as to this, and on these facts he ordered the defendant "to pay all costs or such sums as may be allowed on taxation." I think that he did not appreciate the necessity of a special order under s. 11 (1) (i) as to High Court costs, or under (ii) the effect of making no order as to costs. The order was drawn up on Aug. 6, 1924, and on Aug. 7 the report was signed. These were the records of the court, and upon them the plaintiff went to the taxing master, who asked him for the certificate for High Court costs. The plaintiff then asked the special referee for an appointment, but the defendant refused to attend saying that the referee was *functus officio*. The referee, however, expressed his willingness to alter the order in the plaintiff's favour, and, without notice to the defendant, attended at the Central Office and there wrote into the order "costs on the High Court scale." The alteration was not dated, and there was no note stating by whom or in what circumstances the alteration was made. The amendment was certainly made in the absence of the other party. If the matter had fallen within the "slip rule" the referee should have made a supplementary report and filed it. The clerk at the Central Office would then have altered the judgment by writing in the words "costs on the High Court scale." A special referee has the same jurisdiction as a judge; he can alter an order only under Ord. 28, r. 11, or under statutory jurisdiction. In my judgment, the "slip rule" should be construed strictly. Special referees are among those who may be described, without disrespect, as minor officials, and must be kept strictly within their jurisdiction. There was here no "clerical mistake" nor any "accidental slip or omission." It was a misunderstanding of the rule on the part of the referee, which led him to think he could make an order for costs on the High Court scale when in fact he could not. If a judgment could be corrected on the ground of "misunderstanding" it would open a very wide door. Parties must take their chance of a misunderstanding by the judge who tries the case. For these reasons I am of opinion that the referee had no jurisdiction to act under the "slip rule," and the defendant is entitled to have the amendment struck out of the record. It may be that the plaintiff was entitled to High Court costs under the County Court Act, 1919, s. 11 (1) proviso (ii). However that may be, the interlineation must be struck out and the case must go back to the taxing master.

Appeal allowed.

Solicitors: *Edmond O'Connor & Co.; Hore, Pattison & Bathurst.*

[Reported by T. R. FITZWALTER BUTLER, Esq., Barrister-at-Law.]

**SASSOON & CO. AND OTHERS v. GRAHAM & CO. AND
ORIENTAL NAVIGATION CO.**

[COURT OF APPEAL (Bankes and Atkin, L.JJ.), July 30, 1925]

[Reported 133 L.T. 805]

Practice—Service out of the jurisdiction—Action against two defendants—One defendant ordinarily resident in Scotland, the other not—R.S.C., Ord. 11, r. 1 (e).

An action brought against two defendants one of whom is not resident in Scotland, while the other is so resident, remains for the purposes of R.S.C., Ord. 11, r. 1 (e), an action "brought against a defendant domiciled or ordinarily resident in Scotland," and is, therefore, outside the scope of that rule, with the result that service cannot be allowed on the defendant who is not resident in Scotland.

Notes. As to service out of the jurisdiction see 26 HALSBURY'S LAWS (2nd Edn.) 31 et seq., and for cases see DIGEST, PRACTICE, 337 et seq.

Case referred to :

(1) *John Russell & Co., Ltd. v. Cayzer, Irvine & Co., Ltd.*, [1916] 2 A.C. 298; 85 L.J.K.B. 1152; 115 L.T. 86; 60 Sol. Jo. 640, H.L.; Digest Practice 362, 739.

Appeal from an order of GREER, J., at chambers discharging an order of TALBOT, J., whereby he gave the plaintiffs leave to serve a writ out of the jurisdiction on the second defendants, the Oriental Navigation Co.

The action was brought for breach of contracts contained in bills of lading issued by the defendants, Graham & Co., as charterers of the steamship *Frangestan* of which the Oriental Navigation Co. were owners, under which bills they contracted to carry the goods of the plaintiffs safely on a voyage from Karachi and Bombay to specified ports in the Mediterranean. It was provided that freight was payable and the average adjustments were to be made in London. In the course of the voyage a fire broke out on board the steamer as the result of which she sank with a total loss of her cargo. The charterers alleged that in signing the various bills of lading they were acting only as agents of the Oriental Navigation Co. The defendants, Graham & Co., were a firm consisting of two partners, both resident in Scotland at the date of the writ. The Oriental Navigation Co. was resident in Hong Kong. The solicitors of Messrs. Graham & Co. agreed to accept service on their behalf in England. The plaintiffs applied for leave to serve a concurrent writ of summons on the Oriental Navigation Co. upon the ground that it was specified by the bills of lading that the contracts embodied therein should be governed by English law. TALBOT, J., having granted the leave GREER, J., discharged the order upon the ground that the action did not comply with R.S.C., Ord. 11, r. 1 (e), as being one brought against defendants not ordinarily resident in Scotland. The plaintiffs appealed. By Ord. 11, r. 1 :

"Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the court or a judge whenever . . . (e) the action is one brought against a defendant not domiciled or ordinarily resident in Scotland . . . to recover damages . . . in respect of the breach of a contract . . . (iii) by its terms or by the implication to be governed by English law . . ."

Porter, K.C., for the plaintiffs.

Somervell for the Oriental Navigation Co.

BANKES, L.J.—This is an appeal from a decision of GREER, J., setting aside an order of TALBOT, J., allowing service out of the jurisdiction upon one of the two defendants. The action is brought by a number of bill of lading holders against two defendants, one being a firm of Graham & Co. who, before the action was brought,

but at the time the contract was made, were carrying on business in London, and the other the Oriental Navigation Co. who are the owners of the vessel in which the goods were carried, and are a company resident in Hong Kong. TALBOT, J., granted leave to serve a concurrent writ of summons upon the Oriental Navigation Co. in Hong Kong and it was said that the right so to serve a writ could be established either under Ord. 11, r. 1 (e), or r. 1 (g), and the point which seems to have been mainly argued before GREER, J., was whether the case fell within Ord. 11, r. 1 (g), which provides that service of a writ of summons out of the jurisdiction may be allowed whenever

"Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction."

At the time the action was brought Graham & Co. had disposed of their business and were resident in Scotland, but they had consented to be served with the writ, and had, therefore, consented to the jurisdiction. In these circumstances it was said that any difficulty there might be had been got out of the way inasmuch as the action was properly brought against a person duly served within the jurisdiction, and that leave was, therefore, properly given to serve the Oriental Navigation Co. outside the jurisdiction. Attention has been called to the decision of the House of Lords in *John Russell & Co., Ltd. v. Cayzer, Irvine & Co., Ltd.* (1), which establishes quite plainly that it is not enough to bring the case within para. (g) rule that a person who could not properly have been served out of the jurisdiction has consented to be served. He does not become a proper party to the action merely because he consents to the jurisdiction. LORD SUMNER, in his speech in that case, relying on what was said by PICKFORD, L.J., in the court below, adds this view of the construction of the rule ([1916] 2 A.C. at p. 304):

"The words 'properly brought' enure to the protection of the person out of the jurisdiction whom it is proposed to serve with process."

Counsel for the plaintiffs recognises that that authority applies to the present case and that it is no longer possible to attempt to support service out of the jurisdiction under r. 1 (g). He turns, therefore, to r. 1 (e) and claims that the contract between these parties, either by its express terms or by implication, is to be governed by English law. The question, therefore, is whether or not in the particular circumstances of this case it falls under r. 1 (e). Rule 1 provides as follows:

"Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the court or a judge whenever . . . (e) The action is one brought against a defendant not domiciled or ordinarily resident in Scotland . . ."

If it is such an action, then the rule provides that, if the contract by its terms or by implication is to be governed by English law, there may be service out of the jurisdiction. It is said that because this action is brought against a defendant who is ordinarily resident in Scotland and against another defendant who is not domiciled or resident in Scotland the rule has no application. With submission I cannot so read it, particularly having regard to the opinions of the learned Lords in *John Russell & Co., Ltd. v. Cayzer, Irvine & Co., Ltd.* (1) which indicate quite clearly that these rules are to be read strictly and in the interests of third parties as well as of the parties primarily interested.

It seems that if one tests the argument from this point of view it must fail. What r. 1 (e) says is that the action must be one "brought against a defendant not domiciled or ordinarily resident in Scotland." Assume a case where an action is brought against a Scotsman resident in Scotland, and there is a joinder of a person who is ordinarily resident in England and the Scotsman has not consented to be served. What is the position with regard to him? Is he not entitled to say: "You cannot serve me under this rule"? It is quite true that there are two defendants to the action and not one, and it may be argued that the rule was framed to meet

A the case of a single defendant and not two, but it does not any the less apply to the one Scotsman although an Englishman has been joined as a defendant. It seems to me that that argument is unanswerable, and that it is not open to us to put a different construction on the rule because it appears very likely that the plaintiff will attain his object by bringing two actions instead of one. It is not open to us to put a loose construction upon the language of the rule because it does not seem

B to be of much use to the defendant to take the point. The point is this. The action is brought against a Scotsman and a company carrying on business and resident in Hong Kong. The action is brought in the alternative, claiming either against the one or against the other. In these circumstances, in my opinion, the only possible view is that this case falls within r. 1 (e) and because it falls within the rule the effective part of the rule has no application to the facts of this particular

C case. On these grounds I think that GREER, J.'s, judgment must be upheld, and the appeal, therefore, fails.

ATKIN, L.J.—I agree. This seems to me to be a somewhat important point of practice. The question arises in respect of leave given to serve a company resident in Hong Kong out of the jurisdiction in an action in which the other intended

D defendants are resident Scotsmen. The case put forward is that the Hong Kong company are personally liable to the plaintiffs upon bills of lading, and, in the alternative, if they are not personally liable then the resident Scotsmen are liable as the real principals upon the contract. The Scotsmen have, in fact, appeared because, although they are resident in Scotland, they have instructed their solicitors in England to accept service on their behalf. Leave was given to serve the Oriental Navigation Co. out of the jurisdiction and they now apply to have that order set

E aside.

I do not propose to deal with the part of the application which was dealt with by GREER, J., namely, that the plaintiffs could not bring these defendants within the scope of Ord. 11; r. 1 (g), because that point has, I think, been finally decided by the House of Lords in *John Russell & Co., Ltd. v. Cayzer, Irvine & Co., Ltd.* (1).

F But then it is said by the plaintiff that this is a case where the action is brought against a defendant not domiciled in Scotland, namely the Hong Kong company, and that it is brought to recover damages in respect of a contract which by its terms or by implication is to be governed by English law. As far as the argument proceeded, though I do not want to decide it, it looks as though counsel for the plaintiffs were making a strong case for his contention that this contract was by its terms or

G by implication to be governed by English law. But I think the question arises whether or not he does come within the rule when one of the defendants to the action is domiciled or ordinarily resident in Scotland. It appears to me that we ought to give full effect to the words of r. 1 (e) and not construe them in a narrow sense, and I do not see how it can be denied that this action is brought against Graham & Co.

H as defendants who are ordinarily resident in Scotland, and, if so, r. 1 (e) does not apply. It may very well be that the rule committee were mainly considering the question of a particular defendant sought to be served and the question was whether he was or was not sought to be served in Scotland, but the words of the rule apply to the whole action and there is good reason for giving to those words their plain meaning, because everybody knows that as regards this particular rule there has been quite a history connected with the exemption of Scottish persons from the claim

I to have actions of contract to which they are parties brought against them in this country. As far as I remember they have always been exempted from the corresponding provisions of Ord. 11, r. 1 (e), upon the ground that in actions of contract they have a right to have their contractual obligations determined in their own country by Scottish courts and in accordance with the procedure of those courts. It is to be remembered that when this rule was re-drafted and extended Scotland lost its protection for a short time in respect of the first part of the rule, but upon an outcry being raised in Scotland that protection was restored. I think it is quite

reasonable that it should be so. What would be the position if an action were brought against a Scot resident in Scotland and a foreigner upon a contract to which the Scot was a party? Assume they are joint contractors it would not be necessary to join the Scot, but, if he were joined, it would be very strange that the courts would give leave to serve the foreigner and bring him here, although they could not bring the Scot within the jurisdiction and then determine the rights under the contract. Undoubtedly, it might or would seriously affect the position of the Scot. Take a case of this kind which I think is a very important one. Assume that the Scot had not come into the jurisdiction and been served in an action brought against a person alleged to be an agent by a Scot alleged to be the principal. If in such a case the agent could be sued and obligations could be established against the Scot in his absence, the agent would eventually be entitled to an indemnity against his principal and sometimes the rights and obligations might and would be very materially affected by an action to which according to the rules he, the Scot, could not be made a party here. It is true that in the present case the Scot has entered the jurisdiction so that that difficulty does not arise, but the rule which has been laid down is one applicable to general conditions, and under these it appears to me that it would offend against the principle affecting Scotsmen to allow this part of the rule to be applied in a case where there was a defendant who was in fact resident, but who could not be sued in this country unless he voluntarily chose to come in. For these reasons it appears to me that this appeal fails and must be dismissed.

Appeal dismissed.

Solicitors : *W. A. Crump & Son; Coward, Chance & Co.*

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

BEYFUS AND OTHERS v. LODGE

[CHANCERY DIVISION (Russell, J.), March 18, 19, April, 1925]

[Reported [1925] Ch. 350; 95 L.J.Ch. 27; 133 L.T. 265; 41 T.L.R. 429; 69 Sol. Jo. 507]

Specific Performance—Sale of land—Non-disclosure of material fact affecting value of property—Landlord's notice to repair leasehold property.

Sale of Land—Deposit—Return—Omission by vendor to disclose material fact, but no misrepresentation—No right in purchaser to rescind.

On July 31, 1924, the vendors sold to the defendant at auction two leasehold houses for £650 in respect of which a deposit was paid of £65. By condition 6 of the conditions of sale the production of the last receipt for rent was to be evidence that the rent had been paid and the covenants under the leases performed, and that all breaches thereof had been waived up to the time of the completion of the sale. Condition 8 provided that, if any notices from landlords were outstanding or should be received between the sale and completion, they should be complied with at the expense of the purchaser, and condition 13 stipulated that the assignment to the purchaser should contain covenants by him to perform the lessee's covenants and indemnify the vendors against the same. In August a requisition on title was delivered asking whether any notice from the landlords had been served. The vendors replied by an answer, which was made in good faith but was in fact incorrect, stating that they were not aware of any, whereas notices had been received from the landlord on July 7 calling upon the lessees within three months from July 4 to make good all

A dilapidations, a schedule attached estimating the amount at £488 for the two houses. The mistake being discovered, the purchaser refused to complete. The vendors claimed specific performance of the contract, and the purchaser by a counterclaim asked for rescission of the contract and repayment of the deposit.

B **Held:** (i) the granting of a decree for specific performance was a matter within the discretion of the court who must consider whether it was just to adopt such a course; the fact that notices of dilapidations had been served was a material fact affecting the value of the property which it was the duty of the vendors to disclose to the purchaser and they had not disclosed it; no assistance could be derived by the vendors from conditions 6 or 8; and, therefore, the court would not grant a decree of specific performance; (ii) while there was an omission to disclose a material fact, that omission had rendered no stated fact untrue and so there had been no misrepresentation by the vendors; the purchaser had contracted to purchase, subject to the burden of repairs, and, by condition 8, whether or not any notice by the landlords had at the date of sale been served, so that he and not the vendors was breaking the contract; accordingly, he was not entitled to rescind the contract, and his claim for the return of the deposit must fail.

D **Notes.** Referred to: *James Macara, Ltd. v. Barclay*, [1944] 2 All E.R. 31.

As to defences to actions for specific performance see 31 HALSBURY'S LAWS (2nd Edn.) 345 et seq., and as to forfeiture of a deposit under a contract for the sale of land see *ibid.*, vol. 29, p. 375 et seq. For cases see 42 DIGEST 448 et seq., and 40 DIGEST (Repl.) 242 et seq.

E Cases referred to:

- (1) *Stevens v. Adamson* (1818), 2 Stark. 422; 171 E.R. 692, N.P.; 40 Digest (Repl.) 255, 2144.
- (2) *Carlsh v. Salt*, [1906] 1 Ch. 335; 75 L.J.Ch. 175; 94 L.T. 58; 54 W.R. 244; 50 Sol. Jo. 157; 40 Digest (Repl.) 256, 2152.
- F** (3) *Re Scott and Alvarez's Contract, Scott v. Alvarez*, [1895] 2 Ch. 603; 64 L.J.Ch. 821; 73 L.T. 43; 43 W.R. 694; 11 T.L.R. 471; 39 Sol. Jo. 621; 12 R. 488, C.A.; 40 Digest (Repl.) 250, 2100.
- (4) *Heywood v. Mallalieu* (1883), 25 Ch.D. 357; 53 L.J.Ch. 492; 49 L.T. 658; 32 W.R. 538; 40 Digest (Repl.) 114, 886.
- (5) *Edwards v. Wickwar* (1865), L.R. 1 Eq. 68; 13 L.T. 428; 29 J.P. 820; 14 W.R. 79; sub nom. *Edwards v. Wickwar, Re Brayne's Purchase*, 35 L.J.Ch. 48; 40 Digest (Repl.) 144, 1101.
- G** (6) *Nottingham Patent Brick and Tile Co. v. Butler* (1886), 16 Q.B.D. 778; 55 L.J.Q.B. 280; 54 L.T. 444; 34 W.R. 405; 2 T.L.R. 391, C.A.; 40 Digest (Repl.) 255, 2143.
- (7) *Re Leyland and Taylor's Contract*, [1900] 2 Ch. 625; 69 L.J.Ch. 764; 83 L.T. 380; 49 W.R. 17; 16 T.L.R. 566, C.A.; 40 Digest (Repl.) 79, 600.

H **Witness Action** by vendors for specific performance of a contract by the defendant for the purchase from the vendors of two leasehold shops and houses known as Nos. 102 and 104, Boundary Road, which formed respectively lots 30 and 31, at an auction sale of freehold and leasehold properties of the vendors held on July 31, 1924.

I Each of the two lots was held by the vendors for an unexpired term of some twenty-six years (at a ground rent of £10 per annum), under a lease which cast upon them the burden of inside and outside repairs; each was sublet to a tenant on a yearly tenancy, showing a profit rental as to lot 30 of £53 per annum, and as to lot 31 of £60 per annum. They and the other properties offered for sale at the auction formed part of the estate of the late Solomon Beyfus, the vendors being his executors. Particulars and conditions of sale were prepared, and at the time when that matter was put in hand, no notice had been received from the head landlords of lots 30 and 31 requiring any repairs to be executed on those

premises. At the auction lot 30 was purchased by the defendant for £275, and lot 31 was purchased by him for £375. He signed one contract comprising both lots, paying a deposit of £65 and agreeing to complete the purchase according to the conditions of sale. By condition 5 the leases were offered for inspection and the purchaser was deemed to have notice of the contents thereof. By condition 6 it was provided, among other things, that

"The production of the last receipt for the rent due under the respective leases shall be conclusive evidence that all rents under the respective leases have been paid, and that all covenants and conditions in the said leases respectively to which such receipts refer have been performed and observed and that all breaches thereof have been effectually waived or sanctioned up to the time of the completion of the purchase, whether it shall appear that the lessors or reversioners were cognisant of such breaches or not."

Condition 8 contained the following provision :

"If any notices from landlords, sanitary or other authorities are outstanding or shall be received between the sale and completion of each purchase they shall be complied with at the expense of the purchaser."

By condition 13 the assignment to the purchaser was to contain a covenant by him to observe and perform the lessees' covenants contained in the leases and to keep indemnified the vendors from and against all claims and demands for or on account of breach of such covenants. The final condition provided for the forfeiture of the deposit upon failure by the purchaser to comply with the conditions. Completion was fixed for Aug. 21, 1924. In due course requisitions on title were delivered which included one asking whether any notice from landlord had been served on the property. The answer, dated Aug. 18, was: "The vendors are not aware of any." This answer, though made in good faith, was untrue. The particular individual in the offices of Messrs. Beyfus & Beyfus who was attending to the matter, and was responsible for the answer was not aware of any, but in fact Mr. Phillip Beyfus, a partner in the firm and one of the vendors, had, on July 7, 1924, received a landlord's notice in respect of each of the two houses. He put them away, and the clerk who was attending to this conveyancing matter knew nothing about them. Each notice called upon the lessees within three months of July 4, 1924, to reinstate and make good the whole of the dilapidations found to have accrued in or upon the premises, "as per the schedule hereto annexed," the value of which was in the notices assessed in the case of No. 102 at £251, and in the case of No. 104 at £187 15s., making a total sum of £438 15s. These notices were, in fact, superseded by fresh notices in identical terms dated Mar. 12, 1925, and expiring on June 11, 1925. The mistake made in the answers to requisitions was soon discovered. The purchaser's solicitors were informed at once by letter of Aug. 20, and the next day copies of the notices were sent to them. Nothing having been heard from the purchaser's solicitors, Messrs. Beyfus wrote to them on Sept. 4 asking for the draft assignment. The purchaser's solicitors do not appear to have answered that request, but on Sept. 16 they wrote the following letter :

"With reference to your letter to us of the 21st ult. enclosing notices of dilapidations in respect of these premises. On behalf of our clients, we object to the title on the ground of the non-disclosure of the landlord's notices at the time of the sale. Our client also declines to complete the purchase unless the vendor complies with these notices at his own expense, previous to completion."

That was answered by letter of Sept. 18, in the following terms :

"We are in receipt of yours of the 16th inst., and note you say that your client declines to complete the purchase unless the vendor complies with the notice at his own expense previous to completion. Our instructions are that if your client still takes up that position, proceedings will be taken for specific performance."

A On Sept. 28 the writ was assued. The defendant not only denied the right of the plaintiffs to specific performance, but by counterclaim asked for rescission of the contract, repayment of the deposit, and payment of his costs of investigating the title.

Courthope Wilson, K.C., and E. Knowles Corrie for the vendor.

H. C. Preston, K.C., and A. M. Begg for the purchaser.

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Cur. adv. vult.

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April 3. **RUSSELL, J.**, read a judgment in which he said that, as a matter of construction he decided that the effect of conditions 8 and 13 was to throw upon the purchaser the burden of executing all necessary repairs, and that whether at the date of the sale any notice of dilapidations had or had not already been served. In other words, what was being offered for sale were the houses as they stood subject to the obligations to repair contained in the leases. Both parties in fact acted on that footing. The purchaser made his bids after taking into account the sum of £100 to £150 to be spent by him on repairs; the reserves were fixed upon a similar basis, but the sum allowed for repairs was considerably larger. As regards the purchaser, however, it should be said that although he lives next door, at No. 100, he had no opportunity of inspecting the internal condition of the lots purchased by him, and so forming any reliable estimate of the amount which he might be forced to expend upon the property. [His Lordship continued:] The first question to decide is whether in the circumstances I ought to grant to the vendors the peculiar relief of specific performance. Although acting in good faith they withheld from the purchaser knowledge of the fact that notices had been served before the sale—notice which, if disclosed, would have revealed three things: first, the extent of the repairs which the covenantee required to be done; secondly, the amount required by the covenantee to be expended, and, thirdly, the time available within which the purchaser could provide the necessary money, do the work and avoid the risk of forfeiture. In my opinion, and the evidence bears this out, those were all matters material for the purchaser and all intending bidders to know to enable them to decide whether they should bid at all, and if so, the amount to which they would be prepared to go. This appears to me a matter directly affecting the value of the property which was within the vendor's knowledge which the intending purchaser could not have ascertained, and which it was the vendor's duty to declare. The value of the property can only be measured after taking into account the amount required to be expended on repairs; the purchaser is given no opportunity for forming an estimate; the vendor knows the exact amount, but fails to disclose a fact which would have revealed the amount. The vendor cannot, in my opinion, on this part of the case derive any assistance from either condition No. 6 or condition No. 8. The former binds the purchaser to assume a state of affairs which the vendor at the time of the sale knows to be untrue without fairly bringing the fact to the attention of the purchaser; the latter states as a contingency only what the vendor knew to be an actual fact.

In my opinion it would be wrong in the present case to grant specific performance of the contract against the purchaser. No authority appears to me exactly to cover this case, for neither in *Stevens v. Adamson* (1) nor in *Carlsh v. Salt* (2) (to which I will refer later), did any question of specific performance arise for consideration. In each of those cases, however, it was held that a material fact had been concealed which the vendor was bound to disclose. In the first case, the fact of the service by a landlord of a notice to repair; in the second case the fact of the service of a party wall notice and the issue of an award under the London Building Act, 1894. The granting of a decree for specific performance is a matter within the court's discretion. The court must consider whether it is just to adopt such a course: see per **LINDLEY, L.J.**, in *Re Scott and Alvarez's Contract* (3) [1895] 2 Ch. at p. 613. In the present case the vendors having concealed a material fact which

it was their duty to disclose, it would not, in my opinion, be just to grant a decree of specific performance and I decline to do so. A

As regards the counterclaim to a return of the deposit the matter appears to me to stand upon a different footing. Upon the true construction of the contract the defendant contracted to buy these leaseholds subject to the burden of repairs and (by virtue of condition No. 8) whether or not any notice by the landlord had at the date of sale been in fact served. Although the vendors are unable to obtain specific performance against the purchaser, the vendors are not breaking the contract; the purchaser, in refusing to complete, is breaking the contract. Nevertheless, he claims his deposit back, which by the terms of the contract the vendors may forfeit. This position is clearly explained by LINDLEY, L.J., in *Re Scott and Alvarez's Contract* (3) ([1895] 2 Ch. at p. 612). In order to succeed on this claim the purchaser must, it appears to me, show a case for rescission of the contract. This, in my opinion, he has failed to do. He relied upon various authorities in support of his claim. To these I will now refer. Some of them are to some extent relevant also upon the question of specific performance. B C

Heywood v. Mallalieu (4) was a case where an easement constituted an incurable defect in the title; the vendor could not vest in the purchaser a good title to the subject of the sale, nor was there to be found in the contract any provision fairly calling the purchaser's attention to the imperfection in the title and binding him to accept the imperfect title. That seems to me a clear case both for refusing specific performance and for ordering the return of the deposit. The purchaser was entitled to rescind and get back his deposit because the vendor could not carry out his contract. *Edwards v. Wickwar* (5) was merely a case where the vendor was seeking to force upon the purchaser an imperfect title without having fairly called his attention to the imperfection and binding him to accept the imperfect title. No question arose at that stage as to return of the deposit. *Nottingham Patent Brick and Tile Co. v. Butler* (6) was an action by purchasers to recover their deposit, the vendors counterclaiming for specific performance. In that case there existed a blot on the title, and the vendor was seeking to force the imperfect title on the purchaser by means of a general condition which in no way called attention to the blot. As regards the claim to a return of the deposit, the court took the view that an active misrepresentation inducing the contract had been made, and that the purchaser was entitled to rescind the whole contract and recover the deposit. But for the misrepresentation the deposit would not have been recoverable. D E F

Stevens v. Adamson (1) was a case at nisi prius; and from the details contained in the report it would appear (as was pointed out by RIGBY, L.J., in *Re Leyland and Taylor's Contract* (7)) that the purchaser (who apparently had been let into possession before completion) had actually been ejected by the landlord. In other words, the lease which the vendor contracted to sell had been forfeited, and had ceased to exist. Nothing is said as to the terms of the conditions of sale, but clearly the vendor was unable to vest in the purchaser any title to the subject of the sale. In these circumstances it is not surprising that the plaintiff became entitled to a verdict. The vendor could not carry out his contract; the purchaser was, therefore, entitled to rescind and recover the deposit. The case is no authority for the general proposition that failure by a vendor to disclose a landlord's dilapidation notice served before the date of the sale will entitle the purchaser, whatever the terms of the contract, to rescind the contract and recover the deposit. *Carlsh v. Salt* (2) was founded to a great extent on *Stevens v. Adamson* (1). The contract there was an open contract. The effect of the party wall notice and the subsequent award (which had been concealed by the vendor) was to deprive the purchaser of part of the subject-matter of the sale until payment by him to the adjoining owner of a sum of money over and above the amount of the purchase price. The vendor refused to make any compensation. In particular, there was no term of the contract which covered the point in question; accordingly in claiming the return of the deposit, the purchaser was not himself seeking to break the legal contract between the G H I

A parties while the vendor, in claiming to retain the deposit without having vested in the purchaser the property agreed to be sold, was breaking his bargain. That decision is distinguishable from the case before me, and is no authority for ordering the return of the deposit in the present case where the legal contract between the parties provides in terms for the event of a dilapidations notice being current at the date of the sale.

B So far as the claim for a return of the deposit is concerned the purchaser has made out no case justifying rescission of the contract. There was no misrepresentation; there was, it is true, omission to disclose a material fact; but such omission rendered no stated fact untrue. Nor can it be said that the vendor is unable to carry out his contract in accordance with the terms thereof, the contract being for the sale of leaseholds subject to the liability under covenants to repair as to which

C the contract expressly states that there may be landlord's notices outstanding at the time of sale. The result is that while the omission to disclose a material fact deprives the vendors of the special relief of specific performance, the contract stands at law, and since the purchaser refused to complete according to its terms he loses his deposit.

D Solicitors: *Beyfus & Beyfus; Simon, Haynes, Barlas & Ireland.*

[Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.]

E

BERNERS v. FLEMING

[COURT OF APPEAL (Sir Ernest Pollock, M.R., Sargant, L.J., and Astbury, J.), January 30, February 2, 1925]

F

[Reported [1925] Ch. 264; 94 L.J.Ch. 273; 132 L.T. 822; 69 Sol. Jo. 507]

Specific Performance—Contract wrongly interpreted by plaintiff—Interpretation by court—Acceptance by plaintiff—Right to order.

G

A purchaser refused to complete a contract to purchase certain property on the ground that proposed terms in the conveyance relating to rights of way did not give effect to the conditions of sale which constituted the contract between the parties. In an action by the vendor for the specific performance of the contract of sale as interpreted by him the court held that the construction put on the conditions by the purchaser was correct and that of the vendor was wrong. The vendor then offered to modify his claim to specific performance of the contract as interpreted by the court.

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Held: the vendor, by putting a wrong interpretation on the contract, had not forfeited his claim to specific performance of the contract as rightly interpreted if he were willing so to modify his claim, and, therefore, he was entitled to an order for specific performance to that effect on the terms that he paid the costs of the action.

I

Preston v. Luck (1) (1884), 27 Ch.D. 497, applied.

Notes. Referred to: *Never Stop Railway (Wembley) v. British Empire Exhibition* (1924) Incorporated, [1926] Ch. 877.

As to the effect of mistake on a claim for specific performance see 31 HALSBURY'S LAWS (2nd Edn.) 378-382, and for cases see 42 DIGEST 481 et seq.

Cases referred to:

(1) *Preston v. Luck* (1884), 27 Ch.D. 497; 83 W.R. 317, C.A.; 42 Digest 482, 502.

- (2) *Bennett v. Stone*, [1903] 1 Ch. 509; 72 L.J.Ch. 240; 88 L.T. 35; 51 W.R. 338; 47 Sol. Jo. 278, C.A.; 40 Digest (Repl.) 214, 1737.
- (3) *North v. Percival*, [1898] 2 Ch. 128; 67 L.J.Ch. 321; 78 L.T. 615; 46 W.R. 552; 42 Sol. Jo. 431; 40 Digest (Repl.) 129, 994.
- (4) *Halkett v. Earl of Dudley*, [1907] 1 Ch. 590; 76 L.J.Ch. 330; 96 L.T. 539; 51 Sol. Jo. 290; 42 Digest 441, 123.
- (5) *Frost v. Knight* (1872), L.R. 7 Exch. 111; 41 L.J.Ex. 78; 26 L.T. 77; 20 W.R. 471, Ex.Ch.; 12 Digest (Repl.) 380, 2973.
- (6) *Johnstone v. Milling* (1886), 16 Q.B.D. 460; 55 L.J.Q.B. 162; 54 L.T. 629; 50 J.P. 694; 34 W.R. 238; 2 T.L.R. 249, C.A.; 12 Digest (Repl.) 377, 2961.
- (7) *Fife v. Clayton* (1807), 1 Coop. temp. Cott. 351; 13 Ves. 546; 33 E.R. 398, L.C.; 42 Digest 563, 1289.
- (8) *Gwynn v. Lethbridge* (1808), 14 Ves. 585; 33 E.R. 645, L.C.; 42 Digest 549, 1094.
- (9) *Martin v. Pyecroft* (1852), 2 De G.M. & G. 785; 22 L.J.Ch. 94; 20 L.T.O.S. 135; 16 Jur. 1125; 42 E.R. 1079, L.J.J.; 12 Digest (Repl.) 403, 3118.
- (10) *London and Birmingham Rail. Co. v. Winter* (1840), Cr. & Ph. 57; 41 E.R. 410, L.C.; 42 Digest 563, 1294.
- (11) *Smith v. Wheatcroft* (1878), 9 Ch.D. 223; 47 L.J.Ch. 745; 39 L.T. 103; 27 W.R. 42; 42 Digest 523, 877.
- (12) *Hipgrave v. Case* (1885), 28 Ch.D. 356; 54 L.J.Ch. 399; 52 L.T. 242, C.A.; 42 Digest 566, 1317.
- (13) *Clowes v. Higginson* (1813), 1 Ves. & B. 524; 35 E.R. 204; 42 Digest 481, 488.
- (14) *Higginson v. Clowes* (1808), 15 Ves. 516; 33 E.R. 850; 42 Digest 483, 507.
- (15) *Marshall v. Berridge* (1881), 19 Ch.D. 233; 51 L.J.Ch. 329; 45 L.T. 599; 46 J.P. 279; 30 W.R. 93 C.A.; 42 Digest 453, 233.
- (16) *Lindsay v. Lynch* (1804), 2 Sch. & Lef. 1.
- (17) *Coffin v. Cooper* (1807), 14 Ves. 205; 33 E.R. 499, L.C.; 40 Digest (Repl.) 268, 2241.
- (18) *Chamberlain v. Lee* (1840), 10 Sim. 444; 59 E.R. 687; 40 Digest (Repl.) 269, 2245.

Appeal from an order of RUSSELL, J., in an action by a vendor for specific performance of a contract to purchase certain property.

The plaintiff was the owner in fee simple of various freehold properties adjoining Oxford Street, Newman Street, and Goodge Street, in London, which he put up for sale by auction in July, 1923, subject to the leases still current. The defendant purchased Lot 10. It had no frontage to Oxford Street or Newman Street and access to it was given by two passages, one leading out of Oxford Street, known as Perry's Place, and the other out of Newman Street, known as Newman's Yard. Lot 10 was let on lease to a bank. Physically it consisted of two buildings separated by an internal wall which divided the part looking on to Newman's Yard from the part looking on to Perry's Place. The soil of Perry's Place was included in the sale of Lot 1, and the soil of Newman's Yard in Lot 9. The particulars of sale stated:

"The purchasers of Lots 1, 3, and 10 will be granted an easement of a perpetual right of way over the roadway leading from Oxford Street to Perry's Place, subject to similar obligations to those which are set out in the leases under which the premises comprised in those lots are now held."

It was admitted that "over the roadway leading from Oxford Street to Perry's Place" meant the whole of the land, coloured brown on the sale plan, leading from Oxford Street up to and including the rectangular part of Perry's Place.

"The purchasers of Lots 4 to 11 inclusive will be granted an easement of a perpetual right of way into Newman's Yard from Newman Street subject to similar obligations to contribute to the repair of the gateway, passage and

A yard to those contained in the leases under which the premises comprised in those lots are now held."

The title to Lot 10 was accepted by the purchaser, but he could not agree with the vendor as to the form of the words to be used in the conveyance to him of the rights of way to which he was entitled under his contract. He refused to accept the grant in the restricted form proposed by the vendor, and the vendor commenced proceedings for specific performance of the contract. The purchaser contended that he was entitled to a right of way over Newman's Yard in respect of the whole of Lot 10, and also to a right of way over Perry's Place in respect of the whole of Lot 10. The vendor contended that the purchaser was only entitled to a right of way over Perry's Place in respect of the Perry's Place portion of Lot 10, and to a right of way over Newman's Yard in respect of the Newman's Yard portion of the lot.

RUSSELL, J., in giving judgment, said that he had to decide what was contracted to be given by the contract which the parties signed. Did the contract provide for a grant of two rights of way each appurtenant to the whole of Lot 10, or for two rights of way, one of which was appurtenant to part of Lot 10, and the other to the remainder of Lot 10? The language of the contract was quite clear. The purchaser of Lot 10

"will be granted an easement of a perpetual right of way over the roadway leading from Oxford Street to Perry's Place, subject to similar obligations to those which are set out in the leases under which the premises comprised in those lots are now held."

It was argued that those words confined the right of way to a right of way similar to that granted in the leases. They had no such operation, they merely subjected the right of way, which was contracted to be given, to obligations similar to those to which the right of way granted by the lease was subject, namely, the obligation to contribute a part of the cost of repairing the road. The relevant words,

"the purchaser of Lot 10 will be granted an easement of a perpetual right of way over the roadway leading from Oxford Street to Perry's Place,"

were clear and unambiguous, and showed that the right of way there contracted to be given was one which was to be enjoyed by Lot 10 and not merely by part of Lot 10. As to Newman's Yard

"the purchasers of Lots 4 to 11 will be granted an easement of a perpetual right of way into Newman's Yard from Newman Street subject to an obligation to contribute part of the cost of repairing the road."

It was equally clear that that right of way was to be enjoyed in respect of the whole of Lot 10. The action was one for specific performance, not of the contract as now construed by the court, but of a totally different contract. The action was necessarily based on the allegation that the vendor was at all times willing to carry out the contract. That was quite true with regard to the contract as construed by the vendor, but quite untrue with regard to the contract as construed by the court, which for the present purpose be assumed to be the correct construction. In effect, the vendor said: "True it is that I have sought up to the present moment to force upon the purchaser a contract which I am not entitled to force on him, and that I have resisted with all my power performing the contract which the purchaser, and now, the court say is the correct one, but still you must not dismiss my action for specific performance. I am entitled at the last moment to turn round and say: 'Having blown hot, I now blow cold. I now ask the court to decree specific performance of what the court has determined to be the true contract'." No authority had been cited in favour of that contention, and in the absence of any clear and binding authority it did not seem to be a reasonable position. The action would be dismissed with costs.

The vendor appealed.

Preston, K.C., and *W. A. Peck*, for the vendor, referred to *Preston v. Luck* (1), *Bennett v. Stone* (2), *North v. Percival* (3).

C. A. Bennett, K.C., and *G.M. Simmonds*, for the purchaser.

Cur. adv. vult.

Feb. 2. The following judgments were read.

SIR ERNEST POLLOCK, M.R.—On July 3, 1923, the plaintiff offered certain portions of his freehold estate, lying to the north of Oxford Street, for sale by auction, and the defendant became the purchaser of Lot 10. This lot comprised a warehouse and workshops situate in Perry's Place and Newman's Yard, which though contiguous, are intersected by a wall. There is access to the southern portion of Lot 10 from Oxford Street by a passage therefrom which leads into Perry's Place; while access to the northern portion of it is afforded by a passage way from Newman Street which leads on to Newman's Yard which abuts upon this northern portion. The whole of Lot 10, although physically divided was subject to one lease to a bank granted on Oct. 30, 1918. In the particulars and conditions of sale there is a note at the head of the particulars as follows :

"The purchasers of Lots 1, 3, and 10, will be granted an easement of a perpetual right of way over the road way leading from Oxford Street to Perry's Place, subject to similar obligations to those which are set out in the leases under which the premises comprised in those lots are now held."

Those words are agreed to cover and include the whole of the land coloured brown on the sale plan from Oxford Street leading through the narrower portion up to the square part of Perry's Place. The particulars of Lot 1 include the even numbers 70-86, Oxford Street, and

"the freehold of the yard and passage way leading thereto known as Perry's Place, subject to the rights of way and other easements granted to the lessees and purchasers of Lots numbered 1, 3, and 10, and to a lease of a right of way over part of the roadway leading from Perry's Place up to the point marked on the plan attached at the rental of £1 per annum. The lessees under the grant of right of way pay an equal moiety of keeping the roadway in repair."

At the head of Lot 4 there is another note.

"The purchasers of Lots 4-11 inclusive will be granted an easement of a perpetual right of way into Newman's Yard from Newman Street, subject to similar obligations to contribute to the repair of the gateway passage and yard to those contained in the leases under which the premises comprised in those lots are now held."

Lot 9 included the freehold of the yard, and roadway leading thereto known as Newman's Yard, Newman Street, W.,

"subject to the rights of way and other easements granted to the lessees and purchasers of Lots 4-11 inclusive."

This lot was purchased at the sale by a Mr. Horne. Lot 1 did not find a purchaser. Among the conditions of sale was one numbered 14 which provided :

"Where any lot appears by the particulars to be offered for sale subject to any easement or right for the benefit of any other lot or lots, the conveyance of both the servient lot, and the dominant lot, or lots, shall be framed accordingly, and in case of difference as to the nature or extent of any such easement or right or as to the form or mode of giving effect in the conveyance to any purchasers of any great reservation, or covenant the same shall be determined by the vendor's solicitors."

The title was accepted by the purchaser, but difficulties arose as to the words to be used in granting to him the rights of way which under his contract he was entitled to have. Mr. Horne, the purchaser of Lot 9, whose purchase included the freehold

A of Newman's Yard, was, of course, interested, and after a correspondence which lasted for four months from August to Dec. 20, 1923, the vendor's solicitors insisted that the purchaser must accept the form finally settled by them which was "in perpetuity as the same are, or can be now used, and enjoyed under, or by virtue of the lease hereinafter referred to, but not further or otherwise," and the letter of Dec. 20 requested the purchaser's solicitors

B "to complete your client's purchase by Jan. 1 next and failing this, we shall complete the conveyance to Mr. Horne of Newman's Yard on that day, and also, acting on our client's instructions, shall commence proceedings for specific performance of your client's (defendant's) contract."

C The difficulty was centred in the words "as the same are or can be now used and enjoyed." For, as stated at the outset of this judgment, Lot 10 was physically divided at the date of the purchase, and the user of Perry's Place at that time was confined to the southern portion of Lot 10, abutting upon it, while the user of Newman's Yard was confined to the northern portion of Lot 10 abutting upon it. There was not then, and could not be an interchange and reciprocity of user between the two portions of Lot 10 over Perry's Place and Newman's Yard, a freedom which D the purchaser not unnaturally desired to be able to exercise should the opportunity at any time arise for him to do so. The words in the two notes which I have set out above refer, respectively, to the lots in question—in whole, and not in part.

"The purchaser of Lot 10, will be granted an easement of a perpetual right of way over the roadway leading from Oxford Street to Perry's Place."

E Similarly:

"the purchaser of Lot 10 will be granted an easement of a perpetual right of way into Newman's Yard from Newman Street."

There does not appear to be any justification for cutting down the clear terms of the notes applicable to each. I agree with the judgment expressed by RUSSELL, J., upon this point.

F Now, however, comes the difficulty. On Feb. 6, 1924, the vendor commenced his action as he had expressed his intention of doing in the letter of Dec. 20, 1923. By his statement of claim he asked for specific performance of the agreement of purchase in accordance with his interpretation of the notes to the conditions—that is, with separate rights of way attached to each portion of Lot 10 severally. The purchaser, by his defence, claimed that he was entitled to have granted to him rights of way over Newman's Yard and Perry's Place in respect of the whole of Lot 10. G The latter part of para. 10 of the defence ran as follows: "The defendant offered and is still willing that the grant to him of the said rights of way shall be in the terms of the grant of rights of way contained in the said lease with such alterations as are necessary owing to the fact that the defendant is purchasing the freehold and is not being granted a lease of Lot 10."

H Counsel for the vendor at the trial offered that the claim for specific performance should be modified so as to accord with the true construction of the contract as interpreted by the court, and was willing to undertake to procure that Mr. Horne should execute any document necessary to that end and produced a letter from Mr. Horne showing his willingness thereto. This offer the learned judge held of no avail, and he dismissed the action with costs, on the ground that the vendor's claim I was greater than what the contract of sale gave him, and that he was not entitled to modify his claim at the trial even though he was ready to pay the costs of the action. The purchaser had brought a counterclaim for rescission of the agreement, if it were interpreted as asked by the vendor. As the learned judge decided against the vendor, he held that the counterclaim was unnecessary—that the condition on which it was put forward had not arisen—and he made no order upon it. At the same time he refused leave to the purchaser to amend his offer pleaded in the defence, or to allow him to plead that the vendor by his conduct had repudiated

the contract and so had afforded the purchaser the option to accept that repudiation—to rescind the contract and recover his deposit.

First let me say that, in my judgment, the learned judge was right in refusing to allow the purchaser to amend and plead repudiation by the vendor and the purchaser's acceptance of it. Apart from the difficulty that such a plea would be remote from the facts, the purchaser is not entitled to raise it at this stage of the proceedings. This is clear from the decision of PARKER, J., in *Hulkett v. Earl of Dudley* (4), where he says ([1907] 1 Ch. at p. 597):

"It is, in my opinion, equally clear that this right of repudiation, whatever be its true nature must be exercised—if it is to be exercised at all, as soon as the defect is ascertained."

In the present case, there was no indication on the part of the purchaser that he treated the vendor's conduct as equivalent to renunciation or as affording him the opportunity of electing to treat it as such. The purchaser adhered to the contract and pleaded that, properly interpreted, he was ready and willing to fulfil it. "In that case he keeps the contract alive for the benefit of the other party as well as his own": see *Frost v. Knight* (5) and *Johnstone v. Milling* (6).

Next, can the vendor be granted specific performance even though he has required the purchaser to accept a conveyance in a form which the court holds was not in accordance with the contract? There is no question here of mistake, or want of mutuality: the difficulty that has arisen is only as to the interpretation to be given to the particulars and conditions.

"The mere fact that they put an erroneous construction on a contract in writing existing between them, and insisted that it included what it does not in fact include, is in my opinion no ground for saying there is no contract":

see per COTTON, L.J., in *Preston v. Luck* (1), 27 Ch.D. at p. 507. No case has been cited to the court where it has been decided that where the plaintiff puts a wrong interpretation upon the contract he thereby forfeits his claim to specific performance of the contract as rightly interpreted if he is willing so to modify it. There are, however, a number of cases which point in the opposite direction. Thus, in *Fife v. Clayton* (7) LORD ELDON decreed specific performance where the plaintiff offered to perform the agreement as found at the trial; and in *Gwynn v. Lethbridge* (8) the decree for specific performance of a contract according to the contention of the answer was upheld by the same Lord Chancellor. In *Martin v. Pyecroft* (9) KNIGHT BRUCE, L.J., granted specific performance to a plaintiff

"because he was willing and submits that the agreement may be construed, and shall be performed according to the true and real bargain."

Specific performance of a contract was decreed by LORD COTTENHAM even though it was discovered in the course of the trial that a parol variation or addition to it had been made (which was not set up by the answer) where the plaintiff accepted the position thus created: see the *London and Birmingham Rail. Co. v. Winter* (10). This case was referred to by FRY, J., in *Smith v. Wheatcroft* (11), as embodying the true rule. The question is one of degree and discretion. Where it is found that the parties are not ad idem, the court declines to interfere, but where the parties were at one the court may grant specific performance—even if a variation or addition must be made.

The present case, where the question is one of interpretation, seems to follow a fortiori from the above. In the present day, when the court is equipped to give the relief required in the circumstances, it seems quite unnecessary to require the vendor to bring a fresh action, as it is admitted he could do. Nor can the purchaser require this to be done in order to enable him to alter his position. It is too late for that. The purchaser has stood by his contract, even to the exclusion of his conditional counterclaim for rescission if only his interpretation of the contract is accepted by

A the court. It is too late for him, in a new action, to ask for rescission of the contract which has been found to stand good according to his own interpretation in the present action. For these reasons, I am of opinion that the vendor will be entitled to specific performance on the basis of his paying the costs of the action, a term offered below which he stands by in this court. The appeal must be allowed.

B **SARGANT, L.J.**—The vendor does not in any way question the findings of the judge as to the true construction of the agreement between the parties, namely, that the purchaser was right in claiming to have conveyed to him a right of way in respect of the whole of Lot 10 both over Perry's Place into Oxford Street and over Newman's Yard into Newman Street, and also that the difference on this point which had arisen between the vendor and Horne, on the one hand, and the purchaser, on the other hand, was not one which could be determined by the vendor's solicitors. It is also conceded on the part of the vendor that the judge was fully entitled to order the costs of the purchaser up to and including the hearing to be paid by the vendor as the party who had occasioned the litigation by insisting on what has been decided to be a wrong interpretation of the contract. That which the vendor complains of is the dismissal of his claim for specific performance. He maintains he is still entitled to specific performance of the contract in accordance with the interpretation which has been placed upon it by the court, so as to leave him an opportunity of showing good title in accordance with that interpretation. The question is one of some general importance and on which there is little, if any, express authority. It depends both on general principle and on a consideration of the attitude of the parties as evinced by their pleadings in the action.

E The view of RUSSELL, J., on this part of the case is very clearly and vigorously expressed in the following passage from his judgment. He said :

F “The action is an action for specific performance, and nothing else. It is for specific performance, not of the contract as now construed by the court, but specific performance of a totally different contract. It is an action based, and necessarily based, upon the allegation that the vendor has at all times and is ready and willing to carry out the contract. That is quite true so far as the words apply to the contract as construed by the vendor, but it is wholly untrue in regard to the contract as construed by the court, and which for the present purpose I must assume to be the correct construction. Counsel for the vendor says : ‘True it is I have sought up to the present moment to force upon the defendant a contract which I am not entitled to force upon him; true it is that up to the present moment I have resisted with all my power performing the contract which he—and the court now says with him—was the correct contract; but still, you must dismiss my action for specific performance. Having blown hot, I now blow cold. I now ask the court to decree a specific performance of what the court has determined to be the true contract.’ No authority has been cited to me in favour of that contention, and certainly in the absence of any clear and binding authority it does not seem to me to be the reasonable position. Accordingly, it seems to me the proper order to make with regard to the action is simply to dismiss it with costs.”

I With all deference to the learned judge, I am unable to take this view of the matter. The only contract that the vendor has throughout been endeavouring to enforce is the written contract which confessedly was made between him and the purchaser, and though the vendor has unfortunately put a construction on the contract which was a mistaken one and has failed, I cannot see that he has thereby disentitled himself to enforce the contract on that construction of which the court has determined to be the right one. No doubt, he has insisted on his mistaken view down to and at the hearing; but that was the first time at which the true construction of the contract was or could be ascertained by the court in these proceedings. Where there is, as here, a perfectly bonâ fide dispute as to the interpretation of conditions of sale by auction, it is, I think, an unduly strict view to take of the position of a

vendor, that he cannot seek to enforce his view of the written contract without losing his right of enforcing it at all, should his interpretation prove to be incorrect. Nor do I think that the pleadings in this action have put the vendor out of court. No doubt, various paragraphs in the statement of claim indicate the construction of the contract for which he is contending. But his actual prayer is for "specific performance of the said agreement," which, undoubtedly, means the contract in writing pleaded in the statement of claim. This view is accepted by the defence, which does not question the existence of this contract in writing, and by para. 10 makes an offer—which, of course, must be read as subsisting down to the hearing: see *Hipgrave v. Case* (12), to accept a grant of rights of way in the sense contended for by the purchaser. From the time of the delivery of that defence I think that the sole effective question between the vendor and the purchaser on the vendor's claim was whether these rights of way were to be granted in respect of the whole of Lot 10, or in respect of the two separate portions thereof respectively.

The learned judge suffered from little if any authority being cited to him in support of the contentions of either party; and we in this court have been almost equally unfortunate, though counsel for the vendor did refer to one case, *Preston v. Luck* (1), which is of considerable assistance in his favour. But there are other cases, such as *London and Birmingham Rail. Co. v. Winter* (10) and *Smith v. Wheatcroft* (11), which also tend definitely in the same direction. I have not found any case where, there being a single definite written contract readily capable of interpretation by the court and no question arising of the existence of any parol variation or any misleading of the defendant, the plaintiff has been held to have forfeited his right to specific performance by reason of his having sought to enforce a mistaken interpretation of the contract. *Clowes v. Higginson* (13) which was a sequel to *Higginson v. Clowes* (14) with the position reversed, was a case in which there was an extraordinarily ambiguous agreement, and the court held that there had been a mistake on both sides as to a most important term (namely, the inclusion or exclusion of valuable timber), and that the parties were never ad idem. In *Marshall v. Berridge* (15) the circumstances were so exceptional as to form no precedent of any value in the present case. In *Lindsay v. Lynch* (16) a bill by an intending lessee for specific performance of an agreement for a lease of three lives was dismissed without prejudice to his filing another bill for a lease for a single life. But in that case there was beyond the written agreement a superadded parol variation which was in dispute. I do not think that at the present day it would be right to dismiss the vendor's action without prejudice to his being at liberty to bring another action to enforce the contract as now construed by the court, if the court were of opinion (as I think it should be) that the conduct of the vendor had not definitely precluded him from obtaining specific performance. Nor does the formal order as actually drawn up here contain any such special reservation in the vendor's favour; and as it stands it would, in my judgment, be a formidable obstacle, if not a complete bar, to success in any subsequent action for specific performance.

The purchaser, in his argument before this court, has gone even further than the learned judge, and has contended that the pleading of the vendor has amounted to an actual repudiation of the contract, and entitled the purchaser at the hearing to accept this repudiation and to obtain a declaration that the contract has been rescinded. I cannot think that this attitude is well founded so far as the claim (as distinguished from the counterclaim) is concerned. The reasons for holding that the mistake of the vendor as to the true construction of the contract does not preclude him from enforcing the contract as properly construed apply with at least equal force to negative the conclusion that the vendor's attitude amounted to a repudiation of the contract. Further, it is essential that a party to a contract, who desires to avail himself of an act of repudiation by the other party, should evidence his election to do so with every reasonable dispatch: *Halkett v. Earl of Dudley* (4). But here, on the contrary, from the time of the delivery of the defence down to the hearing of the action, the purchaser, so far from availing himself of what

A is now relied on as a repudiation by the vendor, professed his willingness to complete the contract if (as has now proved to be the case) the contract should be construed in the sense contended for by him. Further, though the purchaser, by his counterclaim, asked for the rescission of the contract, this was only sought conditionally and on a hypothesis which has not been fulfilled, namely that the contract should be interpreted according to the vendor's contentions. As to this counterclaim, the learned judge was, in my judgment, quite right in refusing the purchaser liberty to amend, so as to raise an entirely new and unconditional claim for rescission. No cross-appeal has been lodged by the purchaser against this refusal or against the dismissal of the counterclaim.

The further argument on the part of the purchaser remains to be considered, namely, that by the conveyance to Horne of the freehold of Newman's Yard, the precise terms of which deed were not known to the purchaser until the hearing of the action, the vendor deliberately put it out of his power to grant to the purchaser a right of way over Newman's Yard to the whole of Lot 10; and that the vendor by so doing repudiated his contract with the purchaser and gave him a fresh right of electing to treat the contract as at an end. There is, in my judgment, a sufficient answer to this argument. In the first place, I have grave doubts whether the conveyance to Horne had this effect—that is, whether the subjection of Newman's Yard in that deed to "the rights of way and other easements granted to the lessees and purchasers of Nos. 4, 5, 6, 7, 8, 9, Newman Street, and the warehouse and workshops in Perry's Place and Newman's Yard" (that is Lot 10) did not subject Newman's Yard to the easements provided for by the particulars and conditions of sale on their true construction. Having referred to the offer made by the vendor both to the judge below and to this court, we ought not to decide the point against the purchaser, but should require the vendor to obtain a re-grant from Horne to the vendor sufficient to enable the vendor to give the purchaser a full and undoubted title to a right of way over Newman's Yard to the whole of Lot 10. But, assuming that the grant to Horne prevented the vendor from granting the purchaser the right of way contracted for, I do not think the mistake was without excuse, or that, if and when remedied, it should thereafter stand in the way of the vendor. The vendor had to complete his contract with Horne, and could not well put him off until the difference with the purchaser was determined, the owners of Lots 4 to 9 inclusive also having rights in the matter. I cannot, therefore, regard the conveyance to Horne as being of the nature of a repudiation of the bargain with the purchaser. Further, this right of way to the whole of Lot 10 was after all only an adjunct to the main subject of the sale, namely the warehouses and workshops forming Lot 10. A defect in title to a comparatively small part of the subject-matter of the contract is capable of being cured before conveyance, and is the sort of defect for the cure of which the court usually allows a reasonable time: *Coffin v. Cooper* (17), *Chamberlain v. Lee* (18).

The delay in the completion of the matter having been caused by the clear though bona fide mistake of the vendor as to the terms of the conveyance of the purchaser, and the court having full discretion as to the terms on which specific performance should be decreed, it should, in my judgment, be a term of granting relief in this case to the vendor that the purchaser should pay interest on the balance of his purchase money on completion, not at the full rate of 6 per cent. reserved by the agreement, but at the lower rate of 5 per cent. only. In my view, the judgment of the court should be in the following terms: Discharge the order of Nov. 11, 1924, except so far as it directs that the costs of the action be taxed by the taxing master and paid by the vendor to the purchaser. Declare that on the true construction of the contract of July 3, 1923, in the pleadings mentioned the purchaser was entitled to the grant of a perpetual right of way to and from the whole of Lot 10 over the roadway leading from Oxford Street to Perry's Place, and also to the grant of a perpetual right of way to and from the whole of Lot 10 over the access by way of Newman's Yard from and to Newman Street. And it appearing that the title to

Lot 10 except as regard the power to grant the said right of way to and from Newman Street has been accepted by the purchaser and that the form of the conveyance of Lot 10, except as regards the grant of the two rights of way, has been agreed between the parties, order that upon the vendor executing to the purchaser a conveyance of Lot 10 with the said two rights of way (such variations to be settled by the judge in case the parties differ) the purchaser to complete the said purchase on his part in accordance with the said contract, but so that upon completion the purchaser is charged with interest on the balance of his purchase money at the rate of 5 per cent. per annum only instead of 6 per cent. Liberty to either party to apply to the judge in chambers as to the title of the vendor to grant the rights of way hereinbefore specified or on any other question arising on the completion of the purchase as hereinbefore decreed, and generally order the purchaser to pay to the vendor his costs of the appeal, such costs to be taxed, and let the costs payable under this order be set off against the costs payable by the vendor to the purchaser under the order of Nov. 11, 1924.

ASTBURY, J.—This is an appeal by the plaintiff in a vendor's specific performance action, in which the whole expense of the litigation in the court below was caused solely by the vendor attempting to force upon the purchaser a conveyance which did not give him the rights to which, by the contract in question, he was entitled. If the purchaser had obtained from the vendor, as possibly he might have done, a refusal to complete, except upon the terms wrongfully insisted upon by him, and had by his defence or otherwise accepted this position and asked to be relieved from his contract by reason of such repudiation of his rights by the vendor, I am of opinion that the action would have been rightly dismissed. This, however, is not what the purchaser did. The statement of claim asked for specific performance of the contract existing between the parties, setting up, however, a construction of the agreement which the vendor was not entitled to insist upon, and wrongfully alleging that the vendor was and always had been ready and willing to perform the contract, and that this non-completion thereof was solely due to the wilful neglect and default of the purchaser, which was not the fact. The defence put those allegations in issue, but para. 10 contained an offer by the purchaser to complete upon the true construction of the contract, which was rightly pleaded by him, and the action went to trial with this offer on the part of the defendant remaining in the pleadings. Towards the end of the hearing in the court below, the vendor's counsel in his reply, aware that the court was against the construction of the contract theretofore contended for by his client, offered to complete upon the construction contended for by the purchaser, and to pay the costs of the action down to and including an order for specific performance to be made in the action. This, in my judgment, was an acceptance of the offer contained in the defence to complete on the terms contained in it, so that, at this moment, both parties to the action, which was for specific performance, must be taken to have therein submitted to perform the contract, by which they were both bound, in accordance with the true construction of its terms which the defendant had throughout rightly contended for. In my opinion, the vendor's belated repentance on the question of construction was, subject to costs, in time; the purchaser, who was protected in the matter of costs, had no right to complain of being confirmed in his purchase on the true terms of his contract and his offer to so complete it; and an order for specific performance would have been the appropriate ending to the action, which was properly constituted and available for this purpose. The purchaser's subsequent attempt to obtain leave to amend his conditional counterclaim and to set up a prior unpleaded acceptance of an alleged repudiation of the contract by the vendor at an earlier date, as to the existence of which in the circumstances I am by no means satisfied, was, in my judgment, too late and was properly refused. At the time when the vendor's counsel offered to complete the agreement on its true construction, both parties were, or must be taken to have been, as I have said, willing

A and offered to complete their existing contract, as in law they ought to have been, and this seems to me to end the matter. I have had the privilege of reading the judgments delivered by my Lord and SARGANT, L.J., and I agree with them and with the form of order proposed to be made in this court.

Solicitors: *Saxton & Morgan; Rivers & Milne.*

B [Reported by H. LANGFORD LEWIS, Esq., Barrister-at-Law.]

ROSSITER v. LANGLEY

[KING'S BENCH DIVISION (Salter and Fraser, JJ.), February 12, 1925]

[Reported [1925] 1 K.B. 741; 94 L.J.K.B. 400; 133 L.T. 42; 41 T.L.R. 304; 23 L.G.R. 269]

Rent Restriction—Possession—Postponement of date for possession—Order for possession made by consent—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 5 (2) (as substituted by s. 4 of the Rent and Mortgage Interest Restrictions Act, 1923).

E The fact that an order for possession has been made as the result of an agreement between landlord and tenant does not deprive a county court judge of the discretion with which he has been invested by s. 5 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as to varying the order by postponing the date for possession.

Notes. Cases referred to:

F (1) *Barton v. Fincham*, [1921] 2 K.B. 291; 90 L.J.K.B. 451; 124 L.T. 495; 85 J.P. 145; 37 T.L.R. 386; 65 Sol. Jo. 326; 19 L.G.R. 185, C.A.; 31 Digest (Repl.) 701, 7912.

(2) *Wellesley v. White*, [1921] 2 K.B. 204; 90 L.J.K.B. 926; 125 L.T. 92; 19 L.G.R. 255, D.C.; 31 Digest (Repl.) 655, 7579.

Appeal from Bristol County Court.

G The appellant was the tenant of a shop and dwelling-house at Bristol, at a rent of 17s. 4d. per week. The respondent, the landlord, gave her notice to quit in August, 1923; she did not give up possession, but remained on as a statutory tenant. Subsequently, the landlord brought an action in the county court for possession of the premises, but on Dec. 21, 1923, an agreement was signed by the parties, by which the tenant consented to an order for the giving up of the possession of the premises to the landlord, to take effect on Sept. 29, 1924. When the landlord's claim was heard the county court judge entered judgment for the landlord in accordance with the terms of the agreement. On Oct. 1, 1924, the tenant made an application to the county court to stay and suspend execution on the order. The county court judge dismissed the application without considering the merits of the case, because he held that, the original order having been made by consent, s. 5 (2) of the Rent Act, 1920 (as substituted), did not apply so as to confer on him jurisdiction to vary the order. The tenant appealed.

Cecil Havers for the tenant.

Wethered for the landlord.

The following cases were referred to: *Barton v. Fincham* (1), *Wellesley v. White* (2).

By s. 5 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (as substituted):

"At the time of the application for or the making or giving of any order or judgment for the recovery of possession of any . . . dwelling-house, or for the ejectment of a tenant therefrom, or in the case of any such order or judgment which has been made or given, whether before or after the passing of this Act, and not executed at any subsequent time, the court may adjourn the application, or stay or suspend execution on any such order or judgment, or postpone the date of possession for such period or periods as it thinks fit, and subject to such conditions (if any) in regard to payment by the tenant of arrears of rent, rent, or mesne profits and otherwise as the court thinks fit, and, if such conditions are complied with, the court may, if it thinks fit, discharge or rescind any such order or judgment."

SALTER, J.—This case raises a short point which is not free from difficulty. The landlord of premises to which the Rent Restriction Act applied took proceedings in the county court to recover possession. An agreement was then made between the parties in the following terms :

"We, the undersigned, solicitors for the [landlord], and Miss Rossiter [tenant], hereby agree to judgment for possession of the premises, the subject-matter of this action, to be given up on Sept. 29, 1924. No costs. Dated this 21st day of December 1923. (Signed) Veale & Co., G. E. Rossiter."

That agreement was handed to the judge, and judgment for possession was entered in accordance with its terms. On Oct. 1, 1924, the tenant applied to the county court judge, under s. 5 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, for such relief as the county court judge thought fit to give her by postponing the date of possession. The county court judge did not apply his discretion because he came to the conclusion that he had no jurisdiction to do so, and that s. 5 (2) did not apply because the order had been made by consent.

Section 5 (2) must be read in its context, and sub-s. (1) is of importance—perhaps the most important provision in the Act, because it shows the strong intention of the legislature, an intention which has grown stronger with time, to limit the powers of the courts to allow the ejectment of the smaller classes of tenants. Sub-section (2) provides that, where an order for possession has been made the tenant can, at any time up to the last moment, go to the county court judge and ask him to exercise his discretion. That sub-section shows an equally emphatic intention. No wider words could be used. It is obviously a provision intended to be wholly in the interest and for the protection of the tenant, and intended to give to the county court judge, a wide discretion to vary orders for possession up to the very last moment in the interest of tenants. That power was given in express terms. The question is whether this court has any warrant for restricting these words by saying that an order made by consent is not within this section, and cannot be varied.

In the case of an order made by consent, the tenant might say to the landlord : "I might be able to put difficulties in your way, but if you will let the order stand over for a certain time I will not do so." The landlord in the present case said that he would not ask for costs and would leave the tenant in possession till September, 1924. If the matter were without authority, I should have some doubt, but there are two cases that should be considered. The first is *Barton v. Fincham* (1). In that case a tenant had agreed, in consideration of a money payment by his landlord, to yield up possession by a certain date, but he refused to give up possession when the time arrived. The landlord brought an action in the county court to recover possession, but was unable to show that any of the circumstances existed which, under s. 5 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, must exist before an order for possession can be made : [see now the Rent, &c., Restrictions Act, 1933, s. 3, Sched. 1]. The Court of Appeal, therefore, held that the landlord could not recover possession. The case is not by any means conclusive of the present one, but it forms a very valuable guide. All that it decided is that parties to an agreement made after the Act came into force cannot rely on

A that agreement to increase the powers of the county court judge under s. 5 (1). But nor can they withdraw from him the powers granted under s. 5 (2). With regard to *Wellesley v. White* (2), the present judgment does not necessarily differ from that of the Divisional Court in that case. There the agreement was made before the Act of 1920 came into operation, and that fact probably distinguishes the case from the present one.

B The county court judge was wrong in refusing to consider the application made by the tenant. The appeal must be allowed and the case must go back to him to exercise his discretion in the matter. What he may do in his discretion is not material. But he was wrong in law in holding that he had no discretion to deal with the matter.

FRASER, J.—I agree.

Appeal allowed.

Solicitors: *E. C. Rawlings, Butt & Bowyer*, for *F. E. C. Hakgood*, Bristol; *Wilkinson, Bower, Jackson & Curran*, for *Veale & Co.*, Bristol.

[Reported by T. R. FITZWALTER BUTLER, Esq., Barrister-at-Law.]

D

E

A. W. GAMAGE, LTD. v. PAYNE

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Sankey, JJ.), November 17, 1925]

[Reported 134 L.T. 222; 90 J.P. 14; 42 T.L.R. 138]

Hire-Purchase—Distress—"Tenant whose rent is in arrear"—Joint tenant—Goods hired to joint tenant—Joint tenants in arrear with rent—Law of Distress Amendment Act, 1908 (8 Edw. 7, c. 53), s. 4 (1).

F

G

Under a hire-purchase agreement in respect of a piano made between the appellants and one of two joint tenants of a dwelling-house it was provided that the hirer should pay a monthly payment and that until £43 18s. had been paid the piano should remain the property of the appellants. The rent of the premises and also the rent under the hire-purchase agreement fell into arrear, and the respondent, on behalf of the landlord of the premises, levied a distress upon the piano. The appellants thereupon made a declaration under s. 1 of the Law of Distress Amendment Act, 1908, that the piano was their property, served that declaration on the respondent, and summoned him under s. 2 of the Act for illegal distress.

H

Held: "the tenant whose rent is in arrear" in s. 4 (1) of the Law of Distress Amendment Act, 1908, included either of two joint tenants whose rent was in arrear, and, therefore, the case fell within s. 4 (1), ss. 1 and 2 were excluded, and the distress was not illegal.

I

Notes. As to distress for rent on goods comprised in a hire-purchase agreement see 18 HALSBURY'S LAWS (3rd Edn.) 559, and for cases see 18 DIGEST (Repl.) 296. For Law of Distress Amendment Act, 1908, see 6 HALSBURY'S STATUTES (2nd Edn.) 170.

Cases referred to:

- (1) *Re Blanshard, Ex parte Hattersley* (1878), 8 Ch.D. 601; 47 L.J. Bcy. 113; 38 L.T. 619; 26 W.R. 636; 5 Digest 807, 6894.
- (2) *Gordon v. Goldstein*, [1924] 2 K.B. 779; 94 L.J.K.B. 21; 132 L.T. 155; [1924] B. & C.R. 245; Digest Supp.

Case Stated by a metropolitan magistrate.

On May 16, 1925, a complaint was made by Wilfred Glaishyer Hughes, on behalf of A. W. Gamage, Ltd. (hereinafter called the appellants), under the Law of Distress Amendment Act, 1908, against Francis William Dargonne Payne, trading as Frank Payne & Co. (hereinafter called the respondent), for that he, on May 5, 1925, and at all times subsequently, at 10, Holborn House, Baldwin's Gardens, within the metropolitan police district, after being duly served with a declaration pursuant to the Law of Distress Amendment Act, 1908, did unlawfully and wrongfully proceed with a distress on the chattels of the appellants, to wit, one Hathol vertical piano, contrary to s. 2 of the said Act.

Upon the hearing of the complaint the following facts were admitted. (i) By an agreement in writing dated Oct. 8, 1924, one Stephen Gee let to John Edwin Cavanagh and his mother, Lilian Cavanagh, a widow, premises known as 10, Holborn House, Baldwin's Gardens, for a term of three years from Sept. 29, 1924, at a rental of £104 per annum, payable at the rate of £2 a week. (ii) On Dec. 9, 1924, the said Lilian Cavanagh hired from the appellants on the terms of a hire-purchase agreement, a Hathol vertical piano, the cash price whereof was stated in the agreement to be £39 18s. The agreement provided (inter alia) for the payment by the hirer of £1 4s. 5d. on the signing thereof in consideration of the option of purchase granted thereby, and for the payment of the monthly rent of £1 4s. 5d. thereafter, the first of such payments to be made on Jan. 6, 1925. The agreement also provided that until the sum of £43 18s. should be paid by the hirer the piano should remain the property of the appellants. The agreement also provided that if the hirer should (inter alia) make default in the punctual payment of any of the payments or fail to observe or perform any of the terms of the agreement, or if the piano should be distrained upon for rent or otherwise, the owners (i.e., the appellants) should be entitled to terminate the hiring and re-take possession of the piano. (iii) On April 27, 1925, John Edwin Cavanagh and Lilian Cavanagh were £24 2s. 2d. in arrear with their rent of 10, Holborn House, and Lilian Cavanagh was in arrear with her hire payments to the appellants under the hire-purchase agreement. (iv) On April 30, 1925, the respondent, on behalf of the said Stephen Gee, levied a distress for the said arrears of rent at the premises upon (inter alia) the Hathol vertical piano, and immediately notified the appellants by letter dated May 1, 1925, that he had done so. (v) On the same day the appellants, by one Edgar Wyndham Malvern, duly made a declaration under the Law of Distress Amendment Act, 1908, and the declaration was served upon the respondent. It was agreed between the parties that the sole question for decision was whether the piano was excepted by s. 4 of the Law of Distress Amendment Act, 1908, from the protection from distress given by s. 1 of that Act because it was (in the words of s. 4):

"goods comprised in any . . . hire-purchase agreement . . . made by [the tenant whose rent is in arrear]" or because it was "goods in the possession, order, or disposition of such tenant by the consent and permission of the true owner under such circumstances that such tenant is the reputed owner thereof."

It was agreed that, if the piano did not come within s. 4 on either of the said grounds, the appellants were entitled to the relief claimed; if it did, then the respondent succeeded.

On the part of the appellants it was contended that the piano was protected from distress under s. 1 of the Act, and that s. 4 did not apply; that inasmuch as the hire-purchase agreement was made by Lilian Cavanagh alone, and the tenancy agreement was made by her and her son, John Edwin Cavanagh, jointly, it could not be said that the piano was comprised in a hire-purchase agreement made by the tenant whose rent was in arrear; that the tenant whose rent was in arrear was the entity comprised in John Edwin Cavanagh and Lilian Cavanagh jointly, which was distinct from one of them separately, i.e., Mrs. Cavanagh; that joint tenants held *pur mie et pur tout*, i.e., the whole jointly and nothing severally,

A and that Mrs. Cavanagh had no several interest in the tenancy at all, but merely a joint interest with her son, and that, therefore, she could not be described as "the tenant whose rent is in arrear" within s. 4 (1); that the section would only apply in the case of joint tenancies when the joint tenants also jointly entered into the hire-purchase agreement. It was further contended on the part of the appellants that the piano was not "in the possession, order, or disposition of such tenant (i.e., the tenant whose rent was in arrear) by the consent and permission of the true owner under such circumstances that such tenant was the reputed owner thereof," because (a) in fact it was in the possession of Lilian Cavanagh only, and the same reasoning as above applied; (b) the true owner (i.e., the appellants) only consented that it should be in the possession of one, i.e., Lilian Cavanagh; and (c) the reputed ownership doctrine did not in any event apply to pianos as the custom of letting pianos on the hire-purchase system had been judicially recognised. On the part of the respondent it was contended that the piano came within s. 4 of the Law of Distress Amendment Act, 1908, on both the grounds above mentioned, and was not protected from distress by s. 1 of the Act; that where the tenancy was a joint tenancy all the rights and obligations of the tenancy could be ascribed to each of the joint tenants; that each of the two tenants was the tenant whose rent was in arrear; that the word "tenant" in s. 4 included the word "tenants"; that on the true construction of s. 4 the words "such tenant" meant "such tenant or tenants or any or either of them." It was further contended on behalf of the respondent that the piano was in the possession, order, or disposition of both the joint tenants by the consent and permission of the true owner under such circumstances that each of them was the reputed owner thereof, and that the reputed ownership doctrine did in fact apply.

The magistrate was of opinion that the construction placed by the appellants upon the words "tenant whose rent is in arrear" would render s. 4 of the Law of Distress Amendment Act, 1908, in a large measure nugatory in the case of a joint tenancy, and could not have been intended by the Act. The provision in s. 4 (1) that the Act should not apply to "goods belonging to the husband or wife of the tenant" appeared to him to have no application to a joint tenancy, unless "tenant" denoted one of the joint tenants. He was of opinion that upon the true construction of the section "the tenant whose rent is in arrear" included either of the joint tenants, and that the piano, being comprised in a hire-purchase agreement made by a joint tenant whose rent was in arrear, was within an exception specified in the section, and he accordingly dismissed the summons. On the other point, he was of opinion that the piano was not in the possession, order or disposition of John Edwin Cavanagh by the consent and permission of the true owner or at all; and he was further of opinion that the custom of letting pianos on the hire-purchase system, being well known, and having been judicially recognised (*Re Blanshard, Ex parte Hattersley* (1)), the piano was not in the possession, order, or disposition of Lilian Cavanagh by the consent and permission of the true owner under such circumstances that she was the reputed owner thereof.

Sir Walter Schwabe, K.C., and A. A. Periera, for the appellants.
J. P. Eddy, for the respondent.

LORD HEWART, C.J.—In my opinion, this appeal fails. The question, and it is quite a short one, turns on the words in s. 4 of the Law of Distress Amendment Act, 1908. It is argued that where there is a joint tenancy those words do not apply unless the hire-purchase agreement is made by each of the joint tenants. Here the hire-purchase agreement was made by only one of the tenants. It is clear that it was made by a tenant whose rent was in arrear, and, being a joint tenant, a tenant of the whole premises. *Gordon v. Goldstein* (2), to which we have been referred, only decided that it is inaccurate to describe a husband as grantor of a bill of sale when the chattels comprised in it were entirely his wife's. Here there was no question by whom the hire-purchase agreement was made. It

is said that the true view is that that person was a tenant, not *the* tenant, but, in my view, the magistrate was perfectly right, and for the reasons which he gave.

AVORY, J.—I agree.

SANKEY, J.—I agree.

Appeal dismissed.

Solicitors: *Tudor & Rowe; R. H. King & Co.*

[Reported by J. F. WALKER, Esq., Barrister-at-Law.]

TAYLOR v. BRITISH LEGAL LIFE ASSURANCE CO., LTD.

[CHANCERY DIVISION (P. O. Lawrence, J.), January 22, 23, 27, 29, 30, 1925]

[Reported 94 L.J.Ch. 284; 133 L.T. 453; 23 L.G.R. 585]

Landlord and Tenant—Lease—Reservation—"Passage of pipes through demised premises"—Right to lay pipes after date of lease—Reasonable exercise of right.

A lease to the defendant company of the first floor and part of the basement of a block of buildings contained the following reservation: "Excepting and reserving unto the lessors and the person or persons for the time being occupying the other parts of the said building the passage of gas, water, and other pipes and electric wires through the demised premises and the free running of water and soil in and through the pipes connected with the demised premises."

Held: (i) the words "passage of gas, water, and other pipes and electric wires" operated to reserve to the lessor a general right to lay fresh pipes through the demised premises and was not merely an exception of pipes existing on the premises at the time of the lease, and the absence of any provision in the lease of a right of entry on the defendants' premises for the purpose of laying new pipes did not affect that interpretation of the clause; (ii) the right must be exercised in such a way as not to cause any unnecessary loss, disturbance, inconvenience or annoyance to the defendants.

Notes. As to reservations in leases see 23 HALSBURY'S LAWS (2nd Edn.) 486, and for cases see 31 DIGEST (Repl.) 29.

Cases referred to:

- (1) *Abson v. Fenton* (1823), 1 B. & C. 195; 1 L.J.O.S.K.B. 94; 107 E.R. 73; 19 Digest 115, 754.
- (2) *Morris v. Edgington* (1810), 3 Taunt. 24; 128 E.R. 10; 19 Digest 17, 49.
- (3) *Senhouse v. Christian* (1787), 1 Term Rep. 560; 99 E.R. 1251; 19 Digest 112, 726.
- (4) *Bolton v. Bolton* (1879), 11 Ch.D. 968; 48 L.J.Ch. 467; 43 J.P. 764; sub nom. *Bolton v. London School Board*, 40 L.T. 582; 19 Digest 101, 641.
- (5) *Deacon v. South-Eastern Rail. Co.* (1889), 61 L.T. 377; 19 Digest 96, 598.
- (6) *Savill Bros., Ltd. v. Bethell*, [1902] 2 Ch. 523; 71 L.J.Ch. 652; 87 L.T. 191; 50 W.R. 580, C.A.; 17 Digest (Repl.) 301, 1077.

Witness Action.

The plaintiff, Frances Lily Taylor, a married woman, had for five years carried on the business of an hotel proprietor at the Basil Street Hotel in Basil Street, Knightsbridge, London, and in May, 1924, she negotiated for the extension of her hotel premises by the acquisition of a lease of portions of the second floor and mezzanine floor of a large block of adjoining premises known as Imperial Court. By a lease, dated May 27, 1924, a firm of architects who had built Imperial Court demised to the plaintiff at a rental of £1,150 per annum (together with a certain

A insurance rental) for twenty-one years from June 24, 1924, the portions of the second mezzanine floors aforesaid to be used as an addition to the plaintiff's hotel subject to the following reservation :

B "Excepting and reserving unto the lessors and the person or persons for the time being occupying the other parts of the said building the passage of gas, water, and other pipes and electric wires through the demised premises and the free running of water and soil in and through the pipes connected with the demised premises."

C The defendants were the lessees from the lessors, the said firm of architects, for a determinable term of twenty-one years from June 24, 1923, and the occupiers of the first floor of Imperial Court under an indenture of lease dated May 18, 1923, which contained a similar exception and reservation to the lessors and persons for the time being occupying other parts of the building as was reserved in the lease to the plaintiff. The plaintiff acquired the second floor of Imperial Court for the purpose of dividing the same into a number of rooms—including eight bathrooms with a water-closet in each along the Basil Street frontage of Imperial Court, the water service (hot and cold) to be brought from her hotel through the party or dividing wall on the second floor, and the waste water and soil to be carried away by pipes or conduits conducted through the first floor and mezzanine and ground floors of Imperial Court into the drainage system beneath the building. The plaintiff's intention was known to the lessors and had their approval, and they were also aware of and approved the detailed plan for executing the works by cutting eight separate holes in the floor of the second floor each to take a soil pipe and a bath-waste pipe, all the pipes radiating above the ceiling of the defendants' first floor into four conduits only, two on the west side and the other two on the east so as to reduce the number of openings necessary in the ceiling and floor of the first floor to two only for the purpose of leading to a discharge at the side of the arcade which ran under the east of the building. The plaintiff alleged that the consent of the defendants or their representative to this method of carrying out the operation was obtained, and the necessary openings in the ceiling and floor of the defendants' premises were made in July, 1924. On Aug. 16, 1924, the pipes were openly and to the knowledge of the defendants taken on the first floor of Imperial Court and fitted up and fixed to the wall inside the defendants' premises and then connected to the bathrooms and closets on the second floor. The operation was near completion in September, 1924, and the plaintiff arranged to let some of the bedrooms in the new extension together with the use of bathrooms, as from Sept. 15, 1924, at considerable and profitable rentals. On Sept. 8, however, the defendants cut the pipes rendering the plaintiff's works useless and making it impossible for the plaintiff to let the bathrooms.

H The defendants, by their defence, denied that the plaintiff obtained the licence in writing of the lessors to carry out the works, and, save by a letter, dated July 14, 1924, written by the engineers employed by the plaintiff to carry out the works to them asking permission to take down casing, cut a way for and run a new soil pipe through 19, Brompton Arcade, as explained by their foreman plumber, which permission was never given by them, denied that they were applied to for facilities for executing the works or that they agreed that the pipes could be taken through their premises. Alternatively, that they gave no authority to any person on their behalf to make any agreement with the plaintiff or her engineers. The defendants admitted that on Sept. 8, 1924, they cut the pipes passing from the plaintiff's premises into the defendants' premises. Alternatively, the defendants said that the work proposed to be executed by the plaintiff would result in an unreasonable interference with the defendants' use and enjoyment of their premises, as the pipes would diminish the space of the defendants' premises and the working area thereof and deprive them of a proportion of the light and air previously enjoyed by them and to which they were entitled. The release from the baths and water-closets

of large volumes of water at irregular intervals passing through the pipes installed on the defendants' premises would cause a nuisance to the defendants by noise and vibration and would interrupt the work of the defendants' employees on their premises.

On Sept. 11, 1924, the defendants commenced proceedings to restrain the plaintiff from carrying out the proposed work, but by an agreement between the defendants and the plaintiff the proceedings were not proceeded with pending the trial of this action. The plaintiff, therefore, claimed (i) an injunction restraining the defendants, their servants and agents from cutting or otherwise interfering with the said pipes, conduits, or other works laid or placed by or for the plaintiff in any part of the building known as Imperial Court for the purpose of obtaining free passage or running of water and soil through and from the parts of the building demised to the plaintiff by the indenture of lease dated May 27, 1924. (ii) An injunction to restrain the defendants, their servants and agents from excluding the plaintiff from entering at reasonable times in the day-time upon that part of Imperial Court which was in the occupation of the defendants for the purpose of laying, making, altering, or repairing such pipes, conduits, or other works passing through such part of Imperial Court, or communicating with or affecting other parts of the building, the plaintiff making good to the defendants all damage thereby occasioned. (iii) An order upon the defendants forthwith to repair or reinstate into their former condition all pipes or conduits and other works of the plaintiff in or about Imperial Court cut or damaged by the defendants. (iv) Damages. Further facts will be found set out in his Lordship's judgment as to the pipes existing on the defendants' premises and the plaintiff's operations which his Lordship held were made wholly regardless of their effect on the defendants and could have been carried out in another way by which any inconvenience to the defendants would have practically been rendered non-existent.

C. E. E. Jenkins, K.C., and W. H. Draper, for the plaintiff.

Owen Thompson, K.C., and W. F. Swords, for the defendants, referred to GALE ON EASEMENTS (7th Edn.), p. 439, Abson v. Fenton (1), Morris v. Edgington (2), Senhouse v. Christian (3), Bolton v. Bolton (4), Deacon v. South-Eastern Rail. Co. (5), Savill Bros., Ltd. v. Bethell (6).

P. O. LAWRENCE, J.—The first question which arises in this case is as to the true meaning and effect of the exception and reservation in the defendants' lease. The parcels are described as follows :

"All those rooms and premises (hereinafter called 'the demised premises') consisting of the first floor and a portion of the basement forming and being part of the building known as Imperial Court, Brompton Road, Knightsbridge, in the county of London, which premises are more particularly delineated on the plans annexed to these presents . . ."

The annexed plans show that none of the external walls of the demised premises is included in the demise. The exception and reservation in question is as follows :

"Excepting and reserving unto the lessors and the person or persons for the time being occupying the other parts of the said building the passage of gas, water, and other pipes and electric wires through the demised premises and the free running of water and soil in and through the pipes connected with the demised premises."

The building known as Imperial Court consists of a large building having a frontage on the west on Brompton Road, Knightsbridge, and on the east on Basil Street. It contains a basement, a ground floor occupied chiefly by shops, a mezzanine floor, a first floor and second and third floors above. At the date of the defendants' lease the second and third floors were occupied as offices in connection with Government Departments, but were expected shortly to become vacant. A rain-water stack pipe connecting with the gutter on the Basil Street frontage ran on

A the outside of the building until very nearly the level of the floor of the defendants' premises. It then entered those premises and ran in a northerly direction until it again left the premises in order to connect with the sewers below. In addition to this pipe there were in the lavatory on the north side of the defendants' premises certain waterpipes and a gas pipe, those water pipes serving the lavatory basins and accommodation and also going through the lavatory to the floors above, and the
B gas pipe serving a geyser in the lavatories, but not proceeding onwards to the upper floors. There were also pipes (although there is no evidence about it) serving a lavatory on the south side. On the south side the lavatory contained washing basins and water-closet accommodation. It is obvious that there were pipes leading into the defendants' premises from below connecting with the water-closets and basins. It was also asserted by the defendants, but there is no evidence upon the point, that
C electric wires were embedded in the walls of their premises leading from below to the upper floors.

In these circumstances the question to be determined is what is the true meaning and effect of the exception and reservation. It is said, on the one hand, that it is a settled rule of construction that where there is a grant and an exception out of it, the exception is to be taken as inserted for the benefit of the grantor and to
D be construed in favour of the grantee: see per STIRLING, L.J., in *Savill Bros., Ltd. v. Bethell* (6) [1902] 2 Ch. at p. 537. On the other hand, it is said that such an exception is to be construed in favour of the grantor, as it is difficult to conceive that a lessor in the circumstances of this case would grant a lease of the whole of the first floor of a building such as Imperial Court without reserving to himself a right without which he might hinder the development, if not entirely prevent
E the development, of the upper floors. In my judgment, neither of these considerations ought to prevent the court from ascertaining the true intention of the parties as expressed in the lease. The defendants contend that when properly construed, the exception and reservation was intended to refer only to the pipes and electric wires fixed to the demised premises at the date of the lease and that the exception and reservation ought to be construed as operating to except only such gas, water,
F and other pipes and electric wires and to reserve the right to run water and soil in and through the pipes then existing on the demised premises. In aid of this construction, the defendants rely on cl. 8 of the lease which gives a power to the lessors, their agents and workmen, or other authorised persons, to enter on the demised premises for executing repairs and alterations in, among other things, gas, water, and other pipes and electric wires passing through the demised premises
G or communicating with or affecting other parts of the building. It is said that that clause giving a right of entry only for the purpose of repair and alteration and not giving any express right of entry for the purpose of fixing new pipes and new wires, throws a light on the exception and reservation and has the effect of showing that such reservation and exception was not intended to apply to a right
H to place new pipes and wires through the demised premises.

In my judgment this contention on behalf of the defendants places too narrow a construction upon the exception and reservation. The clause containing such exception and reservation is, in my opinion, not happily worded. In the first place, it is to be observed that the exception and reservation is not of the pipes and wires then passing through the demised premises, which would be the natural way of expressing what the defendants say is the true meaning, but it is of the
I passage of gas, water, and other pipes and electric wires generally. The use of the word "passage" in this connection does not strike me as very apt, but I think that it must mean more than what the defendants assert to be the true meaning. In my opinion, the phrase "the passage of gas, water, and other pipes and wires" operates to reserve the right to the lessor to cause gas, water, and other pipes and electric wires to pass through the demised premises. The absence of the definite article or of any reference to existing pipes and wires leads me to the conclusion that the phrase in question is intended to be a reservation of a general right and

not merely an exception of certain existing pipes and wires. The latter part of the clause reserves the right to the lessors to the free running of water and soil in and through the pipes connected with the demised premises. For the purposes of this case it is immaterial to consider whether this reservation is limited to the pipes connected with the demised premises at the date of the lease or extend to any pipes which may hereafter be connected with such premises. It seems to me fairly clear that the lease draws a distinction between pipes passing through the demised premises and pipes connected with the demised premises. The earlier part of the clause in question deals obviously with pipes which pass through or may be passed through the demised premises without serving those premises at all, whereas the latter part of the clause appears to me to be dealing with pipes which are, not attached to, but connected with, the demised premises in such a way as to serve those premises. To take an illustration: a pipe connected with the water-closets in the lavatories and serving those lavatories, a soil pipe led up from below or led down from a water-closet in the demised premises, is a pipe connected with the demised premises. The right, therefore, reserved under the second part of the clause is a right to the landlord to use pipes connected with the demised premises for the purposes of the other parts of the building and to have a right through those pipes to run water and soil.

If I am right in the construction which I have placed upon the clause of exception and reservation, I am of opinion that the mere absence from cl. 8 of the right of entry for the purpose of fixing pipes which are to run through the demised premises would not have the effect of limiting the exception and reservation in the manner suggested by the defendants. The right to enter upon the demised premises if the landlord has reserved his right to run pipes through those demised premises would, in my judgment, be clearly or necessarily implied. Clause 8 is a clause dealing with the repair and alteration of pipes in the demised premises which are also serving the other premises, and, although possibly not required, is one which is usually to be found in leases of this kind for the obvious reason that it sets out plainly between the parties that at recurrent intervals and sometimes more frequently than others, the landlord will be permitted to enter upon the demised premises for the purpose of repairing or altering pipes that are running through them. As I have said I think that such a right would be subject to the reservation of the pipes because that would also imply a right to repair and maintain those pipes for the purpose for which they were fixed. It has not, of course, been suggested that cl. 8 would alter the meaning of the clause of exception or reservation, but it is suggested that, construing the two together, it is shown that the lease did not intend to reserve such larger right to the landlord as I have held it does in fact.

That brings me to the next question in the case, and that is whether the plaintiff has in this case acted in excess of her rights reserved under the defendants' lease. The law on this subject has been discussed, and counsel has referred to two cases of rights of way: *Bolton v. Bolton* (4), and *Deacon v. South-Eastern Rail. Co.* (5), from which he contended that in a case like this the right of conducting pipes through demised premises was a right which could only be exercised by placing pipes in such a direction and such a position as the defendants adopted—in other words, as showing that the owner of a servient tenement has a complete direction of the manner and mode in which the right should be exercised over the defendants' premises. I have also been referred to another case on right of way, *Abson v. Fenton* (1) and especially to the judgment of ABBOTT, C.J. (1 B. & C. p. 203), and, relying mainly upon that, the contention of counsel for the defendants is that so long as the plaintiff exercises the right reserved to the lessors in such a manner as a person of reasonable and ordinary skill and experience would have selected beforehand, it is well within the rights of the persons to whom the right has been reserved, although it may be true that the method in which the right has been

A exercised is not such a one as after consideration would have been recommended by persons of high degree of skill and experience.

These cases relating to rights of way, although, to my mind, very useful in furnishing a guide as to what the true rights of the parties under this reservation are, are not strictly analogous in a case of the right to place pipes through demised premises for the purpose of passing water and soil through those pipes. In
 B my judgment, the true view to take in the present case is intermediate between the two contentions that have been advanced by counsel for either party. I think that in a case such as this with a reservation such as I have referred to, the true view to take is that the person exercising the right must do it in such a way as not to cause any unnecessary or avoidable inconvenience, annoyance, disturbance, or injury to the person or persons below over whose or through whose
 C property the right is to be exercised. If I were to give full effect to what has been argued on behalf of the plaintiff, the reservation would, to my mind, become intolerably burdensome to the defendants. It might have the effect of appreciably diminishing the immunity and value of the property demised to them, and, if that were the true measure of the rights of the plaintiff under this reservation, it would go a long way towards supporting the argument that such a reservation
 D could never have been intended and ought to be construed in a way different from that in which I have construed it. But considering the whole of the circumstances of a case like this where a right is reserved to a landlord in the use of upper floors to drain through the premises which he has demised, I think it must be obvious to anyone that that right must be exercised in such a way as to cause the minimum loss, disturbance, and annoyance to the persons through whose property the pipes
 E go. It would be difficult to conceive a case in which having let, say, a flat to a person for occupation, the landlord could under such a reservation have the right to bring soil pipes through rooms laid out as drawing rooms or living rooms, or even offices or studies, regardless of the way in which those pipes were so conducted.

Hrs LORDSHIP referred to the evidence and said that the plaintiff had adopted a
 F system of drainage along the walls of the defendants' premises wholly regardless of the effect on the defendants of what had been done. The evidence that he had heard had convinced him that the system of sewage and waste water disposal through pipes leading through the defendants' premises could be formulated, and, indeed, could be selected beforehand by any ordinary reasonably skilled person which, being quite as efficient as the one which has now been selected, would practically minimise the damage and the annoyance to the defendants
 G until it could almost be said to be non-existent. It followed that the defendants would have been justified in cutting the pipes that had been so conducted through their premises unless they had done something in the way of assenting to the erection of the pipes or had acquiesced in their erection after they had been placed there. They had not done so. He declared that the plaintiff as lessee under the
 H lease of May 27, 1924, was entitled to carry gas, water, and other pipes and electric wires through the premises of the defendants demised to them by the lease of May 18, 1923, but that the water and soil pipes which had been carried by the plaintiff through the defendants' premises were so constructed, placed, and arranged as to impose a burden on the defendants' premises in excess of the burden which the plaintiff in exercise of her right to carry pipes as aforesaid was entitled to impose thereon, and the plaintiff had, accordingly, acted in excess of such right
 I and was not entitled to maintain such pipes as then constructed, placed, and arranged on the defendants' premises.

Solicitors : *Rye & Eyre; A. J. Greenop & Co.*

[Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.]

PARR v. ATTORNEY-GENERAL

[HOUSE OF LORDS (Viscount Haldane, Lord Atkinson, Lord Buckmaster, Lord Carson and Lord Blanesburgh), October 29, 30, November 2, 3, December 18, 1925]

[Reported [1926] A.C. 239; 95 L.J.K.B. 417; 134 L.T. 321;
42 T.L.R. 217]

Estate Duty—Aggregation—Settled property—Disposition made prior to operation of Finance Act, 1894—Disentailment and resettlement—Confirmation and restoration of testamentary life interest—Disposition under which settled property passes on death of life tenant—Finance Act, 1894 (57 & 58 Vict., c. 30) s. 4—Finance Act, 1900 (63 Vict., c. 7), s. 12 (2)—Finance Act, 1907 (7 Edw. 7, c. 13), s. 16.

By his will dated July 1, 1869, a testator, who died on Jan. 6, 1870, devised certain real estate to the use of his son J. C. P. for life, and after his death to the use of the first and every other son of J. C. P. in tail male with remainders over. On Nov. 4, 1895, J. C. P. and R. C. P., his eldest son, concurred in executing a disentailing deed whereby the property was conveyed to a grantee to hold the same to such uses as J. C. P. and R. C. P. should jointly appoint. By a resettlement dated Dec. 19, 1895, in exercise of the joint power of appointment in the disentailing deed, the settled estate was appointed to such uses as J. C. P. and R. C. P. should jointly appoint, and in default of appointment to the use that R. C. P. should, during the joint lives of himself and J. C. P., receive a rentcharge, and subject thereto to the use of J. C. P. for his life by way of restoration and confirmation of his then present life estate under the testator's will, together with all the then existing powers under the will of jointuring and charging portions so far as the same had not been already exercised, and all powers of leasing and sale exercisable during the continuance of such life estate under the will or the Settled Land Acts or otherwise, with remainder to the use that his wife should receive an additional rentcharge, and subject thereto to such uses as R. C. P. should appoint, and in default of appointment to the use of R. C. P. for his life, with remainder to the use of his first and every other son successively in tail male with remainders over. On Feb. 27, 1920, J. C. P. died and the property comprised in the resettlement passed on his death subject to the jointure, rentcharges, and portions. J. C. P. died possessed of free estate of great value, and the Crown contended that under s. 4 of the Finance Act, 1894, the free estate and settled property were to be aggregated, so as to form one estate for the purpose of determining the rate of estate duty.

Held: although (per VISCOUNT HALDANE, LORD BUCKMASTER and LORD BLANESBURGH, LORD ATKINSON dissenting) the life interest of J. C. P. under the will of the testator was not disturbed by the resettlement, nevertheless (VISCOUNT HALDANE dissenting) the settled property passed on the death of J. C. P. under the resettlement, and not under the will, and, therefore, the exemption from aggregation afforded by the Finance Act, 1894, s. 4, the Finance Act, 1900, s. 12 (2), and the Finance Act, 1907, s. 16, did not apply.

Re Constable's Settled Estates (1), [1919] 1 Ch. 178, discussed.

Decision of the Court of Appeal, [1924] 1 K.B. 916, affirmed.

Notes. Considered: *Re D'Avigdor-Goldsmid*, *D'Avigdor-Goldsmid v. I.R. Comrs.*, [1951] 2 All E.R. 543.

As to aggregation for the purposes of estate duty, see 15 HALSBURY'S LAWS (3rd Edn.) 63 et seq.; and for cases see 21 DIGEST 22 et seq.

A Cases referred to :

- (1) *Re Constable's Settled Estates*, [1919] 1 Ch. 178; 88 L.J.Ch. 89; 120 L.T. 326; 35 T.L.R. 144; 63 Sol. Jo. 135, C.A.; 40 Digest (Repl.) 849, 3247.
- (2) *Earl Cowley v. I.R. Comrs.*, [1899] A.C. 198; 68 L.J.Q.B. 435; 80 L.T. 361; 63 J.P. 436; 47 W.R. 525; 15 T.L.R. 270; 43 Sol. Jo. 348, H.L.; 21 Digest, 7, 27.

B

- (3) *Re Wright's Trustees and Marshall* (1884), 28 Ch.D. 93; 54 L.J.Ch. 60; 51 L.T. 781; 33 W.R. 304; 40 Digest (Repl.) 865, 3372.
- (4) *Re Cornwallis-West and Munro's Contract*, [1903] 2 Ch. 150; 72 L.J.Ch. 499; 88 L.T. 351; 51 W.R. 602; 47 Sol. Jo. 418; 40 Digest (Repl.) 849, 3246.

C

- (5) *Re Du Cane and Nettlefold's Contract*, [1898] 2 Ch. 96; 67 L.J.Ch. 393; 78 L.T. 458; 46 W.R. 523; 42 Sol. Jo. 468; 40 Digest (Repl.) 826, 3020.
- (6) *Re Mundy and Roper's Contract*, [1899] 1 Ch. 275; 68 L.J.Ch. 135; 79 L.T. 583; 47 W.R. 226; 43 Sol. Jo. 151, C.A.; 40 Digest (Repl.) 866, 3384.
- (7) *Alexander v. Mills* (1870), 6 Ch. App. 124; 40 L.J.Ch. 73; 24 L.T. 206; 19 W.R. 310, L.J.J.; 40 Digest (Repl.) 770, 2541.

D

- (8) *Harrison v. Round* (1852), 2 De G.M. & G. 190; 22 L.J.Ch. 322; 20 L.T.O.S. 118; 17 Jur. 563; 1 W.R. 26; 42 E.R. 844, L.C.; 40 Digest (Repl.) 867, 3391.

- (9) *Long v. Rankin* (1822), Sugden on Powers, 8th Edn. 895, H.L.; 40 Digest (Repl.) 787, 2699.

E

- (10) *Holdsworth v. Goose* (1861), 29 Beav. 111; 30 L.J.Ch. 188; 4 L.T. 196; 7 Jur. N.S. 301; 9 W.R. 443; 54 E.R. 569; 40 Digest (Repl.) 770 2545.

- (11) *Eisdell v. Hammersley* (1862) 31 Beav. 255; 6 L.T. 706; 54 E.R. 1136; 40 Digest (Repl.) 770, 2546.

- (12) *Re Lord Wimborne and Browne's Contract*, [1904] 1 Ch. 537; 73 L.J.Ch. 270; 90 L.T. 540; 52 W.R. 334; 48 Sol. Jo. 246; 40 Digest (Repl.) 827, 3023.

F

- (13) *Lord Braybrooke v. A.-G.* (1861), 9 H.L. Cas. 150; 31 L.J.Ex. 177; 4 L.T. 218; 25 J.P. 531; 7 Jur. N.S. 741; 9 W.R. 601; 11 E.R. 685, H.L.; 21 Digest, 94, 694.

- (14) *A.-G. v. Floyer* (1862), 9 H.L. Cas. 477; 31 L.J.Ex. 404; 7 L.T. 47; 26 J.P. 708; 9 Jur. N.S. 1; 10 W.R. 762; 11 E.R. 814, H.L.; 21 Digest, 86, 622.

- (15) *A.-G. v. Cecil* (1870), L.R. 5 Exch. 263; 39 L.J.Ex. 201; 23 L.T. 20; 18 W.R. 949; 21 Digest 91, 662.

G

- (16) *Sweetapple v. Horlock* (1879), 11 Ch.D. 745; 48 L.J.Ch. 660; 41 L.T. 272; 27 W.R. 865; 40 Digest (Repl.) 545, 540.

- (17) *Lovett v. Lovett*, [1898] 1 Ch. 82; 67 L.J.Ch. 20; 77 L.T. 650; 46 W.R. 105; 42 Sol. Jo. 81; 21 Digest 253, 776.

- (18) *Re Rush, Warre v. Rush*, [1922] 1 Ch. 302; 91 L.J.Ch. 401; 127 L.T. 713; 38 T.L.R. 327; 66 Sol. Jo. 316; reversed [1923] 1 Ch. 56; 92 L.J.Ch. 87; 127 L.T. 717; 38 T.L.R. 900; 67 Sol. Jo. 30, C.A.; reversed sub nom. *Public Trustee v. Wolf*, [1923] A.C. 544; 92 L.J.Ch. 520; 129 L.T. 738; 39 T.L.R. 553; 67 Sol. Jo. 637, H.L.; 2 Digest (Repl.) 226, 355.

H

Appeal by the taxpayers from a decision of the Court of Appeal (POLLOCK, M.R., and ATKIN L.J.; SARGANT, L.J., dissenting), reported [1924] 1 K.B. 916, on an information on behalf of the Crown, claiming estate duty payable on the death of Joseph Charlton Parr in the following circumstances :

I

Thomas Parr (hereinafter called "the testator") made his will, dated July 1, 1869, and thereby, after appointing trustees and executors and after making certain specific and pecuniary bequests, including two legacies of £70,000 and £10,000 respectively, which were so settled as eventually to fall into the testator's residuary personal estate, devised his Grappenhall and Appleton estate to the use of his son Joseph Charlton Parr for life, and after his death to the use of the first and every

other son of the said Joseph Charlton Parr successively in tail male with divers remainders over, and the testator declared that it should be lawful for the said Joseph Charlton Parr by deed or will to appoint to any woman with whom he might marry for her life a yearly rentcharge not exceeding £600 charged upon and payable out of the said estate, and to appoint the premises charged therewith to any person or persons for any term of years on the usual trusts for securing the payment of the said rentcharge, and also to charge the said estate with portions for the younger children of the said Joseph Charlton Parr, and to appoint the premises to trustees on trust to raise the said portions. The testator devised his residuary real estate to the use of his trustees or their heirs on trust during the term of twenty-one years from the testator's death to stand possessed of the rents and profits of the said residuary real estate on the trusts thereafter declared concerning the testator's residuary personal estate, and from and after the determination of the said term of twenty-one years in trust for his son Thomas Philip Parr for his life and after his death in trust for the first and every other son of the said Thomas Philip Parr successively in tail male and in default of such issue in trust for the said Joseph Charlton Parr for his life, and after his death in trust for the first and every other son of the said Joseph Charlton Parr successively in tail male.

The testator died on Jan. 6, 1870, without having revoked or altered his said will in any material particular, and his will was proved on Feb. 1, 1870.

By a marriage settlement dated Feb. 5, 1872, and made between the said Joseph Charlton Parr and Jessie Maria Parr and certain persons as trustees, Joseph Charlton Parr in exercise of the power given to him by the said will, appointed to and to the use of the said Jessie Maria Parr for her life if she should survive him an annuity of £600, to be charged on the Grappenhall and Appleton estate, and he also charged the said estate with portions for the younger children of his marriage. There was issue of the marriage of the said Joseph Charlton Parr and Jessie Maria Parr four children, viz., the defendant Roger Charlton Parr and three daughters.

The said Thomas Philip Parr died on Oct. 29, 1891, without issue, but leaving him surviving his wife Agnes Darby Parr, in whose favour he had by his will in pursuance of the powers conferred on him by the testator's will charged the residuary real estate of the said testator with a yearly rent of £1,500 a year for her life. On the death of the said Thomas Philip Parr without issue the said Joseph Charlton Parr became under and by virtue of the testator's will entitled for his life to the residuary real estate of the testator subject to the said yearly rentcharge of £1,500 in favour of the said Agnes Darby Parr, and also to the residuary personal estate of the testator. Subject as aforesaid, the defendant Roger Charlton Parr became and was under and by virtue of the testator's will tenant in tail male of the residuary real and personal estate of the testator.

By a disentailing deed, dated Nov. 4, 1895, and made between the said Joseph Charlton Parr of the first part, the defendant Roger Charlton Parr of the second part, and Alan Lister Kaye of the third part, and duly enrolled as a disentailing assurance on Nov. 6, 1895, the said Joseph Charlton Parr and Roger Charlton Parr, with the consent of the said Joseph Charlton Parr as protector of the settlement, created by the testator's will, respectively conveyed, assigned and disposed of to the said Alan Lister Kaye and his heirs all the messuages, dwelling-houses, farm lands, tenements, hereditaments, and real estate devised by the testator's will, and also all the personal estate which might be or might become liable to be invested in the purchase of lands and hereditaments to be settled and assured to such of the uses declared by the said will concerning the residuary real estate of the testator or concerning the Grappenhall estate respectively as then were or should be subsisting or capable of taking effect respectively, to hold all the said premises unto the said Alan Lister Kaye and his heirs subject to the said jointures and charges, but freed and discharged from all estates in tail male or in tail of the said Roger Charlton Parr whether at law or in equity and all estates, rights, interests, and powers to take effect after the determination or in defeasance of such estates in tail male or

A in tail or any of them, to such uses, on such trusts and with and subject to such powers and provisions as the said Joseph Charlton Parr and Roger Charlton Parr should at any time or times by deed jointly appoint.

By a resettlement dated Dec. 19, 1895, and made between the said Joseph Charlton Parr of the first part, the defendant Roger Charlton Parr of the second part, and others, after reciting, inter alia, (i) that the trustees for the time being of the testator's will had in exercise of the powers therein contained sold parts of the residuary real estate, and had out of the residuary personal estate and the accumulations of income made pursuant to the said will purchased the estate known as the Ashton Hayes estate in the county of Chester and divers other hereditaments, all which purchased premises had been settled pursuant to the testator's will; and (ii) that the first schedule to the resettlement contained a description of the Grappenhall estate, and of certain hereditaments in the townships of Grappenhall and Appleton which had been purchased by the said Joseph Charlton Parr since the testator's death, and belonged to him in fee simple in possession, and after certain other recitals, witnessed that the said Joseph Charlton Parr and Roger Charlton Parr, in exercise of the power in that behalf given to them by the disentailing deed as settlors jointly appointed that all and singular the manor, lands, and hereditaments described respectively in the schedules to the resettlement, except those lands which had been purchased by the said Joseph Charlton Parr since the testator's death should, subject as aforesaid, thenceforth remain and be to the uses on the trusts, and with and subject to the powers and provisions thereafter declared and contained concerning the same premises, and it was by the resettlement also witnessed that, in pursuance of the said agreement, the said Joseph Charlton Parr, as settlor, granted and conveyed to the trustees the Staunton Park estate, and also certain lands which had been purchased by the said Joseph Charlton Parr since the testator's death to hold all the said premises to the trustees to the uses on the trusts and subject to the powers and provisions thereafter declared and contained respecting the said premises respectively.

F By the said resettlement it was agreed and declared that the Staunton Park estate should remain and be to such uses on such trusts, and with and subject to such powers and provisions as the said Joseph Charlton Parr should by deed or will appoint, and that all the said premises thereinbefore appointed should (subject to the jointures and portions) thenceforth remain and be to such uses and on such trusts as the said Joseph Charlton Parr and Roger Charlton Parr should jointly appoint, and in default of any appointment to the use, subject to certain rentcharges, of the said Joseph Charlton Parr for his life by way of restoration and confirmation as regards the said premises thereinbefore appointed of his then present life estate therein under the will of the testator together with all the then existing powers under the said will of jointuring and charging portions, with remainder (subject to a rentcharge by way of jointure) to such uses as the said Roger Charlton Parr should by deed or will appoint and in default of and subject to any such appointment to the use of the said Roger Charlton Parr for his life with remainder to the use of the first and every other son of the said Roger Charlton Parr successively in tail male with remainders over.

H The joint effect of the disentailing deed and the resettlement was subject to the jointures and to certain life interests in certain moneys, (i) to destroy and extinguish the life estate of the said Joseph Charlton Parr and all estates in remainder thereon which had, before the execution of these instruments, subsisted under and by virtue of the testator's will in the Grappenhall and Appleton estate and in the residuary real and personal estate respectively comprised in the said will (other than and except the jointures and portions), and (ii) to create an entirely new life interest in the said Joseph Charlton Parr in the Grappenhall and Appleton estate and the residuary real and personal estate with remainders over as in the settlement expressed.

I By a deed poll of appointment dated Feb. 2, 1897, the said Joseph Charlton Parr

and Roger Charlton Parr, in exercise of the power given to them by the resettlement, jointly appointed certain lands to the use of the said Roger Charlton Parr in fee simple. And by a deed poll of appointment dated Dec. 31, 1898, the said Joseph Charlton Parr and Roger Charlton Parr, in exercise of the power of appointment given them by the resettlement, jointly appointed certain other lands to the use of the said Roger Charlton Parr in fee simple. By a deed poll of appointment, dated June 15, 1901, the said Joseph Charlton Parr and Roger Charlton Parr, in exercise of the power given to them by the resettlement, jointly appointed certain further lands to the use of the said Roger Charlton Parr in fee simple. By an indenture dated Feb. 2, 1906, Joseph Charlton Parr, in exercise of the power of appointment over the Staunton Park estate given to him by the resettlement irrevocably appointed that estate to the use of the said Roger Charlton Parr in fee simple.

Joseph Charlton Parr died on Feb. 27, 1920, and his will was proved by his executors on July 22, 1920.

Under and by virtue of the resettlement, the hereditaments, moneys, investments, and property which were appointed by or comprised in the resettlement (except such parts thereof as had been appointed or conveyed to Roger Charlton Parr by the appointment of 1897, the appointment of 1901, and the Staunton Park conveyance respectively) passed on the death of the said Joseph Charlton Parr, subject to the jointures and portions charged thereon. The said Joseph Charlton Parr died, seised or possessed in his own right of real estate of considerable value, and was also at his death possessed of personal estate of great value (which real and personal estate are hereinafter called "the free estate"). On the death of the said Joseph Charlton Parr, estate duty became payable in respect not only of the free estate, but also in respect of the hereditaments, moneys, investments, and property which passed as the settled property.

The Crown contended that under and by virtue of s. 4 of the Finance Act, 1894, the free estate and the settled property were for determining the rate of estate duty to be paid on the free estate and the settled property on the death of Joseph Charlton Parr, to be aggregated so as to form one estate. The defendants contended that the settled property passed on the death of the said Joseph Charlton Parr, not under the settlement but under the disposition made by the will of the testator, who died before Aug. 1, 1894, and that under and by virtue of s. 12 (2) of the Finance Act, 1900, and s. 16 of the Finance Act, 1907, the settled property did not fall to be aggregated with the free estate but was liable to estate duty as an estate by itself. The information asked for a declaration in terms of the Crown's contention.

The Court of Appeal (SARGANT, L.J., dissenting) held, that in view of the decision in *Re Constable's Settled Estates* (1) the settled property could not be said to have passed under the will, but passed under the resettlement and therefore the free estate and the settled property must be aggregated for the purpose of determining the rate of duty payable.

The defendants appealed.

Maugham, K.C., and *J. H. Stamp* for the appellants.

The Solicitor-General (*Sir Thomas Inskip, K.C.*), *Clauson, K.C.*, and *Beebee* for the respondent.

The House took time for consideration.

Dec. 18. The following opinions were read.

VISCOUNT HALDANE.—In this case I think that there may turn out to be considerable divergence in our judicial opinion as to the merits of the appeal. The question is a difficult one of law, and I propose to state it as briefly as the necessity for accuracy permits.

The controversy between the parties is whether, as the appellants contend, certain settled property which, on the death in 1920 of Joseph Charlton Parr, admittedly

A passed within the meaning of the Finance Act, 1894, is, for the purpose of determining the rate of estate duty to be paid on that death, exempted from the rule as to aggregation prescribed by s. 4 of Part I of that Act, and ought to be treated as an estate by itself, in virtue of the combined operation of s. 12 (2) of the Finance Act, 1900, and s. 16 of the Finance Act, 1907, and to be liable to pay only estate duty so limited, without being aggregated with the remaining property which passed

B on the death of Joseph Charlton Parr.

Under s. 1 of the Finance Act, 1894, estate duty is to be leviable on the principal value, to be ascertained as thereafter provided, of all property, real or personal, settled or not settled, which passes on the death of a person dying after the Act comes into operation. By s. 2 property passing on the death of the deceased is to be deemed to include, *inter alia*, (a) property of which the deceased was at the

C time of his death competent to dispose, and (b) property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by reason of the cesser of such interest. By s. 4 all property passing is to be aggregated so as to form one estate for the purpose of levying duty, subject to the proviso (by way of exception) that *inter alia* any property so passing which, under a disposition not made by the deceased, passes

D immediately on the death of the deceased to some person other than the wife, or husband, or a lineal ancestor or lineal descendant of the deceased, shall not be aggregated. The scope of the exception was further extended by the Finance Act, 1900. Under s. 12 (2) of that Act:

Where settled property passes, or is deemed to pass, on the death of a person

E dying after the passing of this Act under a disposition made by a person dying before the commencement of Part I of the Finance Act, 1894 [both of which conditions, so far as dates were concerned, were satisfied in the case before us], and such property would, if the disponent had died after the commencement of the said Part, have been liable to estate duty upon his death, the aggregation of such property, with other property, passing upon the first-mentioned death,

F shall not operate to enhance the rate of duty payable either upon the settled property or upon any other property so passing by more than one half per cent. in excess of the rate at which duty would have been payable if such settled property had been treated as an estate by itself.

By a subsequent statute—The Finance Act, 1907—this exemption was extended in scope, and it was provided by s. 16 that in the case of persons dying after April

G 19, 1907 (which was the case with Joseph Charlton Parr) any settled property which would under the Act of 1900 be aggregated with other property so as to enhance the rate of duty to the limited extent provided in that section, should, for the purposes of the Act of 1894, instead of being so aggregated, be treated as an estate by itself.

I now turn to the dispositions by which the title to the property sought to be

H taxed is governed, in order to ascertain how the statutory provisions which I have quoted bear on them. Thomas Parr, by his will dated in 1869, devised certain portions of his real estates to the use of Joseph Charlton Parr for life and, after the death of the latter, to the use of the first and every other son of Joseph successively in tail male with remainders over. He empowered Joseph by deed or will to appoint

I to any woman he might marry a yearly rentcharge for her life not exceeding £600, charged on, and payable out of parts of the real estate, and also to charge these with portions for his children other than the first or only son entitled under the will. There were other devises under the will which need not be referred to. Thomas Parr died in 1870.

By a disentailing deed executed in 1895, by Joseph Charlton Parr, then tenant for life, and his eldest son Roger Charlton Parr, who had then attained twenty-one, the real estate subject to the settlement made by the will was conveyed to a trustee, subject to the existing jointure rentcharge and portions and the powers and terms

for securing or raising them, to such uses and trusts as the tenant for life and tenant in tail should jointly appoint and in default of and subject to such appointment to the uses and on the trusts and with and subject to the powers and provisions which were subsisting or capable of taking effect with reference to the said premises, and so as to restore and confirm the same uses, trusts, powers and provisions respectively. Under the deed there can be no doubt that Joseph and Roger remained entitled as tenant for life and tenant in tail to legal estates.

By a deed of resettlement made shortly afterwards, Joseph and Roger Charlton Parr conveyed the premises to trustees to such uses and on such trusts and subject to such powers and provisions as Joseph and Roger should jointly appoint, and subject thereto to the use that Roger should receive certain rentcharges during their joint lives, and so that if he left a widow she should receive a rentcharge not exceeding £2,000 a year as he should by deed or will appoint, and subject thereto to the use of Joseph for his life without impeachment of waste "and by way of restoration and confirmation" as regards the premises appointed "of his present life estate therein" under the will of Thomas Parr, together with all the existing powers of Joseph under the will of jointuring a wife and charging portions for younger children and the other powers capable, before the disentailing deed, of taking effect during his life under the will or the Settled Land Act or otherwise, with remainder to the use that one Jessie Maria Parr should, if she survived Joseph, receive a certain rentcharge during her life, and subject to this to such uses as Roger should by deed or will appoint under certain restrictions, and subject thereto to the use of Roger for his life without impeachment of waste with various remainders over to the use of the first and other sons of Roger successively in tail male. It was also provided that all moneys and investments comprised in the disentailing assurance should be held on the trusts on which the same would be held were they capital moneys arising under the Settled Land Acts and should be primarily liable to be invested in freehold hereditaments so as to be impressed with the quality of and devolve as real estate.

I entertain no doubt that the remainders limited by the deed of resettlement after the life estate restored and confirmed to Joseph Charlton Parr were new estates created by the resettlement itself. But that is not the question which we have to consider. The real question is whether the life estate of Joseph himself was a new estate, or whether it was an old one which derived its existence solely from the original will, and came to an end and so passed as created on his death in 1920 under the disposition made by the will of 1869 itself within the meaning of s. 12 of the Finance Act, 1900.

What is the meaning in the Finance Acts of "passing on death"? I think this House in *Earl Cowley v. I.R. Comrs.* (2) determined that such a case as the present one comes within s. 1 of the Finance Act, 1894, as relating to settled property where, in the words of LORD MACNAGHTEN, even "a limited interest under a settlement simply ceases on death and passes to no one." That is "passing" within the meaning of the first section so as to be the subject of the duty. The existence of a subsequent remainder appears to be unnecessary for the constitution of such a passing, however important it may be for the question who is to bear the burden of the tax under subsequent sections of the statute. For it is on a mere passing on death that the duty is levied. In this respect the duty imposed in accordance with s. 1 is analogous to probate duty. Nothing in the subsequent sections of the Act which are concerned with the amount of the duty to be paid and the persons who are liable to make the payment alters, in my opinion, the scope or meaning of the words in s. 1. I have therefore come to the conclusion that the duty in this case in truth attached on the mere cesser of the life estate of Joseph, and not on the arising of the new interests which came into being on his death, either under the will or the resettlement.

But this does not dispose of the question we have to decide. What was the character of the life estate which ceased? Was it created by the settlement or

A was it in contemplation of law created by the will of Thomas Parr who died before the Act of 1894 within the meaning of s. 12 (2) of the Act of 1900? No doubt other estates in remainder took effect after that cesser under the resettlement, but they only took effect because the life estate had determined. They did not on Joseph's death bring themselves into operation. Nor were they ever created on Joseph's death. They arose under a conveyance, the resettlement, which brought them into
B existence *de presenti*, immediately on its execution. It is true that the resettlement contains a limitation of the premises to Joseph for life, "by way of restoration and confirmation," of his present life estate under the will. But did such words operate to create a fresh estate or to turn the old estate under the will into a new life estate under the settlement? It seems to me that they should be taken to have been inserted merely to preserve any powers attaching to the old estate from
C the ransacking effect of any fine or recovery which might be levied. I can see no other necessity for them. The limitations operated by way of use and if they did it was because the Statute of Uses simply turned a trust into a use. Ought we to hold that a fresh trust was introduced so as to make a foundation for an application *de novo* of that statute? I do not think so. It seems to me that the question was one of the intention to be collected, and that the very words of restoration and
D confirmation, relied on by the Crown for an affirmative answer, in reality point to a negative one. The question whether a new trust was created is merely one of intention as to what was meant to be done, and when the language used indicates an intention not to create a new trust but to restore and confirm an old one, I think that that intention must be construed not as though what was expressed were words of conveyance used in a deed of conveyance but as though it were a mere expression
E of an intention to preserve intact what was already there. Treating the matter as one of principle, I should therefore be of opinion that the life estate was the old one created by the use declared by the will and was not disturbed by the disentailing deed.

Now there is a considerable body of authority in support of the proposition that
F a resettlement such as we have before us does not disturb an old estate such as this one. In *Re Wright's Trustees and Marshall* (3) an estate had been devised to uses to secure certain annuities, and subject thereto in strict settlement, with power to trustees to sell at the request of the tenant for life under the devise in the will. The tenant for life and his eldest son, the tenant in tail, disentailed, subject to certain powers and charges, to such use as the tenants for life and in tail should jointly appoint, and in default to the uses of the will. The joint power
G of appointment was exercised so as to make a mortgage on the fee, and subject to this and the existing powers and to the grant of an annuity to the tenant in tail with a term to secure it to the use of the tenant for life for his life by way of continuance and confirmation of his former life estate under the will, with remainder over. The case came before PEARSON, J. He followed the opinion expressed by
H LORD ST. LEONARDS, that the mere fact of a disentail and resettlement did not disturb shifting clauses, and left the old user undisturbed. He held that when the intention was obvious not to destroy the old life estate, but only to give effect to limited arrangements which could be introduced without an intention to destroy it and to reconstitute it, the old life estate remained.

In *Re Cornwallis-West and Munro's Contract* (4), FARWELL, J., followed this
I view of PEARSON, J., in an analogous case, treating the words of restoration occurring there as showing that it was intended to keep alive the old powers annexed to the life estate. In so holding he considered that he was following STIRLING, J., in *Du Cane and Nettlefold's Contract* (5), and was in accord with CHITTY, L.J., in *Re Mundy and Roper's Contract* (6). As to the view of STIRLING, J., I agree with him, and as to that of CHITTY, L.J., I think that FARWELL, J., was justified at least in thinking that the learned lord justice said nothing which was contradictory to what he himself was laying down. The questions in these two cases, however, related to a different subject-matter, that of powers of sale under the Settled Land

Acts, and it is only in dicta that they bear on the point before us. I may add here that I do not think that the decision of the lords justices in *Alexander v. Mills* (7), which was cited to us, is of particular relevancy to the present question.

It appears to me for these reasons that the use purporting to be limited by the resettlement to Joseph Charlton Parr for his life by way of restoration and confirmation of his life estate under the will was not a new estate but was simply a preservation of the use arising under the will itself. I think that it was under the provisions of the will that this use was brought to an end with his death, so that there was a passing of property within the interpretation put on s. 1 of the Finance Act, 1894, in the *Cowley Case* (2). It follows that it was under the disposition made by the will of Thomas Parr, who died before the principal Finance Act came into operation, that the settled property passed, and that the case therefore falls within the exemption made by s. 12 (2) of the Act of 1900.

The Court of Appeal have taken a different view. The learned judges there considered that the resettlement made such a change in the life estate that it became a new one, which passed under that deed. They considered themselves bound to follow, in so holding, a previous decision of the same court: *Re Constable's Settled Estates* (1). There the question was a different one, although the Court of Appeal in the present case rightly considered that the reasons given applied. By a will land was limited to uses for life with remainder in tail to the son of the tenant for life. Under powers given by the will the tenant for life had appointed a jointure to his wife and portions for his younger children. In 1912 the tenant for life and the tenant in tail disentailed by a deed in which the land was conveyed (subject to charges and incumbrances and to the life estate of the tenant for life) to such uses as he and the tenant in tail should appoint and in default to the uses and trusts and subject to the powers of the will, so as to restore and confirm the same. Shortly afterwards a deed of resettlement was executed by the tenant for life and the tenant in tail, by which the land was appointed and conveyed subject to mortgages on the inheritance and jointure and portions, to such uses and subject to such powers and provisions as the tenant for life and the tenant in tail should jointly appoint, and in default of and subject to such appointment to the use of the tenant for life in restoration of the life estate or estates limited to him by the will and by another settlement which is not material respectively, with remainders to the use of the tenant in tail for life with remainders over in tail male. The resettlement also declared that the trustees under the resettlement were to be trustees for the purposes of the Settled Land Acts, and that the person who should be tenant for life under the resettlement might exercise certain powers additional to those conferred by these Acts. The original tenant for life desired to exercise as tenant for life under the resettlement the powers conferred by the Settled Land Acts, and also the additional powers conferred by the resettlement. The question was whether he was tenant for life under the resettlement.

The then Court of Appeal reversed the decision of SARGANT, J., that the tenant for life was such only under the original limitations of the will and therefore was not entitled to exercise powers under the resettlement. The judgment of the Court of Appeal was delivered by SWINFEN EADY, M.R. My Lords, for the opinion of that learned and able judge I entertain a deep respect, and it is with reluctance that I venture to differ from the views he expressed. He held, and his judgment was given for the other members of the court also, that by the terms of the resettlement the tenant for life had granted away his life estate under the will, and had taken a wholly new one, and that the words of restoration and confirmation did not affect this, for they merely kept alive the powers incident to the old estate although that estate itself was not kept alive. He was of opinion that the judgments of PEARSON, J., in *Re Wright's Trustees and Marshall* (3) and of FARWELL, J., in *Re Cornwallis-West and Munro's Contract* (4) were wrong, and that they had misinterpreted what was said by LORD ST. LEONARDS in *Harrison v. Round*

A (8). He thought that the judgment in *Re Mundy and Roper's Contract* (6) supported his view. It was not true that when the whole estate of the donee of the power was destroyed the old use could be restored.

B For reasons already given, I am unable to agree with the view that the old estate was destroyed. And I am unable to find that the judgment of CHITTY, L.J., in *Re Mundy and Roper's Contract* (6) lends support to that conclusion. That case
C was concerned with a different question, namely, whether there was what was in effect a compound settlement. No doubt CHITTY, L.J., said that the object of the words restoration which occurred was only to keep alive the old powers; he held that in the construction of the series of deeds constituting the resettlement it had been thought unnecessary to keep alive the old life estate, and that, having regard to the jointure and portions reserved, the life estate introduced was a new one. That may well have been the case having regard to the terms of the deeds
D there, for the question of what constituted the compound settlement within the meaning of the Settled Land Acts was the only question which arose. What is of the essence of the case is that, as CHITTY, L.J., points out, the life estate created by the resettlement was not, as matter of construction, limited so as to bring back simply the old life estate. Nor does it seem to me that *Harrison v. Round* (8) was decided by LORD ST. LEONARDS, as SWINFEN EADY, M.R., held, on the limited view of the operation of the recovery which he states. What LORD ST. LEONARDS appears to me to have really held was that there were no new estates raised by the operation of such a recovery, but that the original estates remained intact, as matter of principle, notwithstanding the protection of the powers from ransacking by a conveyance of the particular kind employed.

E I am therefore of opinion that the judgment in *Re Constable's Settled Estates* (1) was not warranted so far as concerns the dicta cited to us. The question whether it was right as to the particular point it decided in reference to the Settled Land Acts is not before us. I will only add that I do not think that the insertion of the £100,000 clause or the reservation of a reversion of the life estate were considered
F by LORD ST. LEONARDS in *Harrison v. Round* (8) as making any difference in the application of the principle he laid down. These provisions had probably been inserted by the conveyancers to obviate any possible ransacking effect of the recovery there suffered on the existing powers. I wish to add that I do not think that either s. 3 of the Inheritance Act, 1832, or s. 25 of the Fines and Recoveries Act, 1833, are directed to any such point as is before us, and that they do not affect it.

G Did the decision of this appeal rest with me I should hold that the appellants were entitled to succeed.

H LORD ATKINSON.—The question for decision in this case is whether two estates, each composed of real and personal property—for convenience styled respectively the free estate and the settled estate—of the first of which one Joseph Charlton Parr died possessed on Feb. 27, 1920, and of the second of which he was at that date
I tenant for life in possession, must, for the purpose of determining what, on the death of that gentleman was the rate of estate duty payable under the provision of the fourth section of the Finance Act, 1894, be aggregated, i.e., whether the free estate is to be aggregated with the settled estate, or whether the latter estate is exempted from this aggregation under s. 12 (2) of the Finance Act, 1900, coupled with s. 16 of the Finance Act, 1907. This question resolves itself in effect into two questions, viz., first whether the interest in the settled estates, of which Joseph Charlton Parr was possessed, passed from him on his death, under the will of Thomas Parr dated July 1, 1869, or under a disentailing assurance dated Nov. 4, 1895, to which he was a party, coupled with an indenture of resettlement dated Dec. 27, 1895, to which he was also a party. The second question is what is the true construction of the words “under a disposition” in s. 12 (2), of the Finance Act, 1900? To answer these questions it is necessary to consider the limitations of this settled estate under the will of Thomas Parr, who died in 1870, out of which

these questions arise. The settled estate was by that will devised to Joseph Charlton Parr for life, with remainder to the use of his sons successively in tail male. In 1895 Joseph Charlton Parr and his eldest son, Roger Charlton Parr, concurred in executing a disentailing deed conveying the property to a grantee to hold the same to such uses as the father and his said son should jointly appoint. By an assurance of resettlement of Dec. 22, 1895, the settled estate was appointed and conveyed to such uses as Joseph Charlton Parr and his aforesaid son should jointly appoint, and in default of appointment to certain other uses. A B

It is essential, I think, for the purpose of dealing with the contention of the appellants on this appeal, to set out at some length the relevant dispositions contained in the deed of Dec. 22, 1895. First it contains a recital that Joseph Charlton Parr and his son Roger Charlton Parr, in exercise of the powers given to them by the disentailing deed of Nov. 5, 1895, jointly appoint the properties in the several schedules thereto described, subject to the jointures and portions mentioned therein and charged thereon, to the uses and the trust thereafter declared. By this deed Joseph Charlton Parr, significantly described as the settlor, grants to two trustees to such uses, subject to certain conditions therein mentioned, as he shall appoint, and in default of appointment to the use that Roger Charlton Parr, his son, shall, on reaching twenty-five years of age, receive an annuity of £500 per annum, to be increased on his attaining thirty years of age to £700 per annum, and upon his marriage, in his father's lifetime with his father's consent, to £2,000 per annum. There is then a provision for the widow of Roger Charlton Parr, should he, having married with his father's consent, die in the latter's lifetime. Then follows the limitation on which the question for decision, in this case, turns. It runs thus: C D E

To the use of Joseph Charlton Parr for his life without impeachment of waste, and by way of restoration and confirmation as regards the premises hereinbefore appointed of his present life estate therein under the said will of Thomas Parr, together with all the existing powers of the said Joseph Charlton Parr under the same will of jointuring any after taken wife, and also all existing powers under the same will of charging jointures and also all existing powers under the same will of charging portions for younger children, and annual sums for their maintenance and education, so far as the same shall have not already been exercised, and all powers of leasing sale and exchange and partitions annexed to or exercisable or capable of taking effect during the continuance of such life estate under and by virtue of the same will, or the Settled Land Act. F G

It appears to me to be perfectly clear—indeed, it has not, I think, been disputed—that if all the words from the word “waste” to the words “or the Settled Land Act” had been omitted from this passage, Joseph Charlton Parr would have taken a new estate for life in the appointed lands under and by virtue of this resettlement deed of Dec. 22, 1895. It is equally clear that it was designed and intended by the settlor, and the other parties to this deed, that he, the settlor, should be able to exercise over the appointed lands, in which he might acquire under the resettlement a new estate for life, powers similar to and co-extensive with all the powers he was entitled to exercise over the old estate for life given to him by his father's will. This would be a most natural and reasonable provision if he really got a new life estate under the resettlement, but if he got no new estate for life under the settlement then it certainly appears to me that all these provisions authorising the exercise of powers which he already possessed and was entitled to exercise over the old estates for life would be irrational. These provisions are, I think, the very best proof that the authors of, and parties to, this resettlement deed believed that the settlor took a new estate for life under it, to which it was necessary to provide that these powers should apply. It was, as I understood, contended on behalf of the appellants that for the purposes of the Finance Act and Estate Duty Acts one must have regard to the real nature of the transaction which the parties to such H I

A instruments as these desired and intended to carry out, that the two deeds of Nov. 4, 1895, and Dec. 22, 1895, are to be treated as two parts of one transaction, carrying out a purpose arranged between the father and son before the earlier of the two deeds was executed, that therefore the effect of this "restoration and confirmation" clause is to secure and preserve to Joseph Charlton Parr the life interest which he had under the will of his father, Thomas Parr, together presumably with the life interest in the same estate, limited to him by the deed of Dec. 22, 1895. B It was not contended on behalf of the appellants, as I understood, that the two deeds of November and December, 1895, did not convey to Joseph Charlton Parr any life interest whatever in the settled estate. If they did convey to him such an interest, then on the execution of the second of these deeds Joseph Charlton Parr must have had in him at the same moment two life estates in the same subject-matter, one the testamentary life estate, if I may so style it, coming to him under C his father's will, and the other the life estate limited to him by the deeds of November and December, 1895. To my mind that appears to be a strange and, indeed, an almost incomprehensible result, whereas if the true legal effect of the two deeds is to convey away from Joseph Charlton Parr his testamentary life estate, and to D give him in lieu thereof, by force of the deeds, another life estate in this same property that would, I think, be at all events a quite rational and reasonable result, and the provision I have already referred to touching the power reserved to him would strongly support that conclusion.

On the hearing of the appeal much argument was bestowed on the question of the meaning, origin, and effect of "restoration and confirmation" clauses similar E to that used in the deed of Dec. 22, 1895, and many authorities were cited on this point. I do not propose to review them all. I think it is only necessary to refer to the more modern of them. Modern legislation, especially the Settled Estates Act, 1882, has secured to tenants for life of settled estates as wide and more effective powers than it was the sole object and function of this clause to secure to them. I will first refer, therefore, to the case of *Re Mundy and Roper's Contract* (6). F That case was decided on appeal by CHITTY, L.J., and LINDLEY, M.R., and the judgment of the court was delivered by the former. It was stated in the headnote of that case that by a deed dated 1861 certain lands were settled upon A. for life with remainder to his first and other sons in tail male. In exercise of a power by it reserved to A. on his marriage, he, in 1865, by deed charged these lands with a jointure rentcharge for his wife and with portions for his younger children, both G charges being secured by terms of years in the usual way. In 1889, in order to carry out a family arrangement, A. and his eldest son B. by a deed, identified as No. (1) disentailing deed, disentailed these lands, and by deed, identified as No. (2) deed, in exercise of the powers contained in deed No. (1) appointed these lands to A. for life with remainder over without, however, in terms expressing that this life estate was limited to A. in "restoration or confirmation" of his former life estate. It was held that the deed No. (2) of 1889 should not under the circumstances H of the case be treated as the only settlement of the property, but should be treated as constituting with three deeds, of earlier date, a settlement within the meaning of the Settled Land Act, 1882, ss. 2 and 20, and that, accordingly, it was competent for A. to sell the lands and make a good title to them discharged from the jointure and portions, on trustees of this settlement being appointed to receive the purchase money. CHITTY, L.J., in delivering judgment, after referring to the life I estate vested in A. by deed No. (2), said ([1899] 1 Ch. at p. 294):

"But this life estate was not in terms limited to him in restoration of his old life estate. The object of this restoration is well known; it was to keep alive the old powers annexed to the life estate: see 3 DAVIDSON'S PRECEDENTS (3rd Edn.) p. 594, et seq. Regard being had to the limitation in the disentailing deed in default of appointment, it would appear to have been thought unnecessary to restore the old life estate, because the powers to jointure and appoint portions had already been exercised by the vendor by the deed of 1865; and as

to the leasing powers in the deed of 1861, it was thought unnecessary to keep them any longer on foot, seeing that the vendor, as tenant for life under the settlement, had ample powers of leasing by virtue of the Settled Land Acts. But, however this may be, the old life estate was not restored. The result thus far appears to me to be this. Treating the life estate of the vendor (as I think it must be treated) as a new life estate arising under the resettlement, &c. . . ."

Before *Alexander v. Mills* (7) an opinion is stated to have prevailed that where a tenant for life parted absolutely with his interest, any powers of sale given to him or made exercisable at his request and by his direction were thereby destroyed. The argument was that being powers appendant to the estate they were extinguished by the entire alienation of it. This was LORD ST. LEONARDS' opinion: SUGDEN ON POWERS (8th Edn.) at p. 57. The Court of Appeal in this case decided the contrary, and JAMES, L.J., in delivering the judgment of the court, said:

"The one thing really pressed on us against these decisions [i.e., the decisions in *Long v. Rankin* (9), SUGDEN ON POWERS (8th Edn.) p. 899; *Holdsworth v. Goose* (10), and *Eisdale v. Hammersly* (11) is that LORD ST. LEONARDS in successive editions of his work on POWERS, has treated each case as limited to the circumstances of that case, and has declined to recognise them as establishing the broad principle that, so long as nothing is done in derogation of the alienee's estate, the alienation has no operation on the power. We cannot set this limitation on the part of this eminent author against the judicial decisions themselves."

The case of *Harrison v. Round* (8) was apparently relied on by PEARSON, J., in *Re Wright's Trustees and Marshall* (3) to support the opinion he then expressed, an opinion subsequently adopted by FARWELL, J., in *Re Cornwallis-West and Munro's Contract* (4). Those two cases were much relied on by the appellants' counsel as authorities in the present appeal. But in *Re Constable's Settled Estates* (1), SWINFEN EADY, M.R., in the course of his judgment, expressed a confident opinion that *Harrison v. Round* (8) did not support the conclusions at which these two learned judges had respectively arrived in these two cases. The Master of the Rolls supports the conclusion at which he himself arrived by some lengthy passages from the judgment of LORD ST. LEONARDS in *Harrison v. Round* (8), in which the Lord Chancellor is dealing with the facts of the case, and explaining the grounds of his decisions. The Lord Chancellor said:

"By the recovery deed, the father and son conveyed in the way which was at that time usual when deeds of that kind were well prepared, to the tenant of the præcipe during the joint lives of the father and of the person to whom the conveyance was made, so as to leave in the father a reversion of his life estate; and there was also what was called the £100,000 clause for the purpose of avoiding the conveyance. All this shows that, as far as regarded the father's estate, the parties intended to leave it, as far as they could, unaffected by the operation of the recovery and the uses declared by the deed; these uses were to the joint appointment of the father and son, and in default of and until such appointment to the same uses to which the premises were previously limited."

The Lord Chancellor then read the clause in question and continued:

"The effect of this was, that, subject to the exercise of the power of appointment by the father and son, the estate remained precisely in the same position as if the recovery had not been suffered; and if no mortgage had been created, it is impossible to say that the strict terms of the proviso in question would not have been answered, when the second son after the death of his father came into possession of the Copford Hall Estate. The recovery did not so alter the estate as to prevent the operation of the proviso, for no rule of law would in such a case prevent the original intention of the parties from having its full effect and operation. FARWELL, J., when giving judgment in the case of *Re Cornwallis-*

A *West and Munro's Contract* (4) expressly stated that he was only following the decision of PEARSON, J., in *Re Wright and Marshall* (3). I shall deal with the decision of this guide presently."

B In *Re Wright's Trustees and Marshall* (3) the facts were that John Wright died in 1840, having by his will, dated 1835, devised certain lands to certain uses for the purpose of raising annuities with the usual powers of distress and entry for enforcing the payment of the same, and subject to these annuities and powers to the use of trustees for a term, and subject thereto to the use of the testator's son, Francis, for life with remainder to the testator's grandson, John Osmaston (then John Wright), for life, with remainder to the first and other sons of this John Osmaston in tail male. The testator declared by his will that it should be lawful for the trustees of the will, at the request of the person who by virtue of the testator's will, should be tenant for life in possession or in tail male or in tail in possession of any of the hereditaments demised, or any part thereof, or be entitled to the rent and profits of any of the said hereditaments or any part thereof respectively who should have attained the age of twenty-one years, to sell or exchange all or any part of the devised hereditaments. The first son of the testator having died, C John Osmaston and his son, Francis Osmaston, the testator's great-grandson, executed a disentailing deed by which they granted the estates, settled by the testator's will subject and without prejudice to the uses and estates by the said will limited which were prior to the estate in tail male of Francis Osmaston (other than the uses or estates limited to John Osmaston during his life) and to the powers annexed to such prior uses and estates or exercisable during the continuance thereof, D so far as the same uses or powers were then subsisting or capable of taking effect, and to such charges as were subsisting on the life estates of John Osmaston to such uses as the said John Osmaston and Francis Osmaston should appoint and in default of appointment, to the uses of the will. John and Francis Osmaston exercised the power of appointment over part of the estates by way of mortgage for the benefit of the tenant for life and by deed of July 28, 1878, resettled the whole of the estate to various uses, and ultimately to the use of John Osmaston and his assigns during F his life without impeachment of waste in restoration and by way of continuance and confirmation of the former life estate of the said John Osmaston under or by virtue of the said will and codicil with remainders over. PEARSON, J., held that the provisions of this complicated will revealed an intention on the part of the parties concerned merely to displace pro tanto the life estate, but subject to that to preserve the life estate of John Osmaston under the will. He purported to base this G conclusion on the authority of *Harrison v. Round* (8), but SWINFEN EADY, M.R., in *Constable's Case* (1) in my view, conclusively established that this case is not at all an authority supporting the conclusion on the point at which PEARSON, J., arrived.

H The last case which I think it necessary to cite at any length is that of *Re Constable's Settled Estates* (1). The facts are, with perhaps the exception of the particular clause on which the question for decision turns, set out accurately and with sufficient fullness in the headnote, but it may be desirable to set out in extenso this last-mentioned clause. At the date of a certain disentailing deed lands were by the will of one C. settled to the use of G. for life, with remainder to his son C. in tail male. In 1895 G., under powers conferred by this will, I appointed a jointure to his wife and portions for his younger children. In July, 1912, seven years later, G. and C. by a deed disentailed the estate and conveyed it (subject to charges and incumbrances and to G. life's estate) to such uses as G. and C. should jointly appoint, and subject to any such appointment to the use of G. for life in restoration and by way of confirmation of his life estate, with all powers of jointuring and charging portions and all other statutory powers annexed to or exercisable during the continuance of such life estate or estates, and so that they might be exercisable with the same overreaching effect as if the disentailing deed and the deed of appointment had not been executed. Colonel Constable,

the person indicated by the letter G in the headnote, was, as tenant for life under the resettlement deed of Oct. 22, 1912, desirous of exercising, with the consent of the jointress and the portioners, the powers conferred upon him as tenant for life by the Settled Land Acts, and also the extended and enlarged powers conferred on him by the resettlement. He applied by originating summons for a declaration that he was tenant for life under the resettlement within the meaning of the Settled Land Acts. Captain Constable, his son, and the trustees were the respondents to the summons. On the summons coming on before SARGANT, J., as he then was, he did not make any order on it, considering himself bound by the decision in *Re Cornwallis-West and Munro's Contract* (4). He says ([1919] 1 Ch. at p. 183): "While that case was unexplained, there were obvious objections to it." But that as explained shortly afterwards, in *Re Lord Wimborne and Browne's Contract* (12) ([1904] 1 Ch. at p. 542), he thought it was right. This explanation is that FARWELL, J., had said that the true explanation of the *Cornwallis-West Case* (4) was that as the old life estate created under the will had been restored, the tenant for life could not sell and confer a good title under the resettlement alone, as he proposed to do; and as there were no trustees for the purposes of the Settled Land Acts of the settlement created by the will, the tenant for life could not as matters then stood, sell under the will alone.

Speaking for myself, I may say that the more I study the cases I have cited up to this, the more difficult I find it to discover any rational and consistent principles on which they have been decided. The effect of the "restoration and confirmation" clause, it has been contended and indeed decided, is to show that the parties to the disentailing and resettlement assurances intended that the old life estate under the will should be restored and that these instruments must be construed so as to carry out that intention; but if it be restored, no clear intimation is given as to the effect of that restoration of the life estate conferred by the resettlement on the tenancy for life given by the will. It is not contended that there is any merger of the tenancy for life granted by the resettlement in which I may style the testamentary tenancy for life, or any supersession or destruction of the one by the existence of the other, or that they can co-exist. So that until this is solved one is driven to accept the contention put forward by counsel on behalf of the respondent in *Constable's Case* (1) as the more reasonable and natural result, viz., that the object of the restoration clause was, as CHITTY, L.J., and the then Master of the Rolls pointed out in *Re Mundy and Roper's Contract* (6), to keep alive the powers annexed to the old life estate, so that though the tenant for life had alienated the old life estate, he might continue to possess and enjoy them and exercise them over the new life estate: *Alexander v. Mills* (7), Settled Land Act, 1882, s. 50 (1), (2).

SWINFEN EADY, M.R., is reported to have said in *Re Constable's Settled Estates* (1) ([1919] 1 Ch. at p. 194):

"If the legal effect of the resettlement is to convey his old life estate, and to give him in lieu of it another life estate under that instrument (as in our opinion it is) (see 3 & 4 Will. 4, c. 106, s. 3 and DAVIDSON (3rd Edn.) vol. 3, p. 596), this legal effect is not prevented by saying that the life estate under the resettlement is in restoration and by way of confirmation of his old life estate."

Again he says (*ibid.* at p. 196):

"The clause [i.e., the restoration clause] is sufficient to show an intention of keeping alive those powers [i.e., the old powers annexed to the life estate], although ineffectual to restore the same life estate when the operative words of the deed are sufficient to pass it."

In my view that statement of the case is rational and sound. The court accordingly declared that the appellant was entitled to a declaration that he was tenant for life under the resettlement of the property thereby settled, and as such could exercise

A over the property the powers conferred by the Settled Land Acts, 1882 to 1890, and also by the resettlement conferred on a person for the time being tenant for life within the meaning of the Act. This decision applies, I think, to this case. It rules it, I think. If that be so, then the disposition mentioned in s. 12 (2) must apply to the resettlement. The word "property" used in this sub-section must mean, I think, the property out of which the life interest is carved, the settlement
B "disposed" of that within the meaning of the section. I think the appeal should therefore be dismissed with costs.

LORD BUCKMASTER.—In order that the appellants should succeed in this case they are bound to establish that the life estate limited in favour of Joseph Parr by the will of Thomas Parr, the testator, was not disturbed by the deed of resettlement, and also that the settled estate passed on the death of Joseph Parr under the testator's will. In my opinion they succeed on the first of these contentions and fail on the second. There is no dispute that the original life estate in favour of Joseph Parr was unaffected by the execution of the disentailing assurance, although the effect of this deed was completely to destroy all the estates in succession to this life interest, and to create powers of joint appointment in favour of Joseph Parr and Roger Parr which would have enabled the property to be settled with new or substituted life interests in favour of Joseph Parr or other people. The resettlement executed this power by limiting the property to the use of Joseph Parr for his life without impeachment of waste by way of restoration and confirmation of his present life estate therein under the will of Thomas Parr with remainders over which are not material to the present purpose.
D

E In 1884, in *Re Wright's Trustees and Marshall* (3), PEARSON, J., decided that in similar circumstances the original life estate was undisturbed by the resettlement. A decision followed by STIRLING, J., in *Re Du Cane and Nettlefold's Contract* (5), and by FARWELL, J., in *Re Cornwallis-West and Munro's Contract* (4). It was indeed never questioned until *Re Constable's Settled Estates* (1), when the Court of Appeal decided in plain terms that the effect of such a resettlement was to destroy the first life estate and create a new one. The judgment appears to depend on the view that PEARSON, J., had assumed the case to be already determined by the decision of *Harrison v. Round* (8), and also on the statement in the third volume of DAVIDSON'S CONVEYANCING (3rd Edn.) p. 596, questioning the effect of the Inheritance Act, 1833, on the matter. In substance it appears to me
F that it was really the provisions of the Inheritance Act on which the judgments of the Court of Appeal rested, but though the words of this statute if unexplained might seem to justify this conclusion, they appear to me to be necessarily affected by the view that the Act was specially passed for the purpose of limiting inquiries as to title and not for the purpose of effecting a general alteration in the law as to the construction of documents. I find it difficult to understand how an estate that is expressly limited in restoration and in confirmation of an estate of exactly the same quality can be regarded as defeating that estate and creating a new one.
G The word "restoration," though it might suggest that the original life estate had suffered some change, to my mind amounts to no more than saying that it must be treated as still on foot, and the word "confirmation" has no real meaning if it once be assumed that the estate had been destroyed. It must be remembered
H that these words have for many years been used by learned conveyancers whose preciseness of language has often been the subject of undeserved reproach and it is to my mind impossible to assume that they meant the opposite of what they say, for you cannot "confirm" what does not exist. In the case before CHITTY, L.J., in *Re Mundy and Roper's Contract* (6), the learned judge was expressly dealing with a case where the resettlement omitted the critical words, and ([1899] 1 Ch. at p. 294) he draws the contrast between the two positions. The law as stated in SUGDEN ON POWERS (8th Edn.) p. 71, is an express opinion in direct opposition to *Re Constable's Settled Estates* (1) and the view there stated is in my opinion
I

correct. I think, therefore, that *Re Constable's Settled Estates* (1) should be treated as overruled.

The remaining question is, to my mind, one of greater difficulty. The property undoubtedly passed on the death of Joseph Parr, and in s. 2 of the Finance Act, 1894, nothing further is required than that the property should so pass; for the purposes of that section the disposition under which it passes is immaterial and the phrase is not used. In s. 4, however, it is provided that if the deceased never had an interest in the property so passing, or if it passed "under a disposition" not made by the deceased to some person other than the wife or husband or lineal ancestor or descendant of the deceased, it should not be aggregated. In this section it is plain that passing under a disposition must involve the disposition that directs to whom the property shall pass and not a disposition that merely provides the event on the happening of which, it passes—and it is this section that is modified by s. 12 of the Act of 1900, which contains the relevant provisions for the present purpose. As its terms have already been stated there is no need that they should be repeated. The real point is, Did the property in the present case pass under the will of the testator or under the resettlement within the meaning of that section?—that it passed on the event provided by the will of the testator is plain—but I find it difficult to see that it passed "under" the will. To pass under a disposition appears to me to mean something more than passing on the happening of an event prescribed by an instrument. To my mind it includes the instrument whose trusts are operative immediately the event takes place, this was in the present case the resettlement, and I therefore think that the contention of the Crown is right and that this appeal should fail.

LORD CARSON.—I had the advantage of hearing this case argued on both occasions, and at the end of the second hearing I found that the opinion which I had formed at the first hearing—and which, I understood, was shared by a majority of the House on that occasion—remained unaltered. In my opinion, this appeal fails and, having regard to the very full statements made by the noble Lords who have preceded me, I shall be able to state my reasons very briefly.

I think that the whole question turns on the construction of the relevant sections of the Finance Acts, 1894 and 1900. Apart altogether from the position of the tenant for life, it is necessary under s. 4 of the Act of 1894, if the exception as to aggregation is to be applied, to ascertain to whom the estate passes and what interest passes. And likewise in order to apply s. 12 of the Act of 1900, one has to find the disponent and to consult the disposition under which he is clothed with that character. And thus, in my opinion, in all the relevant sections, "disposition" means the same thing, viz., the effective disposition under which the property passes.

Turning, then, to the disentailing assurance and the resettlement in the present case, one finds, after the execution of the former, the property in the possession of persons who had complete title and control and elected, as they had the right to do, to make a resettlement which was to be the effective disposition after the death of the tenant for life. It is a new starting point in the title and the old estates limited by the will have ceased to exist. If, therefore, under s. 4, we have to ascertain what is the disposition which provides to whom the property shall pass, I am of opinion that one answer only can be given, viz., that it passes under the deed of resettlement. Once that conclusion has been arrived at it is, in my view, unnecessary to pursue the questions which have been so strenuously and ably argued as to the disposition under which the tenant for life held his life interest or whether the case of *Re Constable's Settled Estates* (1) was rightly decided—questions on which, as the speeches made by the noble Lords who have preceded me show, your Lordships are not agreed.

I shall only add that I must not be taken as concurring in the view that the life estate of Joseph continued to be derived under the will of the testator after

A the execution of the resettlement, or that the judgment in *Re Constable's Settled Estates* (1) was wrong. In my opinion, the appeal should be dismissed.

B **LORD BLANESBURGH.**—The appellants here claim that the settled property which passed on the death of Joseph Charlton Parr ought not, for the purposes of estate duty, to be aggregated with his free estate but ought to be treated as an estate by itself.

C Now it must, I think, be agreed that the relevant sections of the Finance Acts on which that claim rests are open at any rate to two constructions, and the case of the appellants, as I see it, is in its last analysis dependent entirely on the question which of these constructions is correct. If by the statutes your Lordships are required to ascertain what was the disposition under which the interest of the deceased in the settled property was enjoyed by him during life and ceased with his death, as has been assumed in the courts below, then the correctness or otherwise of the decision of the Court of Appeal in *Re Constable's Settled Estates* (1) may be decisive of the appellants' claim, but if, on the other hand, the disposition which by these sections has alone to be sought for is that under which the settled property passed on the death of the deceased to his son Roger, then *Re Constable's Settled Estates* (1) ceases almost to be relevant to the issue. If this last be the true inquiry, the appellants will be no nearer success in their appeal even if their destructive criticism of that decision be as devastating in its effect as will be the legislative enactment which comes into force in a few days' time on the subject. It is important, therefore, to settle this question of construction at once, and with that object in view I venture to invite your Lordships' attention **E** to the relevant provisions of the statutes—fortunately few in number.

First of all, it is desirable to bear in mind the definition there to be found of "settled property," words which, as will be seen, are very important in this inquiry. That expression by s. 22 (1) (h), of the Act of 1894, means property comprised in a settlement, and "settlement," which by sub-s. (1) (i) includes a settlement effected by a trust, is quoad ultra, defined by reference to the Settled Land Act, 1882, and may for present purposes be described as being any instrument or number of instruments under or by virtue of which any real or personal property stands for the time being limited to or in trust for any persons by way of succession. **F**

Coming to the relevant sections of the statutes, s. 1 of the Act of 1894 is already under your Lordships' notice. The settled property in the present case—the entire estate—"passed" under that section on the death of Joseph Charlton Parr, and estate duty in respect of that entire estate thereupon became chargeable thereunder. **G** It became so chargeable merely because of the death of Joseph Charlton Parr, and irrespective of any question touching either the origin of the property or its destination. Section 2 of the Act, which describes the property which is to be deemed to pass on death, has no reference to anything with which we are now concerned, and need not be further adverted to.

H Section 4 is the aggregation section on which, as subsequently amended and added to, the whole matter turns. I venture to transcribe it at length, as originally enacted, italicising those portions of the section which were struck out by the Act of 1900 and then superseded by the subsections with which we are now directly concerned, added by that statute and the Act of 1907 :

I 4. For determining the rate of duty to be paid on any property passing on the death of the deceased all property so passing in respect of which estate duty is leviable shall be aggregated so as to form one estate and the duty shall be levied at the proper graduated rate on the principal value thereof : Provided that any property so passing, in which the deceased never had an interest or *which under a disposition not made by the deceased passes immediately on the death of the deceased to some person other than the wife or husband, or a lineal ancestor or lineal descendant of the deceased,* shall not be aggregated with any other property, but shall be an estate by itself, and the estate duty

shall be levied at the proper graduated rate on the principal value thereof, *but if any benefit under a disposition not made by the deceased is reserved or given to the wife or husband or a lineal ancestor or lineal descendant of the deceased, such benefit shall be aggregated with property of the deceased for the purpose of determining the rate of estate duty.*

I make three observations on this section. The first is, that by way of contrast in this respect to s. 1, under which the duty is chargeable, the exemption of any property from aggregation is by this section made dependent upon two conditions, relating the one to the origin, the other to the destination of the property. First, the "disposition" must not have been made by the deceased. Next, under that disposition the property on the death of the deceased must pass to someone who may be compendiously described as a stranger to his family. It is not the interest taken in the property by the deceased himself that is of any importance. The essential and determining factor is the description of the person to whom under the disposition not made by himself the property passes on his death.

The next observation I make is this. Excluding—as by the first part of the proviso there is excluded from the property dealt with by the second part—any property in which the deceased never had an interest, this property secondly dealt with, although not in terms so described—clearly, as I think, because the character of the succession is itself prescribed by the section—is necessarily "settled property" as above defined, a consideration the importance of which will emerge when we come, as we do now, to the amending Act of 1900.

By that Act, the words above italicised in s. 4 of the Act of 1894 are repealed, and they are replaced by a sub-section which, as further amended by the Act of 1907, now reads in effect as follows :

Where settled property passes or is deemed to pass on the death of a person dying on or after the 19th April, 1907, under a disposition made by a person dying on or before the 1st Aug., 1894, and such property would, if the disponent had died after the 1st Aug., 1894, have been liable to estate duty upon his death, such property shall be treated as an estate by itself.

Now this is the provision on which must be rested the whole claim of the appellants. What does it mean?

Note first of all the relevant changes thereby made by it in the conditions of exemption from aggregation prescribed by the original section. First, the disposition must not only have been made by some person other than the deceased; it must now have been made by someone dying before the passing of the principal Act. Secondly, if that condition be complied with, then the exemption follows, irrespective of the relationship to the deceased of the person to whom the property goes under that disposition. That disqualification being eliminated, the destination of the property is no longer, as such, referred to. But note how the necessity for its being prescribed by the disposition is preserved. Note the change in the introductory words. For the words in the proviso to s. 4 of the 1894 Act "Provided that any property so passing" we have now the words "Where settled property passes"—i.e., property which might have fittingly been so described in s. 4 if such description would not there have been redundant, is now so described when, by the elimination of the disqualification just referred to that description becomes essential if in the new clause, as in the original clause, the destination of the property after the death of the deceased is the destination which must be prescribed by the "disposition." Not only is this, as it seems to me the natural construction of the words. It is the construction also which is demanded by the reason of the thing. For it is the successor to the settled property and not the deceased himself who derives any benefit from the exemption. That benefit in turn is entirely due to the disponent. Surely then the successor and not the deceased is the person to be designated by the disponent from whom all the benefit proceeds. As under the original s. 4 so now.

A Accordingly, I reach the conclusion without difficulty that under the amended section as clearly as under the section unamended the condition of exemption of any settled property from aggregation is that on the death of the deceased it shall pass to someone else under a disposition of the required description which so prescribes. Applying that conclusion to the present case the appellants here must fail unless they are able to establish that the settled property passed under the will of Thomas Parr to Roger Charlton Parr on the death of his father, the deceased. I believe that all your Lordships are of opinion that the appellants cannot make good that position. As the noble Viscount on the Woolsack has observed, there can be no doubt that the remainders limited by the deed of resettlement after the life estate restored and confirmed to Joseph Charlton Parr were new estates created by the resettlement itself. If further authority for that view be required C it is supplied in ample measure by the cases of *Lord Braybrooke v. A.-G.* (13) and *A.-G. v. Floyer* (14). These cases, cited by counsel for the appellants for another purpose, show that not only were these remainders not taken under the will of the testator: they show that they were taken under the resettlement which for this purpose may even be treated as a disposition by Roger Charlton Parr himself: See, too, *A.-G. v. Cecil* (15).

D This conclusion dispenses me from the necessity of dealing with *Re Constable's Settled Estates* (1). I will only say with reference to it that in my view the life estate in these settled properties of which the deceased was seised at the date of his death was the life estate limited by the testator's will. I would reassure ATKIN, L.J., by adding that I do not reach that result by attributing magical or uncanny results to any conveyancing incantations, but merely by giving effect to the intention of the parties to the deed of resettlement expressed as that intention is in language too clear to be misunderstood. There are more means than one by which it can be given full effect. The words of appointment may, in order to effectuate it, be treated as a release to the necessary extent of the joint power of appointment; alternatively, the life interest may be treated as if it were one taken in default of appointment notwithstanding the form of the deed. I am not unmindful of *Sweetapple v. Horlock* (16), *Lovett v. Lovett* (17), *Re Rush*, *Warre v. Rush* (18), so strongly relied on by counsel for the respondent, nor do I doubt that an appointed estate, albeit the same in every material respect, is normally a different estate from that which the appointee holds in default of appointment. But I do not find that in any of these cases the court was dealing with an appointment in which it was expressed or intended, as it is here both expressed and intended, that the appointed estate shall be the old unappointed estate. Where that intention is clearly manifested I do not see why, if within the competence of the appointor to make it effective, it should not have full effect.

G Accordingly, I myself find no difficulty in adhering on well-established principle to a view of provisions like the present which prior to *Re Constable's Settled Estates* (1) was so well settled and so frequently acted on. I think that *Re Constable's Settled Estates* (1) in this respect was wrong.

H But in the result that conclusion does not, in my judgment, help the appellants at all. Their appeal should, I think, be dismissed with costs.

Appeal dismissed.

Solicitors: *Balderston, Warren & Co.*, for *R. Davies & Co.*, Warrington; Solicitor of Inland Revenue.

[Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.]

KNIGHT v. KNIGHT

[COURT OF APPEAL (Sir Ernest Pollock, M.R., Atkin and Sargant, L.JJ.), March 25, 26, 1925]

[Reported [1925] Ch. 835; 95 L.J.Ch. 33; 133 L.T. 259; 41 T.L.R. 421; 69 Sol. Jo. 459]

Solicitor—Costs—Lien—Costs of successful appeal—Priority to charging order obtained by opponent's solicitor after hearing in court below—Discretion of Court of Appeal—Solicitors Act, 1860 (23 & 24 Vict., c. 127), s. 28.

In December, 1924, in an action on a contract, the court dismissed the action on one issue, but on another issue ordered that a sum of £1,000 paid into court by the defendant in full satisfaction of the plaintiff's claims should be paid out to the plaintiff subject to a set-off for the defendant's costs. In February, 1925, the plaintiff's solicitor obtained a charging order for his costs under the Solicitors Act, 1860, s. 28, against the balance of the £1,000 after payment of the defendant's costs. The plaintiff appealed on the issue on which he had been unsuccessful. The appeal was dismissed, and the defendant's solicitors then applied to set off the defendant's costs of the appeal against the £1,000 in priority to the right of the plaintiff's solicitor under the charging order.

Held: the Court of Appeal had power to grant the application, but it was a matter for their discretion; the costs of the appeal stood on a different footing from those of the action in which money had been "recovered or preserved" for the plaintiff within s. 28 of the Act of 1860; and, in the exercise of the discretion and the circumstances of the case, the application would be refused.

Notes. Section 28 of the Solicitors Act, 1860, has been replaced by s. 69 of the Solicitors Act, 1932 (see 24 HALSBURY'S STATUTES (2nd Edn.) 16).

Referred to: *Re Debtor* (No. 21 of 1950), *Ex parte Petitioning Creditors v. Debtor*, [1951] 1 All E.R. 600.

As to a solicitor's lien and right to a set-off for costs see 31 HALSBURY'S LAWS (2nd Edn.) 288 et seq., and for cases see 34 DIGEST 259 et seq.

Cases referred to:

- (1) *Puddephatt v. Leith* (No. 2), [1916] 2 Ch. 168; 85 L.J.Ch. 543; 114 L.T. 1159; 60 Sol. Jo. 568; 42 Digest 284, 3195.
- (2) *Reid v. Cupper*, [1915] 2 K.B. 147; 84 L.J.K.B. 573; 112 L.T. 573; 31 T.L.R. 103; 59 Sol. Jo. 144, C.A.; 42 Digest 284, 3194.
- (3) *Westacott v. Bevan*, [1891] 1 Q.B. 774; 60 L.J.Q.B. 536; 65 L.T. 263; 39 W.R. 363; 7 T.L.R. 290, D.C.; 42 Digest 295, 3296.
- (4) *Emden v. Carte* (1881), 19 Ch.D. 311; 51 L.J.Ch. 371; 45 L.T. 328; 30 W.R. 17 C.A.; 42 Digest 297, 3315.
- (5) *Cole v. Eley*, [1894] 2 Q.B. 180, 350; 63 L.J.Q.B. 682; 70 L.T. 892; 42 W.R. 505, 561; 10 T.L.R. 461, 515; 38 Sol. Jo. 460, 533; 9 R. 552, C.A.; 42 Digest 303, 3374.

Application by defendant's solicitors to set off costs against money in court.

The plaintiff brought an action against his wife claiming that under the terms of an agreement dated July 7, 1919, he became a partner with her in a one-half share in the business of a private hotel and of the furniture on the premises. The agreement was signed by the wife just prior to her marriage with the plaintiff who subsequently advanced £1,000 to her. The wife paid £1,000 into court in full satisfaction of all the husband's claims in the action and as money advanced to her. On Dec. 19, 1924, ROMER, J., dismissed the action on one issue, but on a second issue ordered that the £1,000 paid into court should be paid to the husband subject to a set-off for the wife's costs. In February, 1925, the husband's solicitor obtained a charging order for his costs under s. 28 of the Solicitors Act, 1860, against

A the balance of the £1,000 after payment of the wife's costs. The husband appealed against ROMER, J.'s, decision on the issue on which he had been unsuccessful. The appeal was dismissed, and the wife's solicitors applied to set off their costs of the appeal as well as those of the action against the £1,000 paid into court in priority to the right of the husband's solicitors under the charging order.

B *T. R. Hughes, K.C.*, and *W. A. Barton*, for the wife, referred to *Puddephatt v. Leith* (No. 2) (1), *Reid v. Cupper* (2), *Westacott v. Bevan* (3).

Charles Harman (*J. E. Harman* with him), for the husband's solicitor, was not called upon.

C **SIR ERNEST POLLOCK, M.R.**—Judgment in this action was given by ROMER, J., on Dec. 19, 1924, dismissing the husband's claim, but holding that the £1,000 paid into court by the wife represented £1,000 which had been advanced by the husband to her, and under his judgment there was to be a set-off of the wife's costs against that £1,000 paid into court. The wife paid that sum into court in an embarrassing manner, as she purported to pay it in "in full satisfaction of the plaintiff's claim and as money advanced to the defendant." I think the learned judge was right in his order which involved a set-off of costs against that sum of £1,000. But D on Feb. 25, 1925, the husband's solicitors obtained a charging order for his costs in the action on the balance of the £1,000 after satisfaction of the wife's right to set off her costs of the action. He obtained that charging order under s. 28 of the Solicitors Act, 1860, which, so far as material, provided that where a solicitor was employed in any proceeding in any court of justice, the court or judge might declare him entitled to a charge upon the property recovered or preserved and E upon such declaration he should have a charge upon and against, and a right to payment out of, the property so recovered or preserved through his instrumentality for the taxed costs, charges, and expenses of or in reference to such proceeding, and the judge or court might make such order for taxation and for raising such costs out of the property as should appear just. The husband's solicitor got his charging order on property "recovered or preserved" through his instrumentality. It F has been held that money paid into court by a defendant, although accompanied by a defence denying legal liability, may be taken out of court by the plaintiff, and is, therefore, property "recovered or preserved" within s. 28: see *Emden v. Carte* (4). In *Westacott v. Bevan* (3) and *Cole v. Eley* (5) it was held that set-off might arise in a matter concerning both a claim and a counterclaim, and G YOUNGER, J., in *Puddephatt v. Leith* (No. 2) (1) held that set-off might arise, not merely in a matter in one action, but in a matter brought before the court in independent proceedings if they could have been brought in one action and in that he followed *Reid v. Cupper* (2).

H Counsel for the wife, the defendant in the action, now asks us to order that her costs of the appeal should be included in her costs of the action which have already been ordered to be set off against the £1,000 to which the husband in the action is entitled. I cannot agree with the view that in such a case there is a general right of set-off. After the order has been made, counsel asks that it should automatically be increased by adding the costs of the appeal to the costs of the action, but whether the costs of the appeal can be set off is not, I think, a matter of right; it is a matter for the discretion of this court. It seems to me I that the rights of the husband's solicitors accrued and became, so to speak, "crystallised" at the making of the charging order under s. 28, and, further, the wife's solicitors did not apply to this court, as they might have done, that security for the costs of the appeal should be given, when it might have been possible for such an order for security to have been made by this court. It is now said that we ought to treat the costs of the appeal as part of the wife's costs to be set off, but I think that the costs of the appeal stand upon a different footing from the costs of the action in which the money was "recovered or preserved." We are not compelled to make the order asked for, and, in the exercise of our discretion, and

in the circumstances of the case, in my opinion, we ought not to make the order giving the costs of this appeal priority over the charging order already obtained against the balance of the £1,000.

ATKIN, L.J.—This payment in seems to me to have been made without a denial of liability, having regard to the words used in paying in the £1,000. This court has doubtless a discretion to order the costs of the appeal to be set off in priority to the charging order, but, in the circumstances of this case, I can see no reason why we should do so. There was no undue haste by the husband's solicitor in obtaining the charging order, and I think this court will be right in giving effect to his lien. The proper order ought, therefore, to be that the wife's costs of this appeal should be set off against the residue of the £1,000 after payment thereof of her costs incurred in the action and the payment to the husband's solicitor of his costs of the action, for which he has obtained a charging order.

SARGANT, L.J.—I agree.

Solicitors: *C. J. Pitman*, for *J. Hall Wright*, Birmingham; *E. & J. Mote*, for *Carter & Fisher*, Torquay.

[Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.]

BRIGHTON COLLEGE v. MARRIOTT

[HOUSE OF LORDS (Viscount Cave, L.C., Lord Atkinson, Lord Buckmaster, Lord Carson and Lord Blanesburgh), November 3, 6, December 18, 1925]

[Reported [1926] A.C. 192; 95 L.J.K.B. 356; 134 L.T. 417;
42 T.L.R. 228; 70 Sol. Jo. 245; 10 Tax. Cas. 213]

Income Tax—Charity—Educational charity—Public school—Profits or gains from receipt of fees—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), s. 37 (b), Sched. D.

A company limited by guarantee was formed to carry on a public school and to provide there a general education. By its memorandum of association it was provided that its income should be applied solely towards the promotion of its objects and that no portion thereof should be applied by way of dividend, bonus, or otherwise by way of profit to present or past members of the company. In the year ended April 5, 1923, the fees charged for attendance at the school had considerably exceeded the working expenses and so had produced a surplus in the hands of the company after it had repaid loans and paid interest on loans incurred to extend and improve the property of the company. This net surplus having been assessed to income tax under Sched. D., the Crown admitted that the object for which the company was established was charitable within the meaning of the statute 43 Eliz. 1, c. 4 (the Charitable Uses Act, 1601).

Held: (i) a charitable institution which carried on a trade at a profit was chargeable with income tax in respect of its profits or gains in that trade, notwithstanding that those profits or gains were and could be only applied to the purposes of the charity; the surplus receipts in the present case were gains even if they were not profits; and, accordingly, they fell to be assessed under Sched. D.; (ii) the surplus was not "yearly interest or other annual payment" within s. 37 (b) of the Income Tax Act, 1918, so as to be exempt from tax under Sched. D., and, therefore, the surplus was rightly assessed.

Notes. Section 37 (b) of the Income Tax Act, 1918, has been re-enacted in s. 447 (b) of the Income Tax Act, 1952. For the provisions of Sched. D. see s. 122 and following sections of the Act of 1952.

A Considered: *Girls' Public Day School Trust v. Ereant*, [1931] A.C. 12. Referred to: *General Medical Council v. I.R. Comrs.*, *English Branch Council of General Medical Council v. I.R. Comrs.*, [1928] All E.R. Rep. 252; *Stoke-on-Trent Revenue Officer v. Stoke-on-Trent Assessment Committee, etc.* (1930), 143 L.T. 650; *Tribune Press Lahore (Trustees) v. Income Tax Comr., Punjab, Lahore*, [1939] 3 All E.R. 469; *Re Bland-Sutton's Will Trusts, National Provincial Bank, Ltd. v. Middlesex Hospital Medical School Council*, [1950] 2 All E.R. 466; *Re Girls' Public Day School Trust, Ltd., Girls' Public Day School Trust Ltd. v. Minister of Town and Country Planning*, [1951] Ch. 400; *I.R. Comrs. v. City of London Corpn. (as Epping Forest Conservators)*, [1953] 1 All E.R. 1075.

B As to the taxation of charities see 20 HALSBURY'S LAWS (3rd Edn.) 603-608, and for cases see 28 DIGEST (Repl.) 50. For Income Tax Act, 1952, see 31 HALSBURY'S STATUTES (2nd Edn.).

C Cases referred to:

- (1) *R. v. Income Tax Special Comrs., Ex parte Shaftesbury Homes and Arethusa Training Ship*, [1923] 1 K.B. 393; 92 L.J.K.B. 152; 128 L.T. 463; 39 T.L.R. 99; 8 Tax Cas. 367, C.A.; 28 Digest (Repl.) 322, 1415.
- D** (2) *Mersey Docks and Harbour Board v. Lucas* (1883), 8 App. Cas. 891; 53 L.J.Q.B. 4; 49 L.T. 781; 48 J.P. 212; 32 W.R. 34; 2 Tax Cas. 25, H.L.; 28 Digest (Repl.) 47, 179.
- (3) *Re Duty on Estate of Incorporated Council of Law Reporting for England and Wales* (1888), 22 Q.B.D. 279; 58 L.J.Q.B. 90; 60 L.T. 505; 53 J.P. 119; 37 W.R. 382; 5 T.L.R. 128; 3 Tax Cas. 105, 39 Digest 299, 779.
- E** (4) *St. Andrew's Hospital, Northampton v. Shearsmith* (1887), 19 Q.B.D. 624; 57 L.T. 413; 35 W.R. 811; 3 T.L.R. 732; 2 Tax Cas. 219, D.C.; 28 Digest (Repl.) 316, 1387.
- (5) *Religious Tract and Book Society of Scotland v. Forbes (Surveyor of Taxes)* (1896), 60 J.P. 393; 33 Sc.L.R. 289; 3 Tax Cas. 415; 28 Digest (Repl.) 113, *326.
- F** (6) *Grove v. Young Men's Christian Association* (1903), 88 L.T. 696; 67 J.P. 279; 19 T.L.R. 491; 47 Sol. Jo. 535; 4 Tax Cas. 613; 28 Digest (Repl.) 112, 420.
- (7) *Coman v. Governors of Rotunda Hospital, Dublin*, [1921] 1 A.C. 1; 89 L.J.P.C. 162; 123 L.T. 529; 36 T.L.R. 646; 64 Sol. Jo. 548; sub nom. *Governors of Rotunda Hospital, Dublin v. Coman*, 7 Tax Cas. 517, H.L.; 28 Digest (Repl.) 218, 939.

G **Appeal** from an order of the Court of Appeal (POLLOCK, M.R., WARRINGTON and SCRUTTON, L.J.J.), reported [1925] 1 K.B. 312, upon a Case stated by the Special Commissioners upon an appeal by Brighton College against an assessment to income tax in the sum of £2,389 for the year ending April 5, 1923.

H The college was a company limited by guarantee established in the year 1873 under the provisions of the Acts relating to public companies. The objects for which the appellant college were established were: (a) To continue with an improved constitution the Brighton College which had been carried on since the year 1846 in Brighton. (b) To provide thereby a sound religious, classical, mathematical, and general education in conformity with the doctrines of the Church of England. (c) **I** The doing of such other lawful things as were incidental or conducive to the attainment of the above objects. By the memorandum of association of the appellant college it was provided:

The income and property of the college whencesoever derived shall be applied solely towards the promotion of the objects of the college, as set forth in this memorandum of association; and no portion thereof shall be paid or transferred directly or indirectly by way of dividend, bonus, or otherwise howsoever by way of profit to the persons who at any time are or have been members of the college,

or to any of them, or to any person claiming through any of them. Provided that nothing herein contained shall prevent the payment in good faith of remuneration to any officers or servants of the college or to any members of the college or other persons, in return for any services actually rendered to the college.

By special licence of the Board of Trade the word "Limited" was omitted from the name of the company. Brighton College, was founded as a public school in 1846 to provide for the sons of noblemen and gentlemen a thorough liberal and practical education in conformity with the principles of the Established Church. The college had been carried on in all ways in accordance with its memorandum (*supra*) and articles of association. It had taken over or acquired school premises, classrooms, a workshop, residential and other premises, and employed a staff of masters and other persons for the instruction and care of the boys. The company, upon an appeal to the general commissioners of income tax for Brighton had, under No. VI of Sched. A. to the Income Tax Act, 1918, been exempted from the income tax in respect of its public buildings, offices, and premises. The company had also received repayment of income tax charged by way of deduction upon certain rents and dividends which it had received and applied to the purposes of the college, on the ground that it fell to be treated as a trustee for charitable purposes. The fees charged for attendance at the school had varied from time to time, and had in recent years produced surpluses, as shown in the first column of the following statement:

	1	2	3	4	
In 1910	1268	886	—	381	profit
„ 1911	1548	1033	500	15 5	„
„ 1912	1633	1013	500	119 5	„
„ 1913	1515	994	500	20 5	„
„ 1914	1583	1108	500	24	loss
„ 1915	1371	1171	500	300 5	„
„ 1916	1403	1151	500	248 5	„
„ 1917	1781	1124	500	157	profit
„ 1918	1901	1095	500	306 5	„
„ 1919	2142	1064	1000	77 5	„
„ 1920	1729	1031	—	697 5	„
„ 1921	6468	1310	500	4657 5	„

Those surpluses had been to a large extent expended, as shown in the second and third column of the statement, in paying interest on mortgages and repaying mortgage indebtedness, the said indebtedness having been incurred in acquiring property for and in extensions and improvements of the college rendered necessary by the large increase in the number of pupils. The fourth column of the statement showed the net position after deducting the interest and mortgage redemption. It was no longer necessary that the parents of pupils should be shareholders, and pupils were not required to be nominated by a shareholder.

In those circumstances it was contended by counsel on behalf of the company at the hearing of the appeal: (i) That the company was not carrying on any trade within the meaning of the Income Tax Acts or at all; (ii) that the council of the appellant college was administering a charitable trust and was not carrying on a trade; (iii) that the income of the company consisted of (a) rents and profits derived from lands which were admittedly exempt from tax, and (b) other annual payments which were applicable to charitable purposes only and were applied to charitable purposes only: see *R. v. Income Tax Special Comrs., Ex parte Shaftesbury Homes and Arethusa Training Ship* (1); (iv) that, even if a trade were carried on, it consisted of the work of education carried on by a charitable institution endowed to enable masters and boys to carry on that work, and the said work was "mainly carried on by the beneficiaries of the charity within the meaning of s. 30 (i) (c) of the Finance Act, 1921, and the profits were applied solely for the purposes of the

A charity and are exempt under that section. The inspector of taxes contended (*inter alia*): (i) That the company carried on a trade, profession, employment or vocation of providing education; (ii) that the profits, the subject of the said assessment, were annual profits or gains arising or accruing to the company from the said trade, profession, employment or vocation; (iii) that the company was not a charity; (iv) alternatively, that the work in connection with the said trade was not mainly carried on by beneficiaries of the company; (v) that the said assessment was correct and should be confirmed. The commissioners who heard the appeal, decided that a trade was being carried on, and, after giving effect to certain agreed alterations, amended the assessment to £2,414 and determined the appeal accordingly. It was agreed by both sides that in arriving at the liability of the company under Sched. D, the annual value of the buildings and offices upon which no tax has been levied under Sched. A. by reason of the before-mentioned decision of the general commissioners of income tax should be deducted. The commissioners held that the Finance Act, 1921, s. 30 (i) (c), did not apply to the profits so arrived at. The Court of Appeal held, reversing the decision of ROWLATT, J., that the company carried on a trade or business in providing education, and was assessable to income tax in respect of the income derived from school fees. The company appealed.

D *Latter, K.C., Edwardes Jones, K.C., Dighton Pollock, and Beagley* for the company.

The Attorney-General (Sir Douglas Hogg, K.C.), and Reginald Hills for the Crown.

The House took time for consideration.

E Dec. 18. The following opinions were read.

VISCOUNT CAVE, L.C.—In this case the Court of Appeal, reversing the decision of ROWLATT, J., has held that the appellants, a corporation bearing the name of Brighton College, were properly assessed to income tax for the year ending on April 5, 1923, and the question for your Lordships' decision is whether the tax was rightly so assessed.

F The school known as Brighton College was founded in or about the year 1846 for the purpose of providing for the sons of noblemen and gentlemen a liberal and practical education in conformity with the principles of the Established Church, and was for some years conducted under the terms of a deed of establishment dated Sept. 11, 1848. In 1873 the school was taken over by the appellant company, which was then incorporated under the Companies Acts as a company limited by guarantee, its principal objects being defined by the memorandum of association (*supra*). G The memorandum of association contained a provision to the effect that the income and property of the college, whencesoever derived, should be applied solely towards the promotion of the objects of the college as set forth in the memorandum of association, and no portion thereof should be paid or transferred directly or indirectly by way of dividend, bonus or otherwise by way of profit to the members of the college. H The articles of association provided (among other things) that every member should have the privilege of nominating to the college one pupil in respect of each share held by him, and that pupils not so nominated should pay an additional charge; but this privilege, although still in existence, is not now used by the members. I The article also provided that the council should have the general care and management of the college and should regulate the tuition and other fees to be paid by the pupils. The school has been carried on by the appellant company in accordance with the memorandum and articles of association. The company has taken over or acquired the land required for the school and has improved the school premises, borrowing considerable sums for that purpose on mortgage or debentures. It employs a large staff and charges fees for the education given. The school is not assisted by any subscriptions, and there is nothing to show that the fees are fixed on other than commercial principles. For many years past the receipts of the college have considerably exceeded the working expenses, and the surplus has been

applied to the payment of interest on the debt secured by the mortgages and debentures and of instalments of the principal debt. In the years 1912 to 1921 these surpluses were as follows :

				Surplus	Interest	Principal paid off
1912	...	...	...	1633	1013	500
1913	...	...	...	1515	994	500
1914	...	...	...	1583	1108	500
1915	...	...	...	1371	1171	500
1916	...	...	...	1403	1151	500
1917	...	...	...	1781	1124	500
1918	...	...	...	1901	1095	500
1919	...	...	...	2142	1064	1000
1920	...	...	...	1729	1031	—
1921	...	...	...	6468	1310	500

In these circumstances the additional commissioners of income tax for the division of Brighton made an assessment upon the appellants under Sched. D of the Income Tax Act for the tax year 1922-1923; and, on an appeal to the Special Commissioners, those commissioners decided that a trade was being carried on, but, after giving effect to certain agreed alterations, they amended the assessment to £2,414. It was agreed by both sides that in arriving at the liability of the appellants under Sched. D, the annual value of the buildings and offices upon which no tax had been levied under Sched. A should be deducted. A Case having been stated for the opinion of the High Court, ROWLATT, J., held that the appellants were not assessable to the tax, but on appeal to the Court of Appeal that court reversed the decision of the High Court and affirmed the decision of the Special Commissioners. Hence the present appeal. It should be added that, for the purposes of the argument before the Court of Appeal and this House, it was admitted by the Crown that the object for which the company was established was a charitable object within the meaning of the statute of Elizabeth.

By the Income Tax Act, 1918, income tax is chargeable under Sched. D in respect of the annual profits or gains arising or accruing to any person (including a corporation) residing in the United Kingdom from any trade, profession, employment or vocation. Exemption is granted (under s. 37): (a) from tax under Sched. A in respect of the rents and profits of any lands or hereditaments belonging to any public school, and (b) tax under Sched. D in respect of any yearly interest or other annual payment forming part of the income of any charity. A further allowance is made (under Sched. A, No. VI, r. 1) in respect of the tax charged on any public school in respect of the public buildings, offices and premises belonging thereto; and by the Finance Act, 1921, s. 30, exemption is granted from income tax under Sched. D in respect of the profits of a trade carried on by any charity, if the work in connection with the trade is mainly carried on by beneficiaries of the charity and the profits are applied solely to the purposes of the charity. Except in these respects the Acts grant no exemption from income tax to educational or other charities. In these circumstances the appellant company, which carries on the business of providing education for money, is *prima facie* chargeable with tax in respect of its annual profits or gains arising from that business; and the question to be determined is whether there is anything in the statute or in the constitution of the appellant company which prevents it from being so chargeable.

Upon this question two arguments are put forward on behalf of the appellant company. First, it is said that the appellant company, being admittedly a charity, cannot carry on a trade, and that a surplus of receipts over expenditure arising in the execution of a charitable trust is not properly described as profit; and stress is laid on the fact that, having regard to the provisions of the company's memorandum of association, no part of its income can be distributed among the members.

A I am unable to agree with this contention. It has long been decided that, if a trade is in fact being carried on at a profit, it is immaterial that the profits must, under the constitution of the trading corporation, be devoted to public objects: *Mersey Docks and Harbour Board v. Lucas* (2); cf. *Re Duty on Estate of Incorporated Council of Law Reporting for England and Wales* (3). It has also been decided, both in the courts and in this House, that a charitable institution which carries on a trade at a profit is chargeable with income tax in respect of its profits or gains in that trade, notwithstanding that they are and can only be applied to the purposes of the charity. Thus, in *St. Andrew's Hospital, Northampton v. Shearsmith* (4), a hospital for the care of insane persons was charged with income tax on the profits earned by receiving wealthy patients, although such profits were applied only for the benefit of the poorer patients and the improvement of the hospital.

C In *Religious Tract and Book Society of Scotland v. Forbes* (*Surveyor of Taxes*) (5), a society whose object was to promote religion by the circulation of tracts and books, was held chargeable with tax in respect of profits earned by carrying on a bookseller's business. In *Grove v. Young Men's Christian Association* (6), a society formed for the improvement of young men was held liable to tax on profits made by carrying on a restaurant which was open to the public as well as to its members, and in *Coman v. Governors of Rotunda Hospital* (7), the governors of a hospital were held to have been rightly assessed to tax under Sched. D in respect of profits earned by letting certain rooms for entertainments. In all these cases the profits earned by the particular trade or business were applicable and applied only to the general purposes of the charities, but this was held to make no difference.

E On behalf of the appellants, an endeavour was made to distinguish these cases from the present on the ground that in the cases cited the trades carried on were only subsidiary to the charitable purpose, while in the present case the carrying on of the school is the main purpose and object of the charity. I do not think this a sound distinction. If a corporation established for charitable purposes and carrying on a subsidiary trade for the benefit of its main objects is chargeable with tax, the tax is equally chargeable where the very purpose and object of the charity is to carry on a trade. The surplus receipts in such a case, even if they were not profits, are certainly gains, and so fall under the burden of the tax. The above-cited case of *Re Duty on Estate of Incorporated Council of Law Reporting for England and Wales* (3) supports this view; and the reference in s. 30 of the Finance Act, 1921, to "the profits of a trade carried on by any charity" shows the understanding of the legislature. Secondly, it is argued that the profits from the school are exempt from taxation on the ground that they are an "annual payment forming part of the income" of the company, within the meaning of s. 37 (b) of the Income Tax Act, 1918. The answer is twofold, namely, first, that the fees received from the scholars are not properly described as an annual payment: see *St. Andrew's Hospital, Northampton v. Shearsmith* (4); and, secondly, that it is sought to tax, not the fees, but the profits. It was not suggested before your Lordships that the profits are within the exemption contained in s. 30 of the Act of 1921.

H Upon the whole I have come to the conclusion that the appellants have been properly charged with tax. It has been suggested that a decision to that effect will throw a heavy charge upon many places of education, such as colleges and public schools, not carried on with a view to individual profit. I think this improbable.

I The real property and investments of these bodies are exempt from taxation; and the cases in which such a college or public school can show (as in the present case) a substantial profit earned year after year and applied for capital purposes, must be rare. In any case, your Lordships have only to determine the true construction of the statute, and upon this I do not feel any doubt. In my opinion, the appeal fails and should be dismissed with costs, and I move your Lordships accordingly.

LORD ATKINSON concurred.

LORD BUCKMASTER.—The detailed facts of this case have already been stated.

But in order to make plain the principles which have formed my opinion it is desirable that I should summarise what I regard as the relevant matter.

Brighton College is carried on as an undertaking under the Companies Acts. The sole purpose of the company is to provide education at Brighton College in conformity with the doctrines of the Church of England, and this is wholly a charitable object. The surplus income after providing for the annual expense is devoted to the improvement of the institution and cannot be divided in any way or under any pretence among the members of the company. The tax that it is sought to exact from these surplus profits is claimed by the Crown under Sched. D of the Act of 1918 as annual profits or gains arising from a trade carried on in the United Kingdom. If the purpose for which the school was established and the objects to which the surplus income is devoted be disregarded, the tax would, in my opinion, be properly charged, and the two questions on this appeal are (i) whether the circumstances I have stated prevent the carrying on of this institution from being a trade, and (ii) if this be answered in the negative, whether the exemptions under s. 37 of the Income Tax Act, 1918, and s. 30 of the Finance Act, 1921, will relieve the appellants from liability.

With regard to the first of these propositions it is, I think, clear that the purpose to which the profits are applied is not material. In *Religious Tract and Book Society of Scotland v. Forbes* (*Surveyor of Taxes*) (5), it was definitely decided that the destination of the profits does not secure immunity from tax, and this principle is, in my opinion, involved in *Coman v. Governors of Rotunda Hospital* (7). It seems to me to make no difference so far as this point is concerned whether the trade from which the profits arose formed the whole or part only of the charity. The main argument, indeed, was in fact devoted to the contention that where the whole purpose of the undertaking was in fact the carrying on of the charity it ceased to be a trade. I am unable to accept this proposition, although it found favour before ROWLATT, J., and formed the basis of his judgment. If the undertaking must be regarded as a trade and would be so regarded if it formed a branch only of a larger institution, it seems to me it must equally be a trade when it is the sole and only purpose. In accordance, therefore, with authorities which have stood too long to be now revised I think that this tax was properly charged under Sched. D.

It remains to be considered whether, in these circumstances, it is exempted. The relief granted by s. 37 of the Act of 1918 from tax is first under (a) in respect of the rents and profits of lands and tenements belonging to a public school or vested in trustees for charitable purposes, and this has been allowed. It must be under sub-s. (b), if anywhere, that the relief must be sought. This grants exemption in respect of any yearly interest or other annual payment forming part of the income of any body established for charitable purposes only. This company certainly satisfies that condition. The only point is whether the surplus profits can be regarded as yearly interest or annual payment. It is certainly not interest, nor do I think it can be regarded as an annual payment, for an annual payment to a company cannot cover the profits that may be made in carrying on a trade. Nor can exemption be claimed under s. 30 of the Finance Act, 1921, for the work done by the masters and staff in carrying on the school is work done by them in the exercise of their various callings, and none of them can be regarded as beneficiaries of the charity. It is for these reasons that I think the judgment of the Court of Appeal is correct and ought to be affirmed.

LORD CARSON and **LORD BLANESBURGH** concurred.

Appeal dismissed.

Solicitors : *Lingards, Browne & Myatt; Solicitor of Inland Revenue.*

[*Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.*]

BUNGE Y BORN LIMITADA SOCIEDAD ANONIMA
COMMERCIAL FINANCIERA Y INDUSTRIAL OF BUENOS
AIRES v. H. A. BRIGHTMAN & CO.

B [HOUSE OF LORDS (Viscount Cave, L.C., Lord Dunedin, Lord Atkinson, Lord Sumner and Lord Buckmaster), June 16, July 24, 1925]

[Reported [1925] A.C. 799; 94 L.J.K.B. 840; 133 L.T. 738; 41 T.L.R. 652; 69 Sol. Jo. 795; 16 Asp. M.L.C. 545; 31 Com. Cas. 27]

C *Shipping—Demurrage—Exception clause—"Obstruction [to loading] beyond control of charterers on railways"—Obstruction on railways preventing provision of cargo, but not preventing loading of ship.*

D A ship was chartered to proceed to one of certain ports in the River Parana and there to receive a full and complete cargo of wheat and/or maize and/or rye. The ship was to be loaded at a certain rate, otherwise demurrage to be paid by the charterers. It was provided by cl. 30 of the charterparty that if the cargo could not be loaded "by reason of . . . a strike or lockout of any class of workmen essential to the loading of the cargo, or by reason of obstruction . . . beyond the control of the charterers on the railways or in the docks or other loading places" no claim for demurrage should be made by the owners. The ship began to load wheat, but owing to a "ca' canny strike" on one of the railways running to the port on which the wheat to be loaded was carried delay was caused in bringing the cargo to the ship's side, and before the loading was completed the Argentine government prohibited the export of wheat. Thereupon the charterers began loading maize and completed the cargo therewith. The owners claimed demurrage and the charterers contended that they were protected by the provisions of cl. 30.

E **Held:** the charterers had failed to show that such obstruction as might have existed on the railway caused by the strike amounted, while the strike lasted, to an "obstruction" within the meaning of cl. 30 of the charterparty and, therefore, the charterers were not entitled to the exemption they claimed.

F Per LORD ATKINSON: When the export of wheat was prohibited and the charterers had to make up their minds what was to be done in this altered condition of things they were entitled to a reasonable time to determine how to deal with those altered conditions, and a reasonable time for this had not elapsed before they proceeded to substitute maize for wheat in loading the vessel.

G Decision of the Court of Appeal, [1924] 2 K.B. 619, affirmed.

H **Notes.** Followed: *Bassa (Owners) v. Royal Commission on Wheat Supplies* (1924), 132 L.T. 634. Referred to: *Lewis v. Dreyfus* (1926), 31 Com. Cas. 239; *Rederiaktiebolaget Macedonia v. Slaughter* (1935), 40 Com. Cas. 227; *S.A. Maritime et Commerciale of Geneva v. Anglo-Iranian Oil Co.*, [1953] 2 All E.R. 1325.

As to exceptions excusing charterers for delay in loading, see 30 HALSBURY'S LAWS (2nd Edn.) 437 et seq., and for cases see 41 DIGEST 457-459.

I Cases referred to:

- (1) *Grant & Co. v. Coverdale, Todd & Co.* (1884), 9 App. Cas. 470; 53 L.J.Q.B. 462; 51 L.T. 472; 32 W.R. 881; 5 Asp. M.L.C. 353, H.L.; 41 Digest 457, 2877.
- (2) *Hudson v. Ede* (1868), L.R. 3 Q.B. 412; 8 B. & S. 631; 37 L.J.Q.B. 166; 18 L.T. 764; 16 W.R. 940; 3 Man. L.C. 114, Ex. Ch.; 41 Digest 458, 2880.
- (3) *The Rookwood* (1894), 10 T.L.R. 314, C.A.; 41 Digest 316, 1761.
- (4) *Stephens v. Harris* (1887), 56 L.J.Q.B. 516; 57 L.T. 618; 3 T.L.R. 720; 6 Asp. M.L.C. 192, D.C.; on appeal, 57 L.J.Q.B. 203, C.A.; 41 Digest 437, 2743.

- (5) *Matheos (Owners) v. Louis Dreyfus & Co.*, ante p. 654; [1925] A.C. 654; 94 L.J.K.B. 465; 133 L.T. 146; 41 T.L.R. 393; 69 Sol. Jo. 491; 16 Asp. M.L.C. 486; 30 Com. Cas. 241, H.L.; 41 Digest 436, 2736.
- (6) *Furness v. Forwood Bros. & Co.* (1897) 77 L.T. 95; 13 T.L.R. 500; 41 Sol. Jo. 662; 8 Asp. M.L.C. 298; 2 Com. Cas. 223; 41 Digest 458, 2886.
- (7) *Re Richardson and M. Samuel & Co.*, [1898] 1 Q.B. 261; 66 L.J.Q.B. 868; 77 L.T. 479; 14 T.L.R. 5; 8 Asp. M.L.C. 330; 3 Com. Cas. 79, C.A.; 41 Digest 306, 1680.

Appeal by the charterers from an order of the Court of Appeal (BANKES, SCRUTTON and ATKIN, L.JJ.), varying a decision of BAILHACHE, J.

The facts appear in the opinion of LORD DUNEDIN.

Jowitt, K.C., and *van Breda* for the appellants.

Le Quesne, K.C., *Sir Robert Aske* and *McNair*, for the respondents.

The House took time for consideration.

July 24. The following opinions were read.

LORD DUNEDIN.—By a charterparty dated April 14, 1920, the steamship *Castlemoor* was chartered by the respondents to the appellants on the terms and conditions therein set out. The steamer was to proceed to one of certain ports in the River Parana where it was to receive from the charterers a cargo of wheat and/or maize and/or rye. The steamer was to be loaded at the rate of 500 tons per day, and demurrage was payable at the rate of £250 per day. Provision was made as to the commencement of the lay days. The charter contained the following clause:

“30. If the cargo cannot be loaded by reason of riots, civil commotion, or of a strike or lockout of any class of workmen essential to the loading of the cargo, or by reason of obstruction or stoppages beyond the control of the charterers on the railways or in the docks or other loading places . . . the time for loading . . . shall not count during the continuance of such causes . . . In case of any delay by reason of the before mentioned causes, no claim for damage or demurrage shall be made by . . . the owners of the steamer. . . .”

The *Castlemoor* was duly ordered to Rosario to load. She arrived in the roads on May 17, 1920. Notice of readiness was duly given at 9 a.m. on May 19, and it was agreed that her lay time began to run at midnight on May 19–20. The cargo eventually loaded consisted of 5,830 tons, and it was agreed that this gave her as lay days eleven days sixteen hours. Loading began on May 20 and finished on June 15 at 11 a.m. The respondents contended that the lay time expired at 4 p.m. on June 4, and they claimed demurrage from thence to the completion of the loading as aforesaid—viz., ten days nineteen hours at £250 per day—£2,698. The appellants contended that no demurrage was due, on the ground that the delay complained of by the respondents was due to causes beyond their control, expressly excepted by cl. 30 of the said charterparty. Specification of various causes was made by the appellants for the delay, none of which need be now mentioned, except two. These were: (i) A labour disturbance on one of the railways supplying Rosario, which was the port to which the steamer was sent; and (ii) a prohibition by the government of all exportation of wheat during the period June 4 to 11.

The parties went to arbitration before Mr. Raeburn, K.C. He issued an award in the form of a Special Case. In his award he dealt with the alleged causes of delay said to fall within the exceptions as follows: He found as a matter of fact that none of the alleged causes existed save the two above especially mentioned. As regards (i), he described the port of Rosario in the following terms:

A "The port of Rosario is situated on the River Parana and has a river frontage of about eight miles. The port is divided into two sections, viz., the old or cliff section and the new or port section. In the old section there are no wharves, but ships come alongside the natural cliff and the grain is loaded by chutes and pipes direct into the hold out of the grain warehouses which are situated along the top of the cliff, or out of railway wagons on the sidings running along the top of the cliff. In the new section there are wharves along the entire river front which are served by railway lines running to the store sheds on the quay. Loading is carried out by means of travelling belts and chutes, either from the sheds or from railway wagons direct."

He then found as follows :

C "On May 15, 1920, there broke out on the Central Argentine Railway a movement on the part of the men, which was described as a 'go slow' or a 'ca' canny' movement, and lasted till June 6. It was a concerted scheme on the part of the employees of the company designed to force the company to withdraw certain regulations which the government had compelled them to impose, and which were obnoxious to the men. The method adopted by the men was to continue at work during proper working hours, but by means of extravagantly strict adherence to the various rules of the company in regard to the working of traffic and the performance of their ordinary duties, so to delay the working of the traffic as to reduce it to a minimum, without at the same time giving to the railway company any specific ground for dismissal. I hold that this was an 'obstruction' on the railway, and I find that it caused in all a loss of six days. It caused delay, however, only in bringing cargo to the port of Rosario, and in no way affected the actual process of loading."

As regards (ii) he found as follows :

F "I find as a fact that the charterers desired to load wheat and not maize, and I hold that they were not bound to load maize. In any event, however, I hold that the charterers were entitled to wait for a reasonable time in order to see whether the wheat prohibition was removed, before beginning to load maize, and I find that a reasonable time had not expired by June 10, when in fact they began to load maize. From June 10 onwards the [respondents] loaded maize and I find therefore that the delay due to the wheat prohibition was six days only, viz., from June 4 to June 9 inclusive."

G On these findings, his judgment was that, subject to the opinion of the court, he held "that the [respondents] are entitled to recover demurrage from the period from 4 p.m. on June 10 to 11 a.m. on June 15—viz., four days nineteen hours"—and he accordingly awarded "that the appellants do pay to the respondents the sum of one thousand one hundred and ninety-eight pounds (£1,198), together with the respondents' costs of the arbitration, and do bear and pay the cost of the award."

H The Special Case came before BAILHACHE, J. He confirmed the judgment of the arbitrator as to the "ca' canny" strike, but differed as to the wheat prohibition, and allowed demurrage for the six days disallowed by the arbitrator. Appeal was taken to the Court of Appeal, who restored the judgment of the arbitrator.

I It will thus be seen that there were two separate questions which arose on the charterparty. The appellants excused their delay on two separate grounds, both of which they said fell within the exceptions allowed in the charterparty for the duty of loading within the stipulated time. There was the "ca' canny" strike and the prohibition of exportation of wheat. Now, the "ca' canny" strike did not in any way affect the actual operation of the loading of the cargo; it only affected the provision of the cargo to be loaded. To make it a cause of justification it must fall within the following words :

"If the cargo cannot be loaded . . . by reason of obstruction or stoppages

beyond the control of the charterers on the railways or in the docks or other loading places . . . the time for loading shall not count during the continuance of these causes."

On this point I am entirely in agreement with the judgment of SCRUTTON, L.J., and I am only repeating what he has very clearly explained when I say that the general rule is absolutely authoritative to the effect that, if you wish to make an exception apply to the providing of cargo as distinguished from the loading proper, you must do so in words so clear as to admit of no ambiguity. In my opinion, that has not been done here. The word "railways" is in concatenation with the word "docks," and points, I think, to the use of a railway as one of the instruments of loading, a use which, in the actual case before us, is amply justified by the existence of the port railway and the rails along the cliff. It is, I think, most expedient that the general rule should not be infringed or whittled down. SCRUTTON, L.J., quoted with approval some expressions of mine used in a case decided in the Court of Session. I should like to say that I was laying down no new law of my own pronouncement, but was only stating what I thought was the clear result of the decisions of this House.

As regard the prohibition of wheat excuse, BAILHACHE, J., had held that it was no answer to say that the exportation of wheat had been prohibited, because there was an alternative in the charterparty to load maize or rye, and if the appellants could not get wheat they must have a cargo of maize or rye ready, and that, consequently, no allowance was due in respect of the prohibition. The learned judges of the Court of Appeal took a different view. They held that as to providing a cargo the appellants must provide maize or rye if they could not get wheat, but that, having made their arrangements for wheat, when the prohibition against exportation came like a bolt from the blue after these arrangements were made, they ought to be allowed a reasonable time, which the court fixed at six days, to make other arrangements, and they accordingly allowed six days' excuse in the calculation of the demurrage due. Against that judgment the respondents did not cross-appeal, and no arguments, on a question on which much argument was possible, were presented to your Lordships; but I wish it to be distinctly understood that I have not formed and do not express any opinion on the question whether the judgment of BAILHACHE, J., on this head or the judgment of the Court of Appeal in its variation was right or wrong.

I move that the appeal be dismissed with costs. I am authorised by my noble and learned friend, VISCOUNT CAVE, L.C., to say that he concurs in this judgment.

LORD ATKINSON.—Clause 30 of the charterparty in this case, on the true construction of which this appeal mainly turns, deals with the prevention of the loading of a cargo on board the ship *Castlemoor* by any one or more of the several things enumerated in the charterparty. The cargo which she was bound to take on board was a cargo of wheat and/or maize and/or rye and/or linseed and/or rape seed in bags and/or in bulk. The charterers, the appellants, bound themselves on their side to ship such a cargo on the *Castlemoor* not exceeding what she could reasonably stow and carry over and above her tackle, apparel, provisions and furniture. The provisions of cl. 30 which are material have been already read. The charterparty bears date April 14, 1920, and by it the ship was bound to load as much of her cargo at one or more safe loading ports on the River Parana not higher up the river than Lorenzo as the master should consider safe, and the balance of the cargo at Buenos Aires or La Plata, at the appellants' option. By cl. 12 of this charterparty, it is stipulated that lay days shall not commence before May 10, 1920, unless the appellants begin loading sooner, and should the steamer not be ready to load at 6 p.m. on May 31, 1920, the appellants were given the option of cancelling the charterparty.

The arbitrator, in the third paragraph of the Special Case which he has stated,

A finds that the *Castlemoor* was duly ordered to Rosario to load, that she arrived there on May 17, 1920, that notice of her readiness to receive cargo was duly given at 9 a.m. on May 19, that it was agreed that her lay time began to run at midnight on May 19-20, that she had as lay days eleven days sixteen hours, and that loading began on May 20 and finished on June 15 at 11 a.m. The respondents, he states, contended that the lay days expired on June 4, and claimed demurrage from thence to the completion of the loading, i.e., for ten days nineteen hours, amounting at the stipulated rate to £2,698. The appellants, on the other hand, he states, contended that no demurrage was due, on the ground that the delay complained of was due to those causes beyond their control specially excepted by the aforesaid cl. 30 of the charterparty. The contour and physical features of the harbour of Rosario demand consideration, as well as the methods by which the business of the port was carried on. In the Case Stated, the arbitrator describes the system under which cereals are collected for shipment at the port of Rosario and are there shipped. He says that the cereals are purchased by the exporters from the growers living in the interior; that it is the duty of the latter to deliver the grain at the railway station or stations specified in the sale note, and also to apply to the appropriate railway company for the wagons necessary to load this grain thereon, and convey it to the port of shipment. The loading of the wagons at the up-country stations is done by labourers employed by the seller, and when so loaded these wagons are hauled to the port of Rosario. It was not proved or found that there were any depots, or loading places, as they have been styled, in any instance up-country where vast quantities of cereal were collected, and a buyer could readily obtain his needed supply. Nor was there any evidence given or any finding arrived at that any particular portion of the wheat brought to Rosario by the procurement of the appellants was by them specifically appropriated to the purpose of providing a cargo for the *Castlemoor* in whole or in part. The port of Rosario, the arbitrator finds, is divided into two sections—the old or cliff section, and the new or port section. In the former of these there are no wharves, so that ships seeking to be loaded there are simply brought alongside and the grain is loaded by chutes and pipes direct into the hold of the ship out of the grain warehouses, which are situate along the top of the cliff, or out of the railway wagons standing on the sidings running along the top of the cliff. Certain of the railway companies connecting Rosario with the up-country, of which the Central Argentine Rail. Co. is the most important, have lines running direct to this cliff and the sheds there. In the new or port section the condition of things is entirely different. The Rosario Port Co. owns practically all the warehouse accommodation and all the railways within that section. These latter railways are connected with five different lines serving the port, of which, as in the other section, the Central Argentine is the most important. The loaded wagons brought by these five railways are, on their arrival at the boundary of the port zone, where the port railway begins, taken over by the employees of the Port Co., and thereafter hauled and worked by locomotives and machinery belonging to the Port Co. and ultimately distributed to the various exporters to whom the grain is consigned. On May 15, 1920, two days before the *Castlemoor* arrived at Rosario, a “ca” canny” movement, or strike as it has been styled, broke out on the Central Argentine Railway and lasted till June 6 following.

I The arbitrator held that this so-called strike amounted to an “obstruction” on the railway within the meaning, as I understand his award, of cl. 30 of the charterparty, that it caused in all a loss of six days, but that the delay only affected the bringing of the cargo to the port of Rosario, and in no way affected the actual process of loading. It is not found, nor even pretended, that this so-called “ca” canny” strike extended to, or in any way affected, any other of the four remaining railways which run up the country from the port of Rosario. There is no evidence whatever that the appellants endeavoured to tap sources of supply in the interior from which wheat might be carried to Rosario by one or more of

these four railways unaffected by the "ca' canny" strike. That strike might no doubt obstruct the business and impede the transport of grain by the particular railway which it affected, but that obstruction is not the particular kind of obstruction to which cl. 30 of the charter particularly relates. The words of that clause are "If the cargo cannot be loaded by reason . . . of obstructions . . . on the railways." It certainly would appear to me that an obstruction which only affects one of these five railway lines and, for all that appears, leaves the remaining four lines free from obstruction, able and willing to effect the needed transport of wheat from the up-country to the port does not satisfy the words of cl. 30.

I think that the authorities establish that this is so. *Grant & Co. v. Coverdale, Todd & Co.* (1) distinguishes the essential difference between the duty of having a cargo at a place from which it can be loaded on a particular ship, and the actual physical act of loading that cargo on that ship, and decides that, when provisions are introduced into a charterparty exempting either the charterers or the shipowner from liability in certain events or under certain conditions, it is essential to determine to which of those two operations these provisions apply. *Primâ facie* it is the absolute duty of the charterers to provide the cargo and bring it to the place of loading, and it is equally the absolute duty of the shipowner to load the cargo when so bought. No doubt provisions may be introduced into a charterparty which relieve these respective parties from some of the duties and obligations *primâ facie* imposed on them respectively; but to have these effects these provisions must be clearly and distinctly expressed.

Hudson v. Ede (2) and *The Rookwood* (3) have a distinct bearing on this case. They are referred to in para. 257b of CARVER ON CARRIAGE BY SEA (4th Edn.), and are treated as establishing the proposition that where, as in this case, the places from which a cargo is to come are not specified, the general rule is that the charterer is not excused unless all practical modes of loading have been prevented. *Hudson v. Ede* (2) is a case of great authority; it was decided in the Exchequer Chamber by KELLY, C.B., WILLES, KEATING and MONTAGUE SMITH, JJ., and BRAMWELL and CHANNELL, BB. There, according to the headnote, the charterparty provided that the ship chartered should proceed to Sulina or outside in sufficient depth of water to load, and there load from the agents of the merchants named a complete cargo of grain, the cargo to be brought and taken from alongside the ship at the ports of loading and discharge at the charterers' expense and risk; thirty running days to be allowed (if the ship be not sooner dispatched) for loading and unloading, and ten days in demurrage over and above the laying days at £6 per day; detention by ice and quarantine not to be reckoned in laying days. There were no storehouses at the port of Sulina itself; the grain shipped was kept in places higher up the Danube, and brought by steam lighters down the river and loaded directly into ships waiting there to take their cargo. The ship in this case, *Tria* by name, being ready to load gave notice to the charterers of that fact; but after six days and before any cargo had been supplied the river immediately above Sulina became frozen over, and so continued to be for two months, the port of Sulina itself remaining open. It was held that this amounted to be "detention by ice" within the meaning of the charterparty. KELLY, C.B., in delivering the judgment of the court, after stating the facts, said (L.R. 3 Q.B. at p. 414):

"Under these circumstances, we are of opinion that this was a detention by ice within the meaning of the charterparty. The conveyance by the river between Galatz and the ship at Sulina may be considered as a part of the act of loading, and as there were no storehouses for grain at Sulina, the case seems to be the same as if the ice lay between the shore, from which, of necessity, the grain must be brought, and the vessel in which it was to be loaded, and so that the parties must have contemplated that portion of the river as a part of the waters through which the cargo was to be conveyed between the shore and the ship, and in which detention by ice was to be provided against."

A In the last paragraph of his judgment the learned Chief Baron said (*ibid.* at p. 415) :

"My brother WILLES has observed, and we agree with him in opinion, that whenever there was no access to the ship by reason of ice from any of the storing places from which merchandise was conveyed direct to the ship, the exception in the charterparty would apply."

B In the present case, the sources of supply were up the country where the growers lived. If all communication between those places and the port of Rosario, where the ship lay, was absolutely and entirely cut off, that case would be applicable to the present case, but, as things were, it is rather an authority to the effect that, where communication is not cut off at all, the obstruction cannot be taken as an obstruction within the meaning of cl. 30 worded as that clause is, and that, where communication is only to some extent obstructed or impeded on one of the lines of railway connecting the port with the interior of the country where the cereal is produced and sold, it is an authority to the effect that the charterers who are not found to have availed themselves of any of the alternative routes are not entitled to contend that the "cargo cannot" be loaded within the meaning of cl. 30 by reason of the "ca' canny" obstruction on one of the five railway lines.

D In *Stephens v. Harris & Co.* (4), BOWEN, L.J., as he then was, in referring to *Hudson v. Ede* (2), said (57 L.J.Q.B. at p. 209) :

"It is catching at a phrase used by KELLY, C.B., in delivering a judgment in the Exchequer Chamber to say that the loading can commence 100 miles away from the ship. The decision rested upon the fact that there was only one mode of loading grain cargoes at Sulina, namely, by lighters bringing the grain down the river from Galatz."

E In my view, the appellants have failed to show that such obstruction as may have existed on the Central Argentine Railway caused by the strike amounted, while the strike lasted, to an obstruction within the meaning of cl. 30 of the charterparty, and that the appellants were not entitled under that clause to the exemption which they claimed.

F On the other point, I think that when the export of wheat was prohibited and the appellants had to make up their minds what was to be done in this altered condition of things, they were entitled to a reasonable time to determine how to deal with those altered conditions, and that a reasonable time for this had not elapsed before they proceeded to substitute maize for wheat in loading the *Castle-moor*. I am, therefore, of opinion that the appeal fails and should be dismissed.

G **LORD SUMNER.**—This is a voyage charter, in which the lay days became fixed by reason of the combined effect, in the events which happened, of the undertaking to load a full cargo and of the provision for a daily loading rate per running day, Sundays and holidays excepted. The lay days so fixed were in fact exceeded. H The question is whether the charterers—now the appellants—can relieve themselves from the consequent obligation to pay demurrage by any of the exceptions mentioned in cl. 30. The charter form is one arranged and agreed with the Centro de Cereales of Buenos Aires and is the Chamber of Shipping River Plate Charterparty, 1914, known by its code name of "Centrocon." The answer to the question turns on the construction of cl. 30 of that form as applied to the circumstances of this case.

I The material facts are that the appellants elected to load at one port, Rosario, under the option given in cl. 3 to load at "one or two safe loading ports or places in the River Parana but not more than the steamer can safely carry over the Martin Garcia Bar (without lightening) and the balance of the cargo in the port of Buenos Aires or La Plata," and the excepted hindrances to loading, which are now relied on, are (a) "strike or lock-out of any class of workmen essential to the loading of the cargo," and (b) "obstructions beyond the control of the [appellants] on the railways or in the docks or other loading places." The vessel was not loaded in

a dock, but lay alongside a wharf and received the cargo from railway trucks in which the wheat, bought by the appellants up-country and appropriated by them to the *Castlemoor* on arrival of the trucks in the port of Rosario, was brought alongside on the railway lines and was thence transferred to the ship's hold. To whom these railway lines belonged is not certain. In one part of the port the lines belong to the Central Argentine Rail. Co.; in another to a separate company which owns and operates a railway within the limits of the port. In which part of the port the *Castlemoor* loaded the Case Stated does not show. The appellants had not provided any cargo ready in the port of Rosario for the *Castlemoor*, though the port contains ample warehouse accommodation and loading ex warehouse is an accustomed mode of loading. The charter gave the appellants the option to load "wheat and/or maize and/or rye," but they had for their own reasons decided to load wheat only, and did not, in fact, change their plans till after the expiry of the lay days, unless extended by the operation of the exceptions clause. Wheat is bought at country railway stations on any of the five lines which serve Rosario, and thence is sent to the port by the buyers and shippers. The appellants had made purchases so as to provide themselves with a general supply, if the wheat arrived in due time at Rosario, but for the provision of cargo for any particular ship they relied on the regular flow of wheat by the railways to the port. During the *Castlemoor's* lay days, the employees of the Central Argentine Railway up-country, which is the principal grain transporter of the five companies, carried out a "ca' canny" or "stop-in" strike, working pedantically and even preposterously to the extreme letter of their rules in order to produce, as they did produce, delays to regular traffic on the railways without incurring the consequences of a strike or losing the emoluments of regular work or making themselves individually liable to summary dismissal for failing to do their duty. Although this general retardation of traffic undoubtedly affected the supply of wheat to Rosario, and, in particular, seriously affected the business arrangements of the appellants, there was not shown to have been any particular hindrance of the wheat which they had bought or, so far as concerned them, anything but a general dislocation of their arrangements. In the result, they had not sufficient wheat forthcoming by railway to enable them to load the ship within the lay days unless they got relief under cl. 30.

The established rule, that, in charterparties, the charterers' obligation to provide cargo and have it ready for loading at the place of loading is *primâ facie* an absolute one and is not affected by clauses of exception as to lay days unless by express language or necessary implication, is not artificial or arbitrary. It is correlative to the shipowner's obligation to provide a seaworthy ship before an exception of marine perils in a bill of lading can apply to relieve him. It arises out of the nature of the contract and is necessary to the practical distribution of the risks involved in its performance. Most charters are so framed that their structure furnishes a sufficient basis for the rule, and that now in question is a good example. By cl. 2, the shipowners engage that the steamer shall proceed to the loading port and there receive from the charterers a full cargo, which they bind themselves to ship. Clause 12 fixes the commencement of the time for such delivery and receipt, and cl. 13 fixes the time within which the charterers engage to load the full cargo. Clause 4 engages the shipowners to carry it to its port of discharge and there deliver it. These (apart from payment of freight and minor matters) are reciprocal and absolute obligations, to load on the one hand and carry on the other, and it is on these obligations that exceptions are introduced by cl. 29 in favour of the shipowner and by cl. 30 in that of the charterer. Clause 30 provides that, if the cargo (that is, the full and complete cargo which the charterer has already engaged to ship) cannot be loaded owing to certain causes, the time for loading is not to count during the continuance of such causes. It appears to be quite plain, even if there were no authorities on the subject, that the exceptions for which cl. 30 provides would not extend to anything but interference with loading a cargo ready to be loaded, unless something in the clause itself shows that exceptions preventing the charterers from

A providing a ready cargo are included, as well as exceptions preventing them from loading it when ready. It seems clear that nothing of the kind is to be found in this clause, which could apply to the hindrances out of which the appellants' difficulties arose. There was no "stoppage" on the railways—that was just what the strikers ingeniously avoided. Whether their inaction could be said to amount to an "obstruction" or not we need not consider, though the workmen did not cause

B any physical obstruction, but, in any case, the words "on the railways" are satisfied by referring them to the railways in the port, which were regularly used as part of the machinery of loading a ready cargo. The case is not within the well-known principle of *Hudson v. Ede* (2), so often explained in later cases and most recently by your Lordships in the *Matheos (Owners) v. Louis Dreyfus & Co.* (5). It is not one of those cases where a specific cause is mentioned, which has to be referred to something extraneous to the place and operation of loading, because nothing bearing that designation is found in that place and operation at all. Such were the railways mentioned in *Furness v. Forwood Bros. & Co.* (6), and *Re Richardson and Samuel & Co.* (7); such, too, is a mention of collieries or mines in an ordinary coal charter. It follows that the appellants fail to excuse themselves from the consequences of not having completed the loading before the day now in question arrived, and that the

D appeal fails.

I would add this. Although the words of such a clause, if clear, must prevail whatever the business consequences may be, I am glad that the construction of the words in question does not constrain us to adopt the appellants' contentions. It was in their option to load at two ports, and all the ports to which their option extends are served by railways, whose systems cover an enormous aggregate mileage in the interior of Argentina. It was in their power to purchase the cargo at any points, however numerous, on those systems, and, on their contention, they could then throw on the ship the risk of delay in loading if any obstacle on any of these railways hindered performance of the obligation to load. For the merchant to exercise in the amplest sense the right to buy where he wills and then to leave so much of the hazard of it to fall on the shipowner, who had no voice in the matter and no means of fore knowledge which would enable him even to measure his risk, is an arrangement which I cannot believe any merchant would venture to propose or

E

F any shipowner would consent to adopt.

I am authorised by my noble and learned friend, **LORD BUCKMASTER**, to say that he concurs in the motion proposed.

Appeal dismissed.

Solicitors: *Richards & Butler; Botterell & Roche*, for *Botterell, Roche & Temperley*, Newcastle-upon-Tyne.

[*Reported by* EDWARD J. M. CHAPLIN, Esq., *Barrister-at-Law.*]

**MOTOR MANUFACTURERS' AND TRADERS' SOCIETY, LTD.
v. MOTOR MANUFACTURERS' AND TRADERS' MUTUAL
INSURANCE CO., LTD.**

[COURT OF APPEAL (Sir Ernest Pollock, M.R., Warrington and Sargant, L.JJ.), May 6, 7, 1925]

[Reported [1925] Ch. 675; 94 L.J.Ch. 410; 133 L.T. 330; 41 T.L.R. 483;
42 R.P.C. 307]

*Passing Off—Trade name—Claim for injunction—Matters to be considered—
Need to prove damage or likelihood of damage—Effect of proof of fraud.*

Where a plaintiff seeks an injunction to restrain the defendant from carrying on business under a certain name on the ground that the use of that name by the defendant is likely to mislead the public into the belief that the defendant is connected with the plaintiff or that the business of the defendant is the business of the plaintiff, or is connected with the plaintiff's business, the plaintiff making no allegation of fraud on the part of the defendant, the only question to be decided is whether as a matter of fact the defendant's name so nearly resembles that of the plaintiff as to be calculated to deceive. That question falls to be determined by an appeal to the eye and the ear coupled with a proper consideration of the circumstances and of the evidence of persons who have come into contact with the plaintiff's name. Among the matters to be considered are whether the defendant's business is different from or whether it competes with the plaintiff's business, and the fact that the plaintiff's name is descriptive and consists entirely of words in ordinary use in the English language. A court of equity will protect the business reputation enjoyed by any person or corporation against tangible risk or probability of injury just as it will protect any other property of a person or corporation against any such risk or probability. Damage or likelihood of damage to the reputation or property is the gist of all such actions, and unless a plaintiff can prove that his credit or business reputation has suffered or that there is a tangible risk or probability of his credit or business reputation suffering no action will lie. In cases of fraud the court will readily assume that the defendant has succeeded or will succeed in accomplishing that which he has set out to accomplish, and in such a case the onus of proof of damage is, speaking generally, not heavy. Where, however, there is no fraud and the plaintiff has adopted a purely descriptive name the onus of proving that another person, by adopting a somewhat similar descriptive name, is exposing the credit or business reputation of the plaintiff to risk or probability of injury is a very heavy one, and in such a case the court must take care not to exercise its jurisdiction so as to confer on the plaintiff a monopoly greater than that to which he is entitled.

Notes. Considered. *G. B. Delavelle, Ltd. v. Stanley* (1946), 63 R.P.C. 103. Referred to: *Brestian v. Try*, [1958] R.P.C. 161.

As to the protection of trade names see 32 HALSBURY'S LAWS (2nd Edn.) 614 et seq.; and for cases see 43 DIGEST 264 et seq.

Cases referred to:

- (1) *Ewing v. Buttercup Margarine Co.*, [1917] 2 Ch. 1; 86 L.J.Ch. 441; 117 L.T. 67; 33 T.L.R. 321; 61 Sol. Jo. 443; 34 R.P.C. 232, C.A.; 43 Digest 283, 1136.
- (2) *Harrods, Ltd. v. R. Harrod, Ltd.* (1923), 40 T.L.R. 195; 41 R.P.C. 74, C.A.; 43 Digest 294, 1205.
- (3) *Lloyd's and Dawson Bros. v. Lloyd's, Southampton, Ltd.* (1912), 28 T.L.R. 338; 29 R.P.C. 433, C.A.; 43 Digest 294, 1204.
- (4) *Aerators, Ltd. v. Tollitt*, [1902] 2 Ch. 319; 71 L.J.Ch. 727; 86 L.T. 651; 53 W.R. 584; 18 T.L.R. 637; 46 Sol. Jo. 451; 10 Mans. 95; 19 R.P.C. 418; 9 Digest (Repl.) 59, 202.

- A** (5) *Walter v. Ashton*, [1902] 2 Ch. 282; 71 L.J.Ch. 839; 87 L.T. 196; 51 W.R. 131; 18 T.L.R. 445; 43 Digest 283, 1135.
- (6) *Merchant Banking Co. of London v. Merchant's Joint Stock Bank* (1878), 9 Ch.D. 560; 47 L.J.Ch. 828; 26 W.R. 847; 43 Digest 292, 1196.
- B** (7) *Colonial Life Assurance Co. v. Home and Colonial Assurance Co., Ltd.* (1864), 33 Beav. 548; 4 New Rep. 129; 33 L.J.Ch. 741; 10 L.T. 448; 28 J.P. 745; 10 Jur. N.S. 967; 12 W.R. 783; 55 E.R. 482; 9 Digest (Repl.) 62, 218.
- (8) *Reddaway v. Banham*, [1896] A.C. 199; 65 L.J.Q.B. 381; 74 L.T. 289; 44 W.R. 638; 12 T.L.R. 295; 13 R.P.C. 218, H.L.; 43 Digest 277, 1098.
- (9) *Army and Navy Co-operative Society, Ltd. v. Army, Navy and Civil Service Co-operative Society of South Africa, Ltd.* (1902), 19 R.P.C. 574, C.A.; 43 Digest 293, 1199.
- C** (10) *British Vacuum Cleaner Co., Ltd. v. New Vacuum Cleaner Co., Ltd.*, [1907] 2 Ch. 312; 76 L.J.Ch. 511; 97 L.T. 201; 23 T.L.R. 587; 51 Sol. Jo. 553; 14 Mans. 231; 24 R.P.C. 641; 9 Digest (Repl.) 60, 204.
- (11) *Dunlop Pneumatic Tyre Co., Ltd. v. Dunlop Motor Co.*, [1907] A.C. 430; 76 L.J.P.C. 102; 97 L.T. 259; 23 T.L.R. 717; 51 Sol. Jo. 715, H.L.; 43 Digest 282, 1126.
- D** (12) *Scottish Union and National Insurance Co. v. Scottish National Insurance Co., Ltd.*, [1909] S.C. 318; 46 Sc.L.R. 267; 16 S.L.T. 671; 26 R.P.C. 105; 43 Digest 265, 1020 viii.
- (13) *London General Omnibus Co., Ltd. v. Lavell*, [1901] 1 Ch. 135; 70 L.J.Ch. 17; 83 L.T. 453; 17 T.L.R. 61; 18 R.P.C. 74, C.A.; 43 Digest 315, 1374.
- (14) *Motorists' Purchasing Association, Ltd. v. Motor Purchases, Ltd.* (1924), Nov. 14, unreported.
- E**

Witness Action.

The plaintiff society was incorporated on July 16, 1902, as a company limited by guarantee without a share capital under the name of "The Society of Motor Manufacturers and Traders, Ltd." The principal objects of the society, as stated in its memorandum of association, were to encourage, promote, and protect in the United Kingdom and abroad the motor trade and generally to watch over and protect the general interests of companies, firms, and persons engaged in the motor trade, but independently of the personal interests of any such companies, firms, or persons. The society had three classes of members, viz.: First, honorary members, who needed no qualification and paid no entrance fee or subscription; secondly, ordinary members who, besides requiring certain qualifications had to pay an entrance fee of fifty guineas and an annual subscription of ten guineas; and thirdly, associate members, who, besides requiring certain qualifications, had to pay an entrance fee of five guineas and an annual subscription of five guineas. The direction of the plaintiffs society's affairs was in the hands of a council (consisting of a president and forty-five other persons), and its business was managed by a committee of management and various sectional committees. The society was purely a trade protection society, and did not itself engage in or carry on any manufacture or trade. It was the foremost of its kind in England and had acquired a considerable reputation both in this country and abroad. It had a large number of members, including some nine or ten well-known insurance companies, who undertook assurance business connected with all kinds of motor risks. The society's activities included the promotion and conduct of the principal motor exhibitions in London. It published and circulated among its members a register of the motor trade. In connection with the various exhibitions which the plaintiff society organised it was in the habit of effecting a considerable number of policies of insurance in various insurance companies, chiefly against loss by fire and theft, paying upwards of £2,000 per annum for insurance premiums. On April 2, 1924, the defendant company was incorporated as a company limited by shares under the name of "Motor Manufacturers' and Traders' Mutual Insurance Co., Ltd.," with a capital of £50,000, divided into 50,000 shares of £1 each. The objects of the defendant company were to undertake

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certain classes of insurance specified in its memorandum of association, consisting mainly of insurances against risks connected with motor cars, motor cycles, and other motor vehicles. Shortly after the incorporation the defendant company sent out a circular to various motor manufacturers and traders in the United Kingdom describing its method of business and offering, not only a commission, but also participation in profits (in the shape of preference shares), for the introduction of business. The registration of the defendant company having come to the notice of the society, the society consulted its solicitors who, on May 2, 1924, wrote to the defendant company as follows:

"We are instructed on behalf of the Society of Motor Manufacturers and Traders, Ltd., to inform you that our clients have only just heard of the incorporation of your company under the name of 'Motor Manufacturers' and Traders' Mutual Insurance Co., Ltd.' Our clients take a very strong view that the similarity of the two names must lead to confusion and the belief that your company is in some way connected with our clients, and we are instructed to request you to give us an undertaking to take steps to change the name of your company without delay in such a way that no confusion can arise. Failing receipt of an undertaking from you by Thursday morning next to the above effect our clients propose to take such proceedings as they may be advised."

The defendant company referred this letter to its solicitor, who on the same day sent the following letter in reply:

"My clients, Motor Manufacturers' and Traders' Mutual Insurance Co., Ltd., have handed me your letter to them of to-day's date with instructions to reply thereto. In the first place I must call your attention to the fact that you have misquoted the title of my clients' company, and the difference, though seemingly slight, is not without its importance. The titles of the two companies seem to me so different that I cannot see any chance of any confusion arising, and I cannot, therefore, advise my clients that there is any reason why they should alter their title. It is obvious that your clients can have no copyright in the words 'manufacturers and traders,' and my clients' title shows that they are an insurance company limiting their operations to this particular class of traders and manufacturers and nothing else. If your clients, however, think fit to commence proceedings I will accept service on behalf of my clients."

On May 5, 1924, the society issued the writ in this action, claiming an injunction to restrain the defendant company from carrying on business under its registered name or under any other name comprising the words "motor manufacturers and traders," or other similar words likely to mislead the public into the belief that the defendant company was connected with the plaintiff society or that the business of the defendant company was the business of, or in any way connected with, the business of the plaintiff's society. When the statement of claim was delivered it contained no allegation that the name of the defendant company was chosen with the intent to deceive or mislead, or that the defendant company was guilty of fraud in continuing to use its name after the letter of May 2, 1924.

Luzmore, K.C., Owen Thompson, K.C., and W. P. Spens, for the plaintiff society, referred to *Ewing v. Buttercup Margarine* (1), *Harrods, Ltd. v. R. Harrod, Ltd.* (2), *KERLY ON TRADE MARKS* (5th Edn.), p. 584; *Lloyd's and Dawson Bros. v. Lloyd's, Southampton, Ltd.* (3).

W. H. Upjohn, K.C., and Meyrick L. Beebee, for the defendant company, referred also to *Aerators, Ltd. v. Tollitt* (4), *Walter v. Ashton* (5), *Merchant Banking Co. of London v. Merchants' Joint Stock Bank* (6), *Colonial Life Assurance Co. v. Home and Colonial Assurance Co., Ltd.* (7), *Reddaway v. Banham* (8), *Army and Navy Civil Service Co-operative Society, Ltd. v. Army, Navy and Civil Service Co-operative Society of South Africa, Ltd.* (9), *British Vacuum Cleaner Co., Ltd. v. New Vacuum Cleaner Co., Ltd.* (10), *Dunlop Pneumatic Tyre Co., Ltd. v. Dunlop*

A *Motor Co. (11), Scottish Union and National Insurance Co. v. Scottish National Insurance Co., Ltd. (12).*

Owen Thompson, K.C., in reply, referred to London General Omnibus Co., Ltd. v. Lavell (13), Motorists' Purchasing Association, Ltd. v. Motor Purchases, Ltd. (14), Walter v. Ashton (5).

Cur. adv. vult.

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P. O. LAWRENCE, J., read a judgment in which he stated the facts and continued: I consider it the duty of the court to negative fraud unless the choice of name or the refusal to change the name is incapable of an innocent explanation. In my opinion, it is possible to account for the choice of the defendant company's name without imputing fraud to the promoters of the defendant company. They may have thought the name a suitable one by which to describe the business which the defendant company was about to embark upon, and, even if the particular combination of words suggested itself to their minds because the plaintiff society had used such a combination, it does not necessarily follow that they had any intention of thereby obtaining for their company any advantage from the reputation of the plaintiff society. They may have thought that as the business which the defendant company was about to embark upon was clearly indicated by its name and was entirely different from the business carried on by the plaintiff society, no confusion would result from the use of the words complained of. The refusal by the defendant company to change its name when requested by the plaintiff society to do it, is quite consistent with a legitimate claim to the right to retain the name. In the result, I have come to the conclusion that neither the original choice of name nor the subsequent refusal to change it was necessarily fraudulent, and that, consequently, no fraud ought to be imputed to the defendant company. The only question to be decided, therefore, is whether as a matter of fact the defendant company's name so nearly resembles that of the plaintiff society as to be calculated to deceive.

This question falls to be determined by an appeal to the eye and ear coupled with a proper consideration of the surrounding circumstances and of the evidence of persons who have come into contact with the plaintiff society's name. In arriving at a conclusion in the present case it is important to bear in mind, first, that this is not a case of fraud; secondly, that the business of the defendant company is altogether different from and in no way competes with the business of the plaintiff society, and, thirdly, that the name of the plaintiff society is descriptive and consists entirely of words in ordinary use in the English language. Very many cases dealing with disputes similar to the one which has arisen in the present case are to be found in the law reports, and a number of such cases have been cited at the Bar, but I do not intend to go through them, as the principles applicable to cases of this kind are not in dispute, and as the decision in each case depends upon the particular facts. For the purposes of this judgment it is sufficient to state that it is well established that a court of equity will protect the business reputation enjoyed by any person or corporation against tangible risk or probability of injury just as it will protect any other property of such person or corporation against any such risk or probability. One of the ways in which a business reputation may be injured is by the appropriation by a stranger of part of such reputation. Such appropriation may be brought about by the adoption of a name which suggests that the person or corporation adopting it is in some way connected or associated with the person or corporation enjoying the reputation. Damage or likelihood of damage to property is the gist of all such actions, and unless a plaintiff can prove that his credit or business reputation has suffered damage or that there is a tangible risk or probability of his credit or business reputation suffering damage no action will lie. In cases of fraud the court will readily assume that the defendant has succeeded or will succeed in accomplishing that which he has set himself to accomplish, and in such a case the onus of proof of damage or of likelihood of damage is, speaking generally,

not heavy. Where, however, there is no fraud and where a plaintiff company has adopted a purely descriptive name, the onus of proving that another company, by adopting a somewhat similar descriptive name, is exposing the credit or business reputation of the former company to risk or probability of injury is, in my opinion, a very heavy one, and in such a case the court must take care not to exercise its jurisdiction so as to confer upon the plaintiff company a monopoly greater than that to which it is entitled. Under the Companies Acts a company by registering its name gains a monopoly of the use of that name since no other company can be registered under a name identical with it, or so nearly resembling it as to be calculated to deceive, but the very fact that the legislature allows a descriptive name to be registered casts a duty on the court to ensure that no company by registering such a name acquires a greater monopoly of the use in trade names of any words or combination of words in ordinary use than the legislature has conferred on it. In the present case it is not suggested that the use by the defendant company of its registered name would cause the public concerned to mistake the defendant company for the plaintiff society or would cause any customers of the plaintiff society to be diverted to the defendant company, but what the plaintiff society alleges is that its credit or business reputation is likely to be affected because the name of the defendant company suggests that the defendant company is in some way connected or associated with the plaintiff society, and that, therefore, the latter's business reputation would be injured if the defendant company were to be wound-up or dispute the policies of assurance or otherwise to refuse to honour its obligations.

Having regard to the facts which I have stated and judging merely by eye and ear I am of opinion that the defendant company's name is not calculated to deceive in the manner alleged by the plaintiff society. The words "The Society of" which precede the words "Motor Manufacturers and Traders," in my opinion, are not only a prominent and distinctive feature of the plaintiff society's name, both when written or printed and when spoken, but are also in a great measure indicative of the fact that it is a trade protection society and not a trading company. The absence of these words from the defendant company's name and the addition thereto of the words "Mutual Insurance Company," in my opinion, serve to distinguish the defendant company's name and the character of its business sufficiently from the plaintiff society's name and business so as not to convey the suggestion that the two companies are connected or associated with one another.

The question then arises whether there is anything in the evidence adduced at the trial which displaces the *prima facie* opinion which I have formed from a mere comparison of the two names. The plaintiff society placed reliance upon the fact that owing to the prevalent fashion of calling companies by their initials, it had become known as the S.M.M.T. and that the defendant company had already commenced to call itself and would not doubt in time become known as the M.M.T.M.I. I am of opinion that the distinction between the two names is even more apparent when initials are used than when the names are written out at length and that this point has no substance in it. It was also contended that the user by the defendant company of a gummed label called a "sticker" when coupled with the name of the defendant company would tend to confusion because the plaintiff society is in the habit of issuing "stickers" to its members in connection with its exhibitions. The plaintiff society has no monopoly of the use of "stickers" and I find a difficulty in appreciating how the mere use of "stickers" could cause confusion; moreover, the only "sticker" proved to have been used by the defendant company is quite unlike the plaintiff society's "stickers" both in colour, shape and contents, and no witness has been called to support the suggestion that such a "sticker" has caused or would cause confusion. In my opinion, this contention does not advance the plaintiff society's case. It was further contended that a statement made by the defendant company's city managers—Harold Townend, Ltd.—in a circular issued by them to the motor trade in October, 1924, that their services would be at the

A disposal of the addresses at the then forthcoming Motor Exhibition at Olympia in order to discuss the defendant company's insurance scheme would cause the recipients to believe that the defendant company was connected with the plaintiff society. In view of the admitted fact that it is the custom of insurance companies (none of whom is connected with the plaintiff society except possibly as members) to send representatives to the exhibitions in order to obtain assurance business, I think that this contention is somewhat far-fetched considering that no suggestion has been made that the defendant company is holding itself out as a member of the plaintiff society or that such holding out (if any) would expose the credit or business reputation of the plaintiff society to any risk of damage. Speaking generally, I have not found anything in the circulars and advertisements of the defendant company (all of which have been submitted to a careful scrutiny) which could properly be said to convey the suggestion that the defendant company is in some way connected with the plaintiff society. I now come to the oral evidence. [His Lordship dealt at length with the evidence given by the witnesses.] Taking the evidence of these trade witnesses as a whole, it is, in my opinion, so weak as to be almost negligible. Even accepting the position that some of them as the result of a casual glance at the name may have thought that there might be some connection between the defendant company and the plaintiff society, I am convinced that not one of them would have remained undeceived if he had taken the trouble to read the circulars or advertisements of the defendant company, much less if he had seriously entertained the idea of effecting an insurance with the defendant company and had got into touch with its officers for that purpose.

E In my opinion, the language used by LORD Low and quoted with approval by LORD JAMES OF HEREFORD in *Dunlop Pneumatic Tyre Co., Ltd. v. Dunlop Motor Co.* (11) ([1907] A.C. at p. 438), exactly fits this case. I, therefore, make no excuse for adapting it as follows: Anyone who took the trouble to think about the matter would see that the defendant company was an insurance company and that the plaintiff society was a trade protection society, and I do not think that the defendant company is liable to have its business stopped unless it changes its name simply because a thoughtless person might unwarrantably jump to the conclusion that it is connected with the plaintiffs. Moreover, such confusion (if any) as may have arisen or as is likely to arise in the future is due entirely to the fact that the plaintiff society has chosen such common descriptive words as "motor manufacturers and traders" as part of its name. If the plaintiff society were to succeed in this case, it could only be on the ground that it had acquired a monopoly of the use in trade names of the words "motor manufacturers and traders," and could, therefore, prevent any company from using such words as part of its name, whatever addition it might make to those words and whatever trade or business it might carry on. In my opinion, the plaintiff society is not entitled to any such monopoly. Nor has the evidence convinced me that the plaintiff society's credit and business reputation is likely to suffer the slightest injury by reason of the adoption by the defendant company of the name which it now bears. In the result, I hold that the plaintiff society has failed to prove any such tangible probability of injury to its credit or trade reputation as would entitle it to the relief claimed in this action. I therefore dismiss this action with costs.

The plaintiffs appealed.

I *Luxmoore, K.C.*, and *W. P. Spens, K.C.*, for the plaintiffs.
Upjohn, K.C., and *Meyrick Beebee*, for the defendants, were not called upon to argue.

SIR ERNEST POLLOCK, M.R.—I think this appeal must be dismissed. I do not think it would be useful, nor is it necessary, to recount the facts or to repeat the law applied to them by LAWRENCE, J., for I desire to accept both from his judgment. With regard to the law the learned judge has recalled the words used by LORD JAMES OF HEREFORD in *Dunlop Pneumatic Tyre Co., Ltd. v. Dunlop Motor*

Co. (11) ([1907] A.C. at p. 438). LORD JAMES OF HEREFORD recalled the words from the judgment of LORD LOW, the Scottish judge, in which he said :

"Anyone who took the trouble to think about the matter would see that the respondent company was a motor company, and the complainers a tyre company. I do not think the respondents are liable to have their business practically stopped unless they change their name, simply because a thoughtless person might unwarrantably jump to the conclusion that they were connected with the complainers."

That passage, to my mind, embodies not only good sense, but also good law, and was rightly used by LAWRENCE, J., as a touchstone to apply to the facts of this case. Perhaps one might add to the passage in which LORD LOW says that the respondents ought not to have their business stopped unless they change their name, because a thoughtless person might jump to the conclusion that they were connected, this—because the defendants use plain and it may be necessary words of the English language to describe the persons whose mutual assurance they desire to effect.

I will only add one word with regard to the observations which I made in my judgment in *Harrods, Ltd. v. R. Harrod, Ltd.* (2), in respect of which SARGANT, L.J., in giving his judgment, usefully entered a caveat if they were intended to be taken or to mean what apparently *ex facie* they might mean. I only desire to say this. I think that, rightly construed, they in no way differ from what SARGANT, L.J., said, and for these reasons. I was dealing in that case with the position that arose apparently from what BYRNE, J., said in *Walter v. Ashton* (5), viz., that one must show some probable risk of injury by what has been done. I do not desire to suggest that that was wrong. What I intended to say in referring to SIR GEORGE JESSEL's wider phrase was that in the passage I quoted just above SIR GEORGE JESSEL had said that where there was fraud, the law was strong enough to prevent it—

"It also prevented a man from carrying on business in such a way whether he knew it or not, so as to represent that his business was the business of another man":

Merchant Banking Co. of London v. Merchants' Joint Stock Bank (6)—that is to say, that where there is fraud, fraud which the man must consciously know of, in representing that his business is the business of another man, in that case there would be implied or deduced from that fact probable risk of injury to the plaintiff, and hence BYRNE, J., in his words must not be taken to have overlooked the case of which SIR GEORGE JESSEL spoke, where injury would be implicit although it might not be proved. I was dealing with the two passages as contrasted, but not intending to indicate at all that it is unnecessary to show some probable risk of injury.

WARRINGTON, L.J.—I am of the same opinion. I am quite content to accept the judgment of LAWRENCE, J., as correct, and also to accept as my own his reasons for his conclusion. In my opinion, there is no tangible risk of any person of ordinary common sense coming to the conclusion that this insurance company is promoted by or otherwise connected with this great and important trade protection society. I am further of opinion that there is no evidence that if a certain number of persons should arrive at such an improbable conclusion, there is any tangible risk of this society of apparently high reputation in the trade being so affected as to be occasioned pecuniary loss or damage. I agree that the appeal should be dismissed with costs.

SARGANT, L.J.—I agree. I think this is the old, old story. The plaintiff society has taken a name containing words descriptive of the area of their operations. They have been very successful. Those words of general description have become associated to a considerable extent with the individuality of the plaintiff society. Therefore, the society wishes to push the result of this association the usual step further and to obtain a monopoly of the descriptive words in question by asserting

A that no one can use those descriptive words as a permanent part of their title, because those words will not be read by the public as used for their ordinary purpose or description, that is to show the persons with whom the defendants desire to deal in the way of business, but will be read as referring to the plaintiffs, and as connecting some connection between them and the defendants. Beyond this I think that any possible danger or damage to the plaintiffs in the evidence is extremely remote; and if it arises at all, it arises from the plaintiffs having used those four words of general description. I cannot see that there is any sufficient foundation for granting relief to the plaintiff society.

Appeal dismissed.

Solicitors : *Kenneth Brown, Baker & Baker; Douglas W. Money.*

[Reported by G. P. LANGWORTHY, ESQ., Barrister-at-Law.]

BRITISH INSULATED AND HELSBY CABLES, LTD. v. ATHERTON

[HOUSE OF LORDS (Viscount Cave, L.C., Lord Atkinson, Lord Buckmaster, Lord Carson and Lord Blanesburgh), October 22, 23, 26, December 11, 1925]

[Reported [1926] A.C. 205; 95 L.J.K.B. 336; 134 L.T. 289; 42 T.L.R. 187]

E *Income Tax—Deduction in computing profits—Capital expenditure—Pension fund—Employer's initial contribution to provide nucleus of fund.*

F Prior to 1916, a company had paid no pensions to employees on their retirement, and, in consequence, more experienced members of the staff left the company's employment to take up appointments elsewhere. In that year the company constituted a pension scheme for employees, under which each member undertook to contribute five per cent. of his salary, and the company undertook to contribute an amount equal to one-half of the contributions of members. In addition, the company undertook to pay £31,784 to form the nucleus of the fund and to provide the capital necessary in order that past years of service of their existing staff should rank for pension. In arriving at the company's net profits for tax purposes, it was sought to deduct the £31,784 paid in accordance with the pension scheme.

G **Held** (LORD CARSON and LORD BLANESBURGH dissenting): although no provision of the Income Tax Act, 1842, prohibited the deduction of the £31,784 against the gross profits of the company, it was nevertheless not deductible because it was expenditure once and for all with a view to the bringing into existence of an asset or advantage for the enduring benefit of the company's trade, and was, therefore, attributable to capital.

H Dictum of LORD DUNEDIN in *Vallambrosa Rubber Co. v. Farmer* (1), 1910 S.C. at p. 525, applied.

Decision of the Court of Appeal, [1925] 1 K.B. 421, affirmed.

I **Notes.** The Income Tax Act, 1842, was replaced by the Income Tax Act, 1918, which was itself replaced by the Income Tax Act, 1952.

Applied : *Mallett v. Staveley Coal and Iron Co.*, [1928] All E.R. Rep. 644; *Anglo-Persian Oil Co. v. Dale*, [1931] All E.R. Rep. 725. Considered : *Morley v. Lawford* (1928), 140 L.T. 125; *Van den Berghs, Ltd. v. Clark*, [1935] All E.R. Rep. 874; *Ward v. Anglo-American Oil Co.* (1934), 19 Tax Cas. 94; *Collins v. Adamson & Co.*, [1937] 4 All E.R. 236; *Southern v. Borax Consolidated, Ltd.*, [1940] 4 All E.R. 412. Applied : *Associated Portland Cement Manufacturers, Ltd. v. I.R. Comrs.*, *Associated Portland Cement Manufacturers, Ltd. v. Kerr*, [1946] 1 All E.R. 68; *Mann, Crossman & Paulin, Ltd. v. Compton, Mann, Crossman & Paulin, Ltd. v.*

I.R. Comrs., [1947] 1 All E.R. 742; *Smith's Potato Estates, Ltd. v. Bolland, Smith's Potato Crisps (1929), Ltd. v. I.R. Comrs.*, [1948] 2 All E.R. 367. Considered: *Saunders v. Pilcher, I.R. Comrs. v. Pilcher*, [1949] 2 All E.R. 1097; *Bentleys, Stokes & Lowless v. Beeson*, [1951] 2 All E.R. 667. Distinguished: *Green v. Cravens Railway Carriage & Wagon Co., I.R. Comrs. v. Cravens Railway Carriage & Wagon Co.* (1951), 32 Tax Cas. 359. Considered: *Morgan v. Tate & Lyle, Ltd.*, [1954] 2 All E.R. 413; *Racecourse Betting Control Board v. Young (Inspector of Taxes), Same v. I.R. Comrs., Young (Inspector of Taxes) v. Racecourse Betting Control Board, I.R. Comrs. v. Same*, [1958] 1 All E.R. 274. Referred to: *Mitchell v. Noble*, [1927] All E.R. Rep. 717; *O'Grady v. Bullcroft Main Collieries, Ltd., Bullcroft Main Collieries, Ltd. v. O'Grady, O'Grady v. Markham Main Colliery, Ltd.* (1932), 17 Tax Cas. 93; *Hughes v. British Burmah Petroleum Co.* (1932), 17 Tax Cas. 286; *Golden Horse Shoe (New), Ltd. v. Thurgood*, [1933] All E.R. Rep. 402; *Whelan v. Dover Harbour Board* (1934), 151 L.T. 288; *Henderson v. Meade-King Robinson & Co.* (1938), 22 Tax Cas. 97; *United Steel Cos., Ltd. v. Cullington (No. 2)* (1939), 162 L.T. 23; *Henriksen v. Grafton Hotel, Ltd.*, [1942] 2 K.B. 184; *Craddock v. Zevo Finance Co.* (1946), 174 L.T. 385; *Doncaster Amalgamated Collieries, Ltd. v. Bean*, [1946] 1 All E.R. 642; *Lever Bros. and Unilever, Ltd. v. I.R. Comrs.* (1946), 115 L.J.K.B. 292; *Alexander Howard & Co. v. Bentley* (1948), 30 Tax Cas. 334; *Cooke v. Quick Shoe Repair Service* (1949), 30 Tax Cas. 460; *Hutchinson & Co. (Publishers), Ltd. v. Turner*, [1950] 2 All E.R. 633; *Household v. Grimshaw*, [1953] 2 All E.R. 12; *Boarland v. Kramat Pulai, Ltd., I.R. Comrs. v. Kramat Pulai, Ltd., I.R. Comrs. v. Southern Malayan Tin Dredging, Ltd., I.R. Comrs. v. Malayan Tin Dredging, Ltd.*, [1953] 2 All E.R. 1122; *Stow Bardolph Gravel Co. v. Poole*, [1954] 2 All E.R. 661; *Knight v. Calder Grove Estates* (1954), 35 Tax Cas. 447; *Hood Barrs v. I.R. Comrs.*, [1957] 1 All E.R. 832; *Bolam v. Regent Oil Co., Ltd.* (1956), 37 Tax Cas. 56.

As to items ranking as capital expenditure, see 20 HALSBURY'S LAWS (3rd Edn.) 162 et seq., and for cases see 28 DIGEST (Repl.) 115 et seq. and 132 et seq.

Cases referred to:

- (1) *Vallambrosa Rubber Co., Ltd. v. Farmer (Surveyor of Taxes)* (1910), 5 Tax Cas. 529; 28 Digest (Repl.) 105, *281.
- (2) *Hancock v. General Reversionary and Investment Co., Ltd.*, [1919] 1 K.B. 25; 88 L.J.K.B. 248; 119 L.T. 737; 35 T.L.R. 11; sub nom. *Hancock v. General Reversionary and Investment Co., Ltd., General Reversionary and Investment Co., Ltd. v. Hancock*, 7 Tax Cas. 358; 28 Digest (Repl.) 129, 491.
- (3) *Usher's Wiltshire Brewery, Ltd. v. Bruce*, [1915] A.C. 433; 84 L.J.K.B. 417; 112 L.T. 651; 31 T.L.R. 104; 6 Tax Cas. 399, H.L.; 28 Digest (Repl.) 77, 293.
- (4) *Smith v. Incorporated Council of Law Reporting for England and Wales*, [1914] 3 K.B. 674; 83 L.J.K.B. 1721; 111 L.T. 848; 30 T.L.R. 588; 6 Tax Cas. 477; 28 Digest (Repl.) 132, 496.
- (5) *Ounsworth v. Vickers, Ltd.*, [1915] 3 K.B. 267; 84 L.J.K.B. 2036; 113 L.T. 865; 31 T.L.R. 530; 6 Tax Cas. 671; 28 Digest (Repl.) 118, 454.
- (6) *Southwell v. Savill Bros., Ltd.*, [1901] 2 K.B. 349; 70 L.J.K.B. 815; 85 L.T. 167; 65 J.P. 649; 49 W.R. 682; 17 T.L.R. 513; 45 Sol. Jo. 521; 4 Tax Cas. 430, D.C.; 28 Digest (Repl.) 78, 295.
- (7) *Granite Supply Association, Ltd. v. Kilton (Surveyor of Taxes)* (1905), 5 Tax Cas. 168; 28 Digest (Repl.) 105, *280.
- (8) *A. G. Moore & Co. v. Hare* (1914), 6 Tax Cas. 572; 28 Digest (Repl.) 126, *365.
- (9) *Rountree & Co., Ltd. v. Curtis*, [1925] 1 K.B. 328; 93 L.J.K.B. 570; 131 L.T. 41; 40 T.L.R. 363; 8 Tax Cas. 678, C.A.; 28 Digest (Repl.) 133, 502.
- (10) *Royal Insurance Co. v. Watson*, [1897] A.C. 1; 66 L.J.Q.B. 1; 75 L.T. 334; 61 J.P. 404; 13 T.L.R. 37; 3 Tax Cas. 500 H.L.; 28 Digest (Repl.) 117, 448.

- (11) *Hulton v. West Cork Rail. Co.* (1883), 23 Ch.D. 654; 52 L.J.Ch. 689; 49 L.T. 420; 31 W.R. 827, C.A.; 9 Digest (Repl.) 658, 4360.
- (12) *Gresham Life Assurance Co. v. Styles*, [1892] A.C. 309; 62 L.J.Q.B. 41; 67 L.T. 479; 56 J.P. 709; 41 W.R. 270; 8 T.L.R. 618; 3 Tax Cas. 185, H.L.; 28 Digest (Repl.) 83, 315.
- (13) *John Smith & Son v. Moore*, [1921] 2 A.C. 13; 90 L.J.P.C. 149; 125 L.T. 481; 37 T.L.R. 613; 65 Sol. Jo. 492; 12 Tax Cas. 266, H.L.; 28 Digest (Repl.) 421, 1860.

Appeal by the taxpayers, British Insulated and Helsby Cables, Ltd., from the decision of the Court of Appeal (SIR ERNEST POLLOCK, M.R., WARRINGTON, and SCRUTTON, L.JJ.), reported [1925] 1 K.B. 421, on a Case stated under the Taxes Management Act, 1880, s. 59, by the Special Commissioners of Income Tax for the opinion of the King's Bench Division of the High Court of Justice.

The Case stated as follows. At a meeting of the commissioners held on Feb. 24, 1922, British Insulated and Helsby Cables, Ltd. (hereinafter called "the company") appealed against an assessment to income tax in the sum of £250,000 for the year ending April 5, 1918, made upon it under the Income Tax Acts, in respect of the profits of its business. The sole question before the commissioners on the appeal, and on which the opinion of the court was sought, was whether a contribution of £31,784 made by the company in the circumstances detailed below to a pension fund established for the benefit of its clerical and technical salaried staff was an admissible deduction in computing its profits for the purpose of assessment to income tax for the year in question.

The company carried on business as manufacturers of insulated cables. Its issued capital at Dec. 31, 1916, consisted of 500,000 £1 ordinary shares and 500,000 £1 preference shares, and in addition it had issued £750,000 debenture stock. The profits of the company for the five years to Dec. 31, 1920, as shown on the respective balance-sheets, had been as follows :

				£
For the year to Dec. 31, 1916	...			306,000
" " " 1917	...			363,000
" " " 1918	...			288,000
" " " 1919	...			328,000
" " " 1920	...			340,000

In addition to its wages staff, the company had a clerical and technical salaried staff of about 500, of whom approximately 300 were eligible to participate in the fund. Prior to the year 1916 the company had not paid pensions to employees retiring on account of old age. It found, however, that it frequently lost experienced members of its salaried staff, who left to take up appointments elsewhere, and that the absence of a regular system of pensions was injurious to its business in other respects. It was therefore decided to establish under the powers given to the company by its memorandum of association a pension fund for its clerical and technical salaried staff, in the hope that the benefits to be derived from the fund would induce the members of its staff to remain in its service, and otherwise increase the efficiency of the company's staff. A pension fund was accordingly constituted by a trust deed, dated Aug. 8, 1916, which contained the following provisions, *inter alia* : Each member of the existing staff who elected to join the fund undertook to contribute 5 per cent. of his salary to the fund as from March 31, 1916. The older members of the staff were not called upon to pay any higher rate of contribution on account of their age. Persons joining the staff after the commencement of the fund were also to contribute at the rate of 5 per cent. of their salary, if not above the age of 40 at the time of joining the fund. If above the age of 40, the rate of contribution was increased according to the age at the time of joining. The company undertook to contribute to the fund an amount equivalent to one half of the contributions of the members. In addition it undertook to pay

the sum of £31,784 (the item giving rise to the appeal in this case) to form the nucleus of the fund, and to provide the capital sum necessary in order that past years of service of the then existing staff should rank for pension. This sum was arrived at by actuarial calculation in the following manner:

	£		£
Value of company's contributions of 2½ per cent. ...	21,269	Value of payments at death ...	9,637
Value of employees' contribution of 5 per cent. ...	42,539	Value of payments on resignation and dismissal ...	575
Deficiency ...	31,784	Value of pensions ...	85,380
	£95,592		£95,592

There was, therefore, a deficiency of £31,784 to be made up. The company also undertook to make up the income from the invested funds to a net income equal to the rate of 4 per cent. per annum free of tax on the amount of the accumulated funds. All money in the hands of the trustees and the income thereof not for the time being required for making of the payments specified in the said trust deed were to be invested upon such securities and in such manner as the trustees should think fit. The benefits took the form (a) in the event of retirement at the age of sixty-five and in certain other circumstances of a pension depending on the length of service, and (b) in other cases of a return of the member's contributions with interest. The trustees of the fund had power to apply the income and also as far as necessary the capital of the fund in payment of the benefits provided. Two of the trustees of the fund were to be appointed by the directors of the company while the three other trustees (called "staff trustees") had to be contributing members of the fund and were to be appointed by the remaining or continuing staff trustees. The majority, therefore, of the trustees, with whom the administration of the fund rested were representatives of the members of the fund, and the actual management of the fund was left to the staff trustees, the directors' trustees advising only with regard to investments. In the event of the winding-up of the fund the whole of the amount was to be divided among the members, and the company would not recover any part of the contributions which it had paid.

On behalf of the company it was contended: (i) That the payment of pensions by the company to its employees was an ordinary business expense and a continuous business demand. (ii) That in determining the admissibility of the deduction it was immaterial whether payment of a pension was made to the pensioner as it fell due, or whether a payment was made in a lump sum to relieve the employer of a future liability on a pension already payable as in *Hancock v. General Reversionary and Investment Co., Ltd.* (2), or whether payment was made irrevocably by the employer to trustees to meet the liability for pensions which would only commence at a future date. (iii) That the company parted with the sum of £31,784 irrevocably and this sum was not represented by any asset of the company, and (iv) That this sum should be allowed as a deduction in computing the company's profits for the purpose of income tax. The following cases were referred to: *Usher's Wiltshire Brewery, Ltd. v. Bruce* (3), *Smith v. Incorporated Council of Law Reporting for England and Wales* (4), and *Ounsworth v. Vickers, Ltd.* (5).

On behalf of the Crown it was contended (inter alia): (i) That the sum of £31,784 was not money wholly and exclusively laid out for the purposes of the trade under rule (3) (a) of the Rules applicable to Cases I and II of Sched. D, and therefore was not an admissible deduction from the profits for the purposes of income tax. (ii) That the said sum was capital withdrawn from the trade and therefore not deductible from profits under r. 3 (f) of the Rules applicable to Cases I and II of Sched. D.

Having taken time to consider their decision the commissioners held that in view of the decision in *Hancock v. General Reversionary and Investment Co., Ltd.* (2), the contribution of £31,784 was an admissible deduction in computing the profits of the company for the purposes of the Income Tax Acts, and the figures having been agreed between the parties they reduced the assessment accordingly. The inspector of taxes declared his dissatisfaction with the decision and required a Case to be stated.

The Court of Appeal held, reversing the decision of ROWLATT, J., who had affirmed the decision of the Special Commissioners, that the sum of £31,784 must be considered as attributable to capital and not to revenue account and could not be deducted. The company appealed.

Sir John Simon, K.C., Latter, K.C., and Hildesley, for the appellants.

The Attorney-General (Sir Douglas Hogg, K.C.), and Reginald Hills, for the respondent.

The House took time for consideration.

Dec. 11. The following opinions were read.

VISCOUNT CAVE, L.C.—The present appeal is concerned with the assessment of the appellants to income tax for the year ending on April 5, 1918, and the relevant facts appear in the Case stated by the Special Commissioners. From that case it appears that the appellants (who are manufacturers of insulated cables) had a large clerical and technical staff, and that prior to 1916 they had not paid pensions to their employees retiring on account of old age. In or about that year, however, the appellant company (to quote the language of the Case)

“found that it had frequently lost experienced members of its salaried staff, who left to take up appointments elsewhere and that the absence of a regular system of pensions was injurious to its business in other respects. It was therefore decided to establish, under the powers given to the company by its memorandum of association, a pension fund for its clerical and technical salaried staff, in the hope that the benefits to be derived from the fund would induce the members of its staff to remain in its service and otherwise increase the efficiency of the company's staff.”

Accordingly a pension fund for the staff was constituted by a trust deed dated Aug. 8, 1916. By this deed each member of the existing staff who elected to join the fund undertook to contribute 5 per cent. of his salary to the fund, the older members of the staff not being called on to pay any higher rate of contribution on account of their age. Persons joining the staff after the commencement of the fund were to contribute at the same rate if not above the age of forty at the time of joining the fund, but if above the age of forty the rate of contribution was increased. The company undertook to contribute to the fund an amount equivalent to one-half of the contributions of the members, and further undertook to pay the sum of £31,784 to form the nucleus of the fund, and to provide the capital sum necessary in order that past years of service of the then existing staff should rank for pension. The company also undertook to make up the income from the investments of the fund to a net income equal to 4 per cent. per annum free of tax. The benefits were to take the form (a) in the event of retirement at the age of sixty-five and in certain other circumstances, of a pension depending on the length of service, and (b) in other cases of a return of the members' contributions, with interest. The trustees of the fund had power to apply the income and, as far as necessary, the capital of the fund in payment of the benefits provided. Two of the trustees of the fund were to be appointed by the directors of the company, while the three other trustees were to be contributing members of the fund. In the event of the winding-up of the fund, the whole of the amount was to be divided among the members, and the company was not to be entitled to recover any part of the contributions which

it had paid. The above-mentioned sum of £31,784 (which is the item giving rise to the appeal in this case) was arrived at by an actuarial calculation, and represented the estimated deficiency which might be expected to arise by reason of the admission to the pension fund of the older members of the existing staff without any additional contributions on account of their age. The date when this sum was actually paid to the trustees of the fund is not stated, but probably it was paid at some time in the year 1916, after the execution of the deed.

In these circumstances the question arose whether in computing for the purposes of income tax the profits of the company for the tax year 1917-18 (which had, of course to be based on its profits for the three preceding years) the above-mentioned sum of £31,784 should be deducted from its receipts. The commissioners held, on the authority of *Hancock v. General Reversionary and Investment Co., Ltd.* (2), that this sum was an admissible deduction, and on the hearing of the case stated by them their decision was affirmed by ROWLATT, J.; but on appeal to the Court of Appeal the decision was reversed, and it was held that the deduction could not be allowed. Hence the present appeal. The material sections of the Income Tax Act may be shortly stated. By the Rules for ascertaining the duties to be charged in respect of a trade or manufacture under Sched. D of the Income Tax Act, 1842 (which was in force when the assessment in question was made), it was provided (by Case I, r. 1) that the duty to be charged in respect thereof should be computed on a sum not less than the full amount of the "balance of the profits or gains" of such trade or manufacture on an average of three years, and should be assessed, charged, and paid "without other deduction than is hereinafter allowed"; (by Case I, r. 3) that in estimating the balance of profits and gains of a trade or manufacture so chargeable, no sum should be deducted from such profits or gains

"on account of any capital withdrawn therefrom, nor for any sum employed or intended to be employed as capital in such trade or manufacture";

and (by Cases I and II, r. 1) that no sum should be deducted

"for any disbursements or expenses whatever, not being money wholly and exclusively laid out or expended for the purposes of such trade or manufacture."

It was also enacted (by s. 159) that in the computation of duty to be made in any of the cases mentioned in the Act it should not be lawful to make any other deductions than such as were expressly enumerated in the Act. With reference to the provision last mentioned, and to the similar injunction contained in r. 1 of Case I, it has been pointed out on several occasions, and particularly by SCRUTTON, J., in *Smith v. Incorporated Council of Law Reporting for England and Wales* (4) ([1914] 3 K.B. at p. 681), and by LORD PARKER and LORD SUMNER in *Usher's Wiltshire Brewery, Ltd. v. Bruce* (3) ([1915] A.C. at pp. 458 and 467), that the Act does not contain any express allowance or enumeration of deductions; and that effect can only be given to these provisions by holding that when a deduction is proper to be made in order to ascertain the balance of profits and gains for any year, it ought to be made notwithstanding r. 1 applicable to Case I and s. 159, provided that it is not prohibited by the terms of the Act and Rules. From this it follows that in determining whether a particular item may or may not be deducted from profits, it is necessary first to inquire whether the deduction is expressly prohibited by the Act, and then, if it is not so prohibited, to consider whether it is of such a nature that it is proper to be charged against incomings in a computation of the balance of profits and gains for the year.

I think it clear that the deduction from the profits of the above-mentioned sum of £31,784 is not prohibited by r. 1 applicable to Cases I and II, which prohibits the deduction of a disbursement not being money wholly and exclusively laid out or expended for the purposes of the trade. It was made clear in the above cited case of *Usher's Wiltshire Brewery, Ltd. v. Bruce* (3), and *Smith v. Incorporated Council*

of *Law Reporting for England and Wales* (4), that a sum of money expended, not of necessity and with a view to a direct and immediate benefit to the trade, but voluntarily and on the grounds of commercial expediency, and in order indirectly to facilitate the carrying on of the business, may yet be expended wholly and exclusively for the purposes of the trade; and it appears to me that the findings of the commissioners in the present case bring the payment in question within that description. They found (in words which I have already quoted) that the payment was made for the sound commercial purpose of enabling the company to retain the services of existing and future members of their staff and of increasing the efficiency of the staff; and after referring to the contention of the Crown that the sum of £31,784 was not money wholly and exclusively laid out for the purposes of the trade under the rule above referred to, they found that the deduction was admissible—thus in effect, although not in terms, negating the Crown's contention. I think that there was ample material to support the findings of the commissioners, and accordingly that this prohibition does not apply. Nor, in my opinion, is the prohibition contained in r. 3 of the Rules applicable to Case I directly in point. The £31,784 was not "capital withdrawn" from the trade, for it was not paid out of capital but out of the incomings of the year; nor was it (strictly speaking) a sum "employed or intended to be employed as capital in" the trade, for it did not remain in the company's hands but was irrevocably paid away to the trustees of the pension fund. It follows that, in my opinion, the express prohibitions contained in the statute, although they may throw some light upon the intention of the legislature, do not in terms apply.

But there remains the question, which I have found more difficult, whether, apart from the express prohibitions, the sum in question is, in the words used by LORD SUMNER in *Usher's Case* (3), a proper debit item to be charged against incomings of the trade when computing the profits of it; or, in other words, whether it is in substance a revenue or a capital expenditure. This appears to me to be a question of fact which is proper to be decided by the commissioners on the evidence brought before them in each case; but where, as in the present case, there is no express finding by the commissioners on the point, it must be determined by the courts on the materials which are available and with due regard to the principles which have been laid down in the authorities. In *Vallambrosa Rubber Co., Ltd. v. Farmer (Surveyor of Taxes)* (1) LORD DUNEDIN, as Lord President of the Court of Session, expressed the opinion (1910 S.C. at p. 525) that "in a rough way" it was

"not a bad criterion of what is capital expenditure as against what is income expenditure to say that capital expenditure is a thing that is going to be spent once and for all, and income expenditure is a thing which is going to recur every year";

and no doubt this is often a material consideration. But the criterion suggested is not, and was obviously not intended by LORD DUNEDIN to be, a decisive one in every case; for it is easy to imagine many cases in which a payment, though made "once and for all" would be properly chargeable against the receipts for the year. Instances of such payments may be found in the gratuity of £1,500 paid to a reporter on his retirement which was the subject of a decision in *Smith v. Incorporated Council of Law Reporting for England and Wales* (4), and in the expenditure of £4,994 in the purchase of an annuity for the benefit of an actuary who had retired which, in *Hancock v. General Reversionary and Investment Co., Ltd.* (2) was allowed, and I think rightly allowed, to be deducted from profits. But when an expenditure is made, not entirely once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital. For this view there is already considerable authority. Thus, moneys expended by a brewing firm with a view to the acquisition of new licensed

premises (*Southwell v. Savill Bros., Ltd.* (6)) "fitting expenses" incurred in transferring a manufacturing business to new premises (*Granite Supply Association v. Kitton (Surveyor of Taxes)* (7)); costs incurred in promoting a Bill which was dropped on the desired facilities being obtained by agreement (*A. G. Moore & Co. v. Hare* (8)); and expenditure incurred by a shipbuilding firm in deepening a channel and creating a deep water berth (not on their own property) to enable vessels constructed by them to put out to sea (*Ounsworth v. Vickers, Ltd.* (5)), have been held to be in the nature of capital expenditure and not to be deductible under the Income Tax Acts; and *Rountree & Co. Ltd. v. Curtis* (9) is to the same effect. I think that the principle to be deduced from this series of authorities rests on sound foundations and may properly be adopted by this House.

In my opinion, the present case falls within the same principle. The payment of £31,784 which is the subject of dispute, was made, not merely as a gift or bonus to the older servants of the appellant company, but (as the deed shows) to "form a nucleus" of the pension fund which it was desired to create; and it is a fair inference from the terms of the deed and from the commissioners' findings that without this contribution the funds might not have come into existence at all. The object and effect of the payment of this large sum was to enable the company to establish the pension fund and to offer to all its existing and future employees a sure provision for their old age, and so to obtain for the company the substantial and lasting advantage of being in a position throughout its business life to secure and retain the services of a contented and efficient staff. I am satisfied on full consideration that the payment was in the nature of capital expenditure, and accordingly that the deduction of the amount from profits, although not expressly prohibited by the Act, was rightly held by the Court of Appeal not to be admissible. For these reasons I move your Lordships that this appeal be dismissed with costs.

LORD ATKINSON.—The facts of this case have been already fully stated. I abstain from repeating them save so far as may be necessary to make my judgment intelligible. I am of opinion that the sum of £31,784 was paid by the appellants to the trustees of the trust deed of Aug. 8, 1916, to be employed by them in the manner, for the objects, and under the conditions in the deed set forth, was money wholly and exclusively laid out and expended for the purposes of the appellants' trade, manufacture, adventure, or concern, within the meaning of r. 1 applicable to Cases I and II under Sched. D, s. 100, of the Income Tax Act, 1842, and, therefore, that the deduction of this sum from the balance of the gains and profits of the appellants' trade, realised in the years in which the payments were made was not prohibited by this rule. But a careful examination of the provisions of the trust deed, coupled with the facts found, has convinced me that the payment of this large sum of money to these trustees for the purposes of the trust amounted to an actual employment or intended employment of it as capital in the appellants' trade, manufacture or adventure or concern within the meaning of r. 3 of Case I of Sched. D, quite as much as if it had been devoted to the purchase in fee of recreation fields or bath houses to improve the health of their staff or of a library to increase their knowledge or discipline their minds. The use and enjoyment of these last-named things by the staff might, not unnaturally, make them more contented, more attached to their employers' service, and consequently more efficient than they otherwise would have been, and their employers would in this way be rewarded for their outlay; but if a portion of the profits and gains of the employers' trade and business, received in the year in which those things were acquired, was devoted to their acquisition it would, *prima facie*, I think, lead to an employment of their cost as capital, or an intended employment of it as capital, the deduction of which from the above-mentioned profits and gains for income tax purposes is prohibited by this r. 3 of Sched. D of the Income Tax Act, 1842.

The authorities do not supply any clear, precise, and sufficiently comprehensive definition of the operation styled a capital investment for the purposes of the

Income Tax Acts. In *Royal Insurance Co. v. Watson* (10), the appellant company were by statute empowered to acquire and, in fact, did acquire from the Queen's Insurance Co., their whole undertaking, which was regularly transferred to the purchasing company on Aug. 19, 1891. The agreement into which the two companies had entered for this purpose provided, amongst other things, that the purchasing company should, until the transfer was completed, retain in their service the former manager of the Queen's Insurance Co. at a salary of £4,000 per annum. Liberty was reserved, however, to the purchasing company to commute this salary by payment of a bulk sum calculated on the basis of certain tables in the agreement mentioned. The purchasing company availed themselves of this liberty and, shortly after the manager had been taken into their service, commuted this salary by payment to him of the sum of £55,846 8s. 5d. The Royal Insurance Company contended that they were entitled in fixing the amount of their liability to assessment for income tax for the year ending April 5, 1923, to deduct this large sum from the gains and profits of the business for the year 1891-1892, the year in which the payments had, in fact, been made. The Court of Appeal held that the company was not entitled to make this deduction, and on appeal to this House that decision was affirmed on the ground that this large sum of money was, in reality, part of the consideration to be paid by the purchasing company to the vending company for the transfer by the latter to the former of the latter's business, and was, therefore, money employed as capital within the meaning of the aforesaid r. 3. LORD HALSBURY, in delivering judgment, said ([1897] A.C. at p. 6):

"It is often a very difficult question to ascertain, in dealing with a commercial account, what is capital and what is income; but, if it is established as a fact that the expenditure is capital, the language of the statute itself determines that that expenditure cannot be deducted from the profits, and that the profits are to be ascertained without reference to the capital expenditure."

It was, as I understood, suggested, in this case during the argument of this appeal, that the sum of £31,784 paid by the appellant company to the trustees of the trust deed of Aug. 8, 1916, was precisely of the same nature and character as the 2½ per cent. of the aggregate amount of the subscriptions of the members of the appellants' staff to the pension fund, paid monthly by the appellants to the trustees, and as this monthly payment was obviously a recurring payment and not capital expenditure, so must the payment of the sum of £31,784 be treated as a recurring payment though, in fact, made once for all.

One of the two principal questions raised on the appeal, however, is whether the payment made once and for all of this large sum to secure the solvency of the pension fund amounts to a real or intended employment of capital. I am quite unable to see how the recurring monthly payment by the same company of a sum—possibly varying in amount from month to month—can infect, as it were, the payment of the larger sum, so as to convert the payment of each into matters of the same nature and character. LORD HERSHELL concurred with LORD HALSBURY. He said ([1897] A.C. at p. 8) that this payment of between £50,000 and £60,000 was made in pursuance of the obligation contained in the contract by which the business of the Queen Insurance Company was purchased and, therefore, was properly capital expenditure. LORD MACNAGHTEN held that the payment of this same large sum was a payment on account of capital, and LORD DAVEY held that it, in fact, formed part of the consideration for the purchase of the company's business and connection, and that being so, the point was sufficient for the decision of the case. It will be observed that no question was raised as to the source from which the sum paid to the manager was obtained; no suggestion was made that it was obtained from capital withdrawn from the business of the appellants. The natural conclusion from the reports of the case would appear to be that it was paid out of the gains and profits of the year in which the payment was made. In the argument of the present appeal your Lordship's attention

was not drawn to any case in which what was claimed to be a precise, full and accurate definition of the phrase capital expenditure was given. LORD DUNEDIN, however, in *Vallambrosa Rubber Co., Ltd. v. Farmer, Surveyor of Taxes* (1), when dealing with the expenses incurred every year in weeding and tending certain rubber trees on the lands of the company, which trees had not reached the rubber bearing age, said (1910 S.C. at p. 525) :

"I do not say that this consideration is absolutely final or determinative, but in a rough way I think it is not a bad criterion of what is capital expenditure—as against what is income expenditure—to say that capital expenditure is a thing that is going to be spent once and for all, and income expenditure is a thing that is going to recur every year."

This rough test (LORD DUNEDIN did not pretend it was more than that) has been approved in many cases as though a rough yet an effective test, and I cannot find any case in which it has been disapproved of. In *Ounsworth v. Vickers, Ltd.* (5), ROWLATT, J., appears to have approved of and adopted it, saying however, ([1915] 3 K.B. at p. 273) :

"I take it, and indeed both sides agree, that no stress is there laid upon the words 'every year': the real test is between expenditure which is made to meet a continuous demand, as opposed to an expenditure which is made once for all."

Much assistance is not to be gained in this case from the judgment of SCRUTTON, J., in *Smith v. Incorporated Council of Law Reporting for England and Wales* (4). The question for decision there related to a gratuity of £1,500 given by the respondent society to a member of their reporting staff on his retirement after long service. The commissioners had held that this sum of £1,500 was allowable to the respondents as a business expense in calculating for income tax purposes the profits of the year in which it was paid. On a Case stated by the commissioners, it was held by SCRUTTON, J., that the question whether this sum could be deducted from the respondents' profits as being "money wholly or exclusively laid out for the respondents' business" within the meaning of r. 1 applying in the first and second Cases under Sched. D, was a question of fact for the commissioners to decide, and that as there was evidence before them adequate to support their finding of fact their decision was not a matter which could be reversed on appeal, even although the appellant tribunal might itself have come to a different conclusion upon the evidence given.

In *Usher's Wiltshire Brewery v. Bruce* (3) the tenants of the appellants' tied houses were under their agreement bound to repair their houses and to pay certain rates and taxes. They failed to do so. The appellant company, though in no way legally or morally bound to do so, paid for these repairs, and paid these rates and taxes. They did so, not as a matter of charity but of commercial expediency, in order to avoid the loss of their tenants, and consequently the loss of the market for their beer, which they had acquired those houses for the purpose of affording. It was held that, though the appellant company was not legally or morally bound to make those payments, yet they were, in estimating the balance of the profits and gains of their business for the purposes of assessment of income tax, entitled to deduct all the sums so paid by them as expenses necessarily incurred for the purpose of their business. There is no suggestion in the present case that the appellant company were bound by a similar necessity to pay the sum of £31,784 or any portion of it to the trustees to carry out the pension scheme.

I now turn to the trust deed of Aug. 8, 1916. First the payment of the sum of £31,784 was made once for all. It was made to secure that the pension fund should be adequate to meet the claims of the older members of the staff on their retirement before the contributions of all the contributors had amounted to a sum adequate to meet those claims—a laudable object, no doubt, and perhaps a

prudent one in the interest of the company's trade. Second, it was optional with the eligible members of the appellants' staff to join the scheme, as it is styled, or not, even if their respective salaries amounted to £100 per annum. From the salary of every member who joined, 5 per cent. was to be deducted by the company monthly and paid over monthly to the trustees of the deed to be added to the pension fund. In addition, as I have already pointed out, the company paid monthly to the trustees for the same purpose $2\frac{1}{2}$ per cent. of the aggregate amount of these contributions. These are the only recurring payments made to the credit of the pension fund. They are, I think, irrelevant to the question for decision touching the payment of the larger bulk sum. Next the appellant company are, by the terms of the deed, almost altogether deprived of all direction or control over the management, administration or application of the pension fund; so much is that the case, that by cl. 23 of the deed it is provided that if a resolution should be passed for an order made for the winding-up of the company and neither the government nor any other company or body should within six months from the date of the resolution or order undertake the obligations of the company, under the deed, two actuaries are to be appointed, one by the directors' trustees and the other by the staff's trustees, who are to decide in what manner the fund (i.e., the pension fund) should be divided among the members of the fund or such of them as shall be living or in receipt of retiring pensions, the first charge upon the fund being the return to the members of all sums contributed by them with interest at 4 per cent. The decision of these actuaries, it is provided, is to be final and binding on all parties concerned. The fund is not treated as part of the assets of the company. The debts of the company due to their creditors are not to be satisfied out of it to any extent. Again, the trustees have absolute power to invest all money in their hands not required for the time being in making payment of pensions in such securities as they may deem fit. They are empowered to pay the pensions allowance as far as may be necessary out of the capital of the fund. There is to be an actuarial valuation of the position of the company every five years from Jan. 1, 1916, or at such other period as the trustees may determine. If, as a result of the actuaries' report, there should appear to be a surplus beyond the requirements of the fund, that surplus or any part of it may be set aside and invested by the trustees as a reserve fund. If, on the other hand, there should appear to be a deficiency, that is to be made good in such manner as the trustees may determine. By the fourteenth clause it is provided that the business of the trust is to be managed by the trustees or a majority of such of them as may be present at their meetings, and all powers, expressly or by implication given to the trustees, may be exercised by this majority. The trust deed contains many other provisions supporting the conclusion that the company have once and for all parted with all proprietary rights in and all powers over this donation of £31,784.

It is difficult to see on what principle the company are, for the purposes of the assessment of income tax for the year in which the payment was made, entitled to deduct it from their profits and gains for that year, since it cannot, I think, be regarded as forming part of the cost by which those profits and gains have been acquired, nor as an expenditure which, however prudent from the employers' point of view, was essentially necessary for the acquisition, in that or any subsequent year, of any portion of the profits and gains of the appellant's business. It would certainly appear to me not to be—to adopt LORD SUMNER's phrase used by him in his judgment in *Usher's Wiltshire Brewery, Ltd. v. Bruce* (3) ([1915] A.C. at p. 468)—

“a proper debit item to be charged against incomings of the trade when computing the balance of the profits of it.”

That is apparently the view of it taken by WARRINGTON, L.J. ([1925] 1 K.B. at p. 441):

"The real question which we have to determine is whether this is a proper debit item to be charged against the incomings of the trade when computing the balance of profits."

He held it was not a proper debit item. SCRUTTON, L.J., after pointing out that the Attorney-General's definition of capital expenditure, namely, that money expended on a business which is intended to, and does, create an asset is capital, cannot apply to the circulating capital of a trade or business, holds that the payment of this large sum of £31,784 by the company, which they were not under any liability to make, was either a withdrawal of capital from the business for the purposes of the fund, or capital employed in creating an asset or advantage in the business, something added to the business not in discharge of any existing liability but, in the result, creating a new asset. If the word "asset," as used in this connection, be confined to something material—and I do not think it can well be so confined—then I am inclined to agree with SCRUTTON, L.J., that, if the existence of this pension fund results in making the staff of the company more contented and less inclined to change their service and therefore, on the whole, more efficient, these results when secured would amount to an "asset" of the company's business. The Master of the Rolls expresses the same idea at the end of his judgment, in the following words :

"It appears to me that when you consider what is the nature of this payment made, not for the purpose of meeting any actual liability but only for the purpose of, in a very general way, improving the position of the staff, the right attribute to apply to it is that it was a payment made as and for the purpose of a capital outlay and cannot be deducted from the revenue as payment made in the course of seeking profits and gains."

Rowntree's Case (9) is quite distinguishable from this.

In *Hancock v. General Reversionary and Investment Co., Ltd.* (2), LUSH, J., after commenting on LORD DUNEDIN's decision, acted on by ROWLATT, J., in *Ounsworth v. Vickers, Ltd.* (5), said ([1919] 1 K.B. at p. 37) :

"The proper test to apply is this. Was the expenditure incurred in order to meet a continuing business demand, in which case it should be treated as an ordinary business expense and an admissible deduction, or was it an expenditure incurred once for all, in which case it should be treated as a capital outlay? I agree with that view."

(And he then proceeds to state the ground on which he comes to the conclusion that the payment of £4,994 fell within the latter class of payments and not the former.) And says (*ibid.*) :

"... applying that test I think that it necessarily follows on the facts found by the commissioners, that the £4,994 should be treated, as the pension was treated, as an ordinary business expense, and that the deduction should be allowed. It is the pension in another form; it is actuarially equivalent in value and it is identical in character. It was paid to meet a continuing demand which was itself an ordinary business expense as the surveyor had treated it."

I cannot find that this reasoning was ever expressly approved of in any authority. The learned judge apparently treats the payment of this large sum as if it were made by the company to one of its employees. Little assistance is to be got from *Rowntree's Case* (9) and other cases owing to the special findings of the commissioners on the several questions of fact. On the whole I think the judgment appealed from was right and should be affirmed and this appeal be dismissed with costs.

LORD BUCKMASTER—The facts in this case have already been stated, they do not admit of ambiguity and their repetition is needless. The sole question for decision is whether the contribution of £31,784 made for the purpose and

A in the circumstances already narrated can be deducted from the profits earned by the appellants in their business for the year ending April 5, 1918. The determination of this question depends upon the true meaning of the rules in Sched. D to the Act of 1842. The first and paramount provision is: that the duty to be charged shall be computed on a sum "not less than the full amount of the balance of the profits and gains" of the trade on a fair and just average for three years. In B ascertaining this result there are certain restrictive conditions imposed by the succeeding rules—one prevents any deduction for any disbursements "not being money wholly and exclusively laid out or expended for the purposes of the trade"—and another prevents allowance on account of capital withdrawn from the trade, or "for any sum employed or intended to be employed as capital in such trade." C It is, I think, plain on the findings of fact of the commissioners that the moneys in question in this case were exclusively laid out for the purposes of the trade—this view is emphatically asserted by WARRINGTON, L.J., and assented to by the Master of the Rolls. No difficulty arises in this connection. Whether this money should be treated as capital withdrawn from the business or intended to be employed as capital in the business, it is not, in my opinion, necessary to decide, for I agree with WARRINGTON, L.J., that the real difficulty lies in considering whether D the deduction can be made in arriving at the full amount of the balance of profits and gains. In order to examine this question it appears to me that the different contributions to the scheme are not really material—the principle involved would be the same if there were no contributions other than those provided by the employers themselves and they had started and financed this scheme at their own sole cost. So tested I cannot think that this sum, which represents an amount E set apart as the nucleus of the pension fund, can be properly deducted in determining the balance of the profits and gains. Authorities appear to me to be of little assistance; the *Rowntree Case* (9) is different, as the money there was set apart for charitable trusts in which ultimately others than those connected with the business might become the beneficiaries—and the *Hancock Case* (2) is nothing F but the payment in one sum of an annually recurring liability and is closely analogous to the *Incorporated Law Society Case* (4). But neither in their facts nor in their reasoning does it seem to me that these authorities govern the present case. In my opinion this appeal should be dismissed.

LORD CARSON.—The question arising for decision in this appeal is briefly G whether a contribution of £31,784 made by the appellants to a pension fund established for the benefit of their clerical and technical salaried staff is an admissible deduction in computing the profits of the appellants for the purpose of assessment to income tax for the year ended April 5, 1918. From the Case Stated it appears that in 1916 the appellants established the said pension fund for their salaried and clerical staff, with the object that the benefits to be derived from the fund should H induce the members to remain in their service and otherwise increase the efficiency of the staff. A member of the existing staff who elected to join the fund had to undertake to contribute 5 per cent. of his salary to the fund as from March 31, 1916. The older members of the staff were not called on to pay any higher rate on account of age. The appellants were to contribute an amount equal to one-half of the contributions of the members and, in addition, they agreed to pay and did I pay the said sum of £31,784, being a sum based on an actuarial calculation, to form the nucleus of the fund and to provide the amount necessary in order that past years of service of the then existing staff should rank for pension. In other words, as was admitted in the argument, this sum was provided in order to place the older members of the appellants' staff in a position to obtain the full benefits of the fund to the same extent as the younger members whose subscriptions would in most cases be payable for a number of years before benefit would be claimed. It is clear from the terms of the trust deed and the actuarial calculation that the sum was not in the nature of an investment or a fixed asset of the company but

would be eventually exhausted in providing pensions for the existing staff, including the older members. It is also clear, and indeed it is not disputed, that the appellants parted with all property in the fund, the trust deed also providing (para. 23) that

"in the event of the appellant company being wound up the whole of the fund is to be apportioned and divided among the members, the appellants having no right to receive any part of the contributions by them paid."

It was not contended, nor in face of the findings of the commissioners could it have been successfully argued, that the sum in question was not money "wholly and exclusively laid out or expended for the purposes of the trade," and indeed it is under modern views and conditions not only a proper but essential expenditure for carrying on any properly organised business; and that being so the question which has to be determined is whether it is a proper legal deduction to be made in arriving at the "full amount of the balance of profits and gains." Of course, as LORD BUCKMASTER points out, if the sum in question cannot be properly deducted in determining the balance of profits and gains, there is no necessity to consider whether this money should be treated as capital withdrawn from the trade or intended to be employed as capital in the trade. But as I do not take the same view of this expenditure as my noble friend, I think it necessary to state that I can find no grounds (and here I find myself in agreement with the noble Viscount on the Woolsack) for holding that the sum in question comes within either of the said categories. It is clear from the terms of the trust deed, as already pointed out, that in no sense was the sum an investment, that it would be eventually exhausted in payment of the pensions and that in the event of a winding-up of the company it could never form any part of the assets of the company. I cannot, under these circumstances, conceive any system of commercial accountancy under which this sum could ever appear in the capital accounts of the company. Nor is it capital withdrawn from the business as it was admittedly paid out of the earnings of the year. It is not disputed that an annual sum contributed to the pension fund on an actuarial basis for the purposes of making the fund solvent for paying the pensions of the older members of the staff would be a proper deduction in arriving at the balance of profits and gains, it would be an ordinary business expense. Nor, I think, can it be disputed that if at any time the fund threatened to become insolvent after it was started a sum paid to prevent such insolvency would be a proper disbursement in arriving at the balance of profits and gains. Why, therefore, should the payment of the sum in question, which by an actuarial calculation represents the sum equal to the annual payments which would be necessary, not be considered as in the same position? To use the words of LUSH, J., in *Hancock's Case* (2) ([1919] 1 K.B. at p. 37), which was the case of a lump sum paid in purchasing an annuity in lieu of an annual pension.

"It is the pension in another form; it is actuarially equivalent in value and it is identical in character. It was paid to meet a continuing demand which was in itself an ordinary business expense."

Or as expressed by the Master of the Rolls in *Rowntree's Case* (9) ([1925] 1 K.B. at p. 336):

"Then we come to another class of cases in which an expenditure is made on business grounds of a sum, apparently a capital sum, but which really comprises and compresses what is an annual charge."

I agree with their statements of principle, and in my opinion they are entirely applicable to the present case. Indeed a careful comparison of the reasoning in which the judgments are founded in these two cases greatly helps to determine on which side of the line such an expenditure should be placed. I can find no reason for holding that a payment made to make up the contribution to a sufficient sum to enable the older servants of the company to enjoy the benefits of the pension fund brings into existence an asset or an advantage for the enduring benefit of trade

A and might therefore be attributed not to revenue but to capital. I notice that my noble friend on the Woolsack agrees with the decision in *Hancock's Case* (2) as I also do, but I fail, as ROWLATT, J., failed, to see how it can in principle be distinguished from the present case. I am of opinion that this appeal should be allowed.

B **LORD BLANESBURGH.**—It is, I apprehend, now well settled that in the Income Tax Acts, unless the context requires a different meaning to be placed upon them, such words as “profits,” “gains,” “capital,” are to be construed according to their ordinary signification in commerce or accountancy. It will, accordingly, not be amiss if, remembering the nature of the present controversy, an attempt be made to ascertain from the statements or accepted implications of the Case Stated, but, in the first instance, merely as a business proposition, what was the precise nature C and purpose of the payment now in question and, as consequent thereon, its proper place in this company's accounts.

D Up to 1916 the clerical and technical staff of the company had no superannuation fund existent for their benefit. The lack of one had in practice proved disadvantageous to the company in several ways. With no continued provision in prospect for their old age, experienced members of its staff had been prone to leave the service for appointments elsewhere more attractive in this regard; and the natural anxiety of those who remained as to their financial position after retirement was not without its effect both upon their contentment and their efficiency. The existence of a pensions fund built up by their own contributions would assist, and if these contributions were supplemented by additions to be made to them by the company would, it was expected, succeed in remedying this state of things. The fund would constitute a strong inducement to the individual contributories to remain during their working lives in the company's service, and it would tend to their increased efficiency while they so remained. It was no part of the Attorney-General's case that this was not a reasonable expectation. That the company's action in this matter was prompted by anything more altruistic than an enlightened self-interest well calculated to secure for its business as a profit-earning concern and for itself F as a good employer the advantages already indicated, the Attorney-General was not concerned to dispute.

Now, expenditure by a trading company of which so much can be affirmed is well within its powers, whether expressly so conferred or not. This is no longer doubtful. Indeed, since *Hutton v. West Cork Rail. Co.* (11), in which both the rationale of the power and its limitations are clearly expounded, this matter has ceased to be debatable. Modern conditions of industry have only tended to make the occasions for its exercise more frequent and more compelling. For myself, I cannot escape the conviction that, if the action of the company in this matter had been seen to be, as in my judgment it clearly is, no more than a striking illustration of the legitimate exercise of its inherent powers as in that judgment described, this case would have been shorn of much of the difficulty which it has presented to those who have regarded it from another angle. In 1916 the pension which by means of the fund then in contemplation was to be provided for each participant on retirement at sixty-five was one-sixtieth of his average salary for every year of his service with the company. And there were to be other benefits. It was believed that if the contributions required of them were not made prohibitive, three hundred at least of the company's then salaried staff would join a fund offering such advantages. It was, of course, of the essence of the scheme that in adequate numbers they should. Practical abstention on their part would have destroyed the whole I *raison d'être* of the fund so far as the company's participation in it was concerned. The necessity of securing their adhesion to it from the company's point of view explains the specially attractive terms which were offered them. In the case, for instance, of future members of the staff who were to be required to join the fund as part of their contracts of service, only those under forty at the date of joining were under deduction from their salaries of so little as 5 per cent. to be entitled

to the benefits of the fund. Not so the existing members of the staff. They were at that maximum cost to themselves and irrespective of age to be admitted as full participants; and, not only so, but their service with the company prior to the establishment of the fund and when, of course, no payments towards it were being made by them were to rank as pension years of service. Now, happily as many will think, the time has gone by when terms like these are, in such a connection, to be viewed, even by a tax gatherer, with jaundiced eyes. Here, however, it is not even suggested that they were more attractive than the occasion required. They could not, however, without a contribution to the fund made specially on account of these employees have been fulfilled. A fund composed alone of the proposed future contributions and offering these benefits would from its very inception have been actuarially insolvent. The contribution of £31,784, with which your Lordships are now concerned, was the payment actuarially calculated to be requisite, and it was in the event by the company made, to avoid that result.

On Aug. 8, 1916, the company executed the trust deed constituting the fund and it thereby covenanted with the trustees to make the following payments: (a) the sum now in question; (b) an annual contribution aggregating one-half of every sum in the same year contributed by each participant employee; (c) a contribution sufficient to make the annual return upon the invested moneys of the fund one of 4 per cent. This third contribution does not enter into the argument and need not again be referred to. With reference to the other two, however, it is well nigh vital to ascertain what they really represented and what under the trust deed was the duty of the trustees in relation to them when received.

The sum with which your Lordships are immediately concerned, this £31,784, represented the actual equivalent of the sum with accretions of interest which would at the date of the establishment of the fund have been in the hands of its trustees if there had in fact been made by or on account of each of these participant members during each of the previous years of service for which he was to rank for pension the payments which would have been called for had the fund then existed. It was a payment by the company on account of each of these employees of a sum which in the language of the Master of the Rolls in *Rowntree's Case* (9), comprised and compressed a series of prior annual payments on his account. It was a sum, and this is perhaps in the present connection its most important characteristic, actuarially so adjusted in amount that when the last of the existing staff, participant to the fund, on whose account it had been paid died or fell out of benefit no part of it or of any accretion to it would remain in the hands of the trustees. It would then have been entirely exhausted in providing the covenanted benefits for the participants on whose account it was paid. It is as if the company, as it might well have done, had paid this money to the trustees of a pension fund, otherwise identical in its provisions and benefits with that constituted, but in which only then existing members of the staff were to be participant. On the death of the last of these the trustees actuarially would be left with no funds at all. In no sense was this £31,784 the permanent capital of any fund. As to the annual contributions made, as these were to be, on account of every participant member of the fund, present and future, what is important to note about them is that it was the duty of the trustees, as with the first sum, to invest and accumulate them when received so far as they were not required to meet current outgoings of the fund. In other words, there was to be no distinction at all between the way in which the trustees were to deal with payment (a) and with payments (b) when made and received. All contributions received by them became, on receipt, indistinguishably blended.

If what I have so far said be accurate, it follows that in no relevant respect do these payments (a) and (b) differ from one another. What, then, is the outstanding characteristic of all of them? It is, I think, this, that they are made by the company for the account, as to the first payment, of some, as to the later payments, of all of its participant staff employees; made, it is true, in a special form to secure a

A special end, but from the company's side, when regard is had to their purpose, made with the same justification that would attend the payment of an increased remuneration of the individual employees benefited. Regard, in retrospect, after his retirement, the proportion of these payments made by the company on account of any individual participant. In no material respect, quoad the company, do they differ from any payments of salary made to him direct. In truth, we have here a much plainer case than that of *Hancock* (2). There the payment was made in respect of an officer who had retired. The main justification suggested for it was the protection of the company against recurrent demands. Here the payments are made on account of officials still in the service, and are made that that service may be more contented, more efficient and more prolonged. Can any higher warrant than this for the payment of any staff salary be suggested? And it is admitted by the Crown that the company's periodical contributions (b) are all of them properly chargeable to revenue account. But why so? Surely, because they are not only, as I have, I hope, shown, legitimate payments, but because, as such, they are none other than expenses prudently incurred in the course of the company's business. And such, too, is payment (a)—this sum of £31,784. Payments (b) are additional remuneration for every one of the participant members of the fund, proportioned in each case to his own contribution to it. Payment (a) is still further remuneration, in no way commercially excessive, for those of them who when the fund was established were already in the company's service, and proportioned in each case to the amount of his salary for the time being.

I do not myself see how any of these payments could properly be charged to capital account by any company which keeps its accounts on the double account system. And as the Income Tax Acts contemplate that accounts will be so kept, no other system need here be considered. Under that system, as is well known, the two accounts, capital and revenue, or trading account as in business language it is usually termed, are separate accounts. The capital account is concerned with the company's fixed capital and its application. The revenue account is concerned with the company's trading or circulating capital and its application. Dividends may lawfully be paid, although, it may be, the whole of the company's fixed capital has disappeared. No profits available for dividend are, however, existent, unless the company's trading capital would remain intact after they had been distributed as such. If what I have so far said be correct, it follows that for this company to have charged any of these payments, either (a) or (b), to capital account would have thrown on that account a revenue charge; would have enabled the company to ascertain profits and distribute dividends without taking it into account; would have introduced a system facilitating in the case of a company less prosperous, the concealment more or less successful of the truth, that dividends declared during a period of depression were in whole or in part being paid out of capital.

On the facts of this case there were, as it seems to me, only three funds from which any of these payments (a) or (b) could, by such a company as this, legitimately have been taken. The first was its undistributed profits—the payments, if thence derived, being no more than a series of bonuses to its employees out of the realised profits of good years. The second was its gross receipts before profits were struck. The third, merely another aspect of the second, and not applicable to this prosperous company, was working capital to which recourse might properly be had on any occasion when the gross receipts after these payments had been charged against them were less than the outgoings by at least an equivalent amount. Applied to this company, on the facts found, there is, as to the first of these, no suggestion of any intention on its part to make these payments out of realised profits. The unqualified covenant into which it entered with regard to them would have effectively disposed of such a suggestion had it been made. As to the third the gross receipts, as I have indicated, were more than adequate to meet the payments and still leave a large surplus. The revenue account, therefore, strictly so called, alone remains as the place in which they can properly appear.

As to the suggestion that the £31,784, representing the notional payments made over a number of years must be treated as capital because that sum was paid in one year and in one amount, I find myself in entire agreement with LUSH, J., when, in *Hancock v. General Reversionary and Investment Co., Ltd.* (2), he said, [1919] 1 K.B. at p. 37):

"It seems to me as impossible to hold that the fact that a lump sum was paid instead of a recurring series of annual payments alters the character of the expenditure as it would be to hold that if an employer made a voluntary arrangement with his servant to pay the servant a year's salary in advance instead of paying each year's salary as it fell due, he would be making a capital outlay."

For these reasons, I cannot bring myself to doubt that this payment of £31,784, judged of purely as a commercial transaction of this company and not purporting or intended to be a bonus out of profits could only properly be brought into charge, as in fact it was, in the revenue account of the company. And if this be the true conclusion, apart from the Income Tax Acts, the propriety of this payment as an admissible deduction in the ascertainment of the balance of the company's profits and gains under these Acts follows, I think, almost as of course. I will substitute for any re-statement of the relevant provisions of the statutes, already well under your Lordships' notice, two authoritative pronouncements as to their effect. LORD LOREBURN, in *Usher's Wiltshire Brewery, Ltd. v. Bruce* (3) ([1915] A.C. at p. 444), said:

"Profits and gains must be estimated on ordinary principles of commercial trading by setting against the income earned the cost of getting it subject to the limitations prescribed by the Act."

LORD SUMNER in the same case said (*ibid.* at p. 468):

"The effect . . . I think, is this, that that direction to compute the full amount of the balance of the profits, must be read as subject to certain allowances and to certain prohibitions of deductions, but that a deduction, if there be such, which is neither within the terms of the prohibition nor such that the expressed allowance must be taken as the exclusive definition of its area, is to be made or not to be made according as it is or is not, on the facts of the case, a proper debit item to be charged against incomings of the trade when computing the balance of profits of it."

To these I will add three further statements as to the true result of the Acts in matters relevant to the present discussion. The first, justified by reference both to *Usher's Case* (3) and to the judgment of LORD DUNEDIN when Lord President, in the *Vallambrosa Case* (1), is that the fact that expenditure in question is not referable to the profits of the year in which it is made does not prevent it from being a proper deduction in that year. The second, justified also by *Usher's Case* (3) is that the admissibility of a deduction under the Act is not dependent on the question whether at the time the payment was made the subject was under legal liability to make it. Payments, justifiable on the principle of *Hutton's Case* (11) already cited, are well within the limits of admissibility. The third, justified by some observations in the judgment of SCRUTTON, L.J., in the present case which command my entire concurrence, is that the reference in r. 3 of Case I in s. 100 of the Act of 1842 to "capital" withdrawn from or employed in the trade is a reference to fixed capital, as distinct from "circulating" or, in LORD WATSON'S phrase, "trading" capital, the proper source for payment of wages and other expenses incurred in the conduct of a trader's business: see *Gresham Life Assurance Society v. Styles* (12).

Bearing these authoritative considerations in mind, I proceed now to apply the relevant prohibitions of the Acts to this payment, and I ask myself first whether there is any ground for affirming that this money was not laid out or expended wholly and exclusively for the purposes of this company's trade, manufacture,

A adventure, or concern? The answer must, I think, be in the negative. The
 explanation already given of the circumstances in which, and the object for the
 attainment of which, the payment was made leaves no doubt in my mind on this
 point, and I believe all your Lordships take the same view. I notice that the
 Master of the Rolls, for the purpose of his judgment only, and clearly with some
 reluctance, accepts it. I am myself unable to share his doubts on this point. I
 B next ask myself whether it is true to say that this payment represented "capital
 withdrawn from or any sum employed or intended to be employed as capital" in
 the company's trade? Again, I think the answer must be in the negative. Mr.
 Hills, in his able argument on behalf of the Crown, while disclaiming any desire
 to attach too much weight to the contention, found in cl. 3 (A) of the trust deed
 of the fund, by which the company covenanted to pay this sum to the trustees

C "in order to provide the capital sum necessary in order that past years of
 service of the present permanent staff since they received a salary of £100
 per annum or more shall rank for pension,"

an indication that this was on the part also of the company a payment on capital
 account. The suggestion strikes me as novel. I cannot myself see how that
 D which really is a revenue payment on the part of the trader making it—whether
 it is so or not is, of course, a question—can become a capital disbursement merely
 because the recipient invests it or, if you like, agrees to invest it, any more than
 I can see how that which was a capital payment on the part of the payer becomes
 a revenue payment merely because the recipient spends it or is left at liberty to
 spend it. Moreover, the application of this principle to the present case would, in
 E view of the terms of this trust deed, equally extend to the company's periodic pay-
 ments, all of which the Crown agrees and even asserts are properly chargeable to
 revenue. The difficulty of treating this as a capital disbursement of the company
 is appreciated when the divergent grounds on which the Master of the Rolls and
 SCRUTTON, L.J., held it so to be are regarded. In the view of the Master of the
 Rolls this payment not being "a necessary expenditure in seeking profits and gains,"
 F was only made at all because the company had a good year; if they had had a bad
 year they would not have made it,

"still less would they have charged it on ordinary principles to the revenue
 account . . . therefore . . . it ought to be treated as being an item of capital
 to be employed as capital in such trade."

G My Lords, I demur in limine to the statement that a disbursement admissible as
 a deduction must be a "necessary" expenditure in seeking profits. *Usher's Case*
 (3) I think clearly indicates that it suffices, in this regard, if it be prudent in the
 proper and reasonable conduct of the trade. One has only to recall in this connec-
 tion advertising expenditure. But, my Lords, even if the premises be conceded
 I cannot myself see that the conclusion follows. The learned Master of the Rolls
 H might possibly consistently with his premises have well held that this payment
 was in truth a bonus out of realised profits and not an expense incurred with a
 view of maintaining them in the future. That, however, was not open to him on
 the Case Stated. That they lead to the conclusion that the payment is one either
 withdrawn from or to be employed as capital—as fixed capital bien entendu—
 seems to me to be quite inadmissible. SCRUTTON, L.J., to whose views as to the
 I meaning of the word "capital" in the statute I have already referred, holds that the
 sum should be disallowed because as a result of the expenditure

"either capital was withdrawn from the business for this pension fund or the
 capital employed in the business created an asset or advantage of the business"

—by which expression, as the lord justice explains in another part of his judgment,
 he means "something in the nature of fixed capital." Now, my Lords, this method
 of arriving at the same result as the Master of the Rolls is, in my judgment, equally
 open to destructive criticism. In no sense of the word "capital," circulating, working,

or fixed, did this expenditure involve any withdrawal. It was made out of gross receipts in a year in which, working capital and, a fortiori, fixed capital, remaining intact a large surplus still emerged. Nor, in my judgment, did the expenditure in any relevant sense create a new asset of the company of the nature of a fixed capital asset or any other. The learned lord justice does not more closely describe this so-called asset or, fixed though it was, did he attach to it a name by which it could be recognised. He did not suggest that it resulted in an enhanced goodwill. He could not, in my judgment, have done so with reason, because it has never, I think, even been suggested that a contented personnel is an element in goodwill, whatever else it may be. In that state of things it has occurred to me that the existence or non-existence of this so-called asset might fairly be submitted to the prosaic test of asking what in a liquidation would be forthcoming in respect of it when a liquidator essayed his statutory duty to realise the company's assets and divide the proceeds amongst his constituents. Certainly no part of the fund. That in its entirety is completely alienated. And I can myself think of nothing else. Moreover, my Lords, a reference to the authorities shows, it seems to me, clearly that it is by reference to no such shadowy conceptions that the words of the statute "employed as capital" have to be interpreted. Such things as a purchase of goodwill involving a capital expenditure might come within them (*John Smith & Son v. Moore* (13)), an excess profits duty case; the expense of making a new channel to the sea essential or convenient for approach to a shipyard would be such expenditure, notwithstanding that the channel when constructed would not be the property of the trader and that others jointly with himself would have the right to use it on their lawful occasions (*Ounsworth v. Vickers, Ltd.* (5)); the expenses incurred in the promotion of a private Bill, the capital object of which was ultimately obtained by agreement (*A. G. Moore & Co. v. Hare* (8)). These advantages are real and definite. I can see nothing comparable here. Moreover, in this connection also the observation already made is true that the principle expounded by the lord justice would equally apply to the annual payments to be made by the company and admittedly properly chargeable to revenue.

The result, therefore, is that, in my judgment, there is so far no prohibition in the statute which prevents, for the purposes of income tax, the application to this disbursement of the principles which for any other purpose are alone, as I think, properly applicable to it. And no other statutory prohibition is suggested. WARRINGTON, L.J.'s, ground of decision against the appellants is quite different. He would, I think, as I have done, have answered in the negative the two questions already propounded. It is, at any rate consistent with his judgment that he would have done so. His decision for the Crown is based solely on the ground that in his judgment the payment in question was, in LORD SUMNER's words already quoted, "not a proper debit item to be charged against incomings of the trade when computing the balance of profits of it." The learned lord justice treats these words of LORD SUMNER's as extending to a revenue disbursement wholly and exclusively laid out or expended for the purposes of the trade, which is, nevertheless, still inadmissible as a deduction because it is not a proper debit item to be charged. I agree with the lord justice in thinking that the words do import all that. But what amount of impropriety is to be treated as sufficient to require disallowance as improper of a disbursement which is not the subject of, at all events, express statutory prohibition. It must surely be an expenditure somewhat abnormal or irrational or extravagant. I conceive, for instance, that a payment avowedly made out of realised profits such as is alluded to by LORD DUNEDIN in another portion of his judgment in the *Vallambrosa Case* (1) would clearly be within the words. I doubt, however, whether the learned lord justice would have brought the present disbursement within the same category had there been present to his mind the extraordinary compelling circumstances which, as a matter of business, had led to it. These properly regarded—I do not again detail them—and the payment treated,

A on this hypothesis, as it must be, as a revenue payment, it seems to me impossible to hold that it was in any sense at all either excessive or improper.

I need not expand a judgment already too long by any further discussion of the authorities. I think with the Lord Chancellor that *Hancock's Case* (2) was correctly decided, but I should myself have been prepared to decide this case as I do even if I were of opinion that *Hancock's Case* (2) could not be supported—so much more compelling in a relevant respect are the facts and circumstances here. As to *Rowntree's Case* (9) the disbursement there sought to be justified came, in my judgment, both within the express prohibition of the statute and its implied prohibition as enunciated by LORD SUMNER. On the whole case I am of opinion that the order of the Court of Appeal should be recalled and that of ROWLATT, J., restored.

C Solicitors: *Rawle, Johnstone & Co.*, agents for *Hill, Dickinson & Co.*, Liverpool; *Solicitor of Inland Revenue.*

[Reported by EDWARD J. M. CHAPLIN, ESQ., Barrister-at-Law.]

D

COOPER (INSPECTOR OF TAXES) v. STUBBS

E [COURT OF APPEAL (Sir Ernest Pollock, M.R., Warrington and Atkin, L.JJ.), June 29, 30, 1925]

[Reported [1925] 2 K.B. 753; 94 L.J.K.B. 903; 133 L.T. 582;
41 T.L.R. 614; 69 Sol. Jo. 743]

F *Income Tax—Profits—Trade—Annual profits or gains—Contracts for future delivery—Speculative transactions—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), Sched. D., Case I, Case VI.*

G The taxpayer was a partner in a firm of cotton brokers and cotton merchants. He entered into a number of speculative transactions in cotton for future delivery without any intention of taking up actual cotton or of using the contracts for actual cotton transactions, but with a view to the transactions being closed by the receipt or payment of differences. These transactions were personal to the taxpayer and not part of the partnership business. The number of such transactions for the years in question were: for 1920, thirty-eight; for 1921, fifty-one; and for 1922, sixty-one. Assessments to income tax under the Income Tax Act, 1918, Sched. D, having been made on the taxpayer in respect of the profits arising from these transactions, the taxpayer appealed to the Special Commissioners. The commissioners held that the dealings were not so habitual and systematic as to constitute the carrying on of a trade or business, and that the profits were therefore not assessable under Case I. They held, further, that the transactions were gambling transactions, the profits of which were not assessable under Case VI, and they discharged the assessment.

H **Held:** the profits arising from the transactions were liable to tax under Sched. D., (per SIR ERNEST POLLOCK, M.R.) under Case I of that schedule, and (per WARRINGTON and ATKIN, L.JJ.) because, while the commissioners' finding of fact in relation to Case I could not be disturbed, the profits were "annual profits or gains" not falling under the preceding cases, within Case VI of the schedule.

I Decision of ROWLATT, J., 133 L.T. 582, affirmed.

QUÆRE: whether profits of betting transaction would fall to be charged to income tax.

Notes. The Income Tax Act, 1918, Sched. D, was replaced by the Income Tax Act, 1952, s. 122.

Distinguished: *Jones v. Leeming*, [1930] All E.R. Rep. 584. Followed: *Townsend v. Grundy* (1933), 18 Tax Cas. 140. Considered: *Re Debtor, Ex parte Debtor* (No. 490 of 1935), [1936] Ch. 237; *Lowry v. Field, Lowry v. Williams, Titcomb v. Clancy, De Burgh Whyte v. Clancy*, [1936] 2 All E.R. 735, *Leader v. Counsel, Benson v. Counsel*, [1942] 1 All E.R. 435; *Hesketh Estates, Ltd. v. Craddock* (1942), 25 Tax Cas. 1; *Barry v. Cordy*, [1946] 2 All E.R. 396; *Edwards v. Bairstow*, [1955] 3 All E.R. 48. Referred to: *Re Bankruptcy Notice* (No. 292 of 1928) (1928), 44 T.L.R. 533; *I.R. Comrs. v. Lysaght*, [1928] All E.R. Rep. 575; *Rees Roturbo Development Syndicate v. I.R. Comrs., Same v. Ducker*, [1928] 1 K.B. 506; *Forth Conservancy Board v. I.R. Comrs.*, [1931] All E.R. 679; *I.R. Comrs. v. Fraser* (1942), 24 Tax Cas. 498.

As to undertakings analogous to trade, see 20 HALSBURY'S LAWS (3rd Edn.) 287 et seq., and for cases see 28 DIGEST (Repl.) 20 et seq.

Cases referred to:

- (1) *Thacker v. Hardy* (1878), 4 Q.B.D. 685; 39 L.T. 595; 43 J.P. 221; 27 W.R. 158; sub nom. *Thacker v. Hardy, Same v. Wheatley*, 48 L.J.Q.B. 289, C.A.; 42 Digest 834, 432.
- (2) *Currie v. I.R. Comrs., Durant v. I.R. Comrs.*, [1921] 2 K.B. 332; 90 L.J.K.B. 499; 125 L.T. 33; 37 T.L.R. 371; 12 Tax Cas. 245, C.A.; 28 Digest (Repl.) 424, 1867.

Appeal by the taxpayer from an order of ROWLATT, J., reported 133 L.T. 582, made on a Case stated by the Special Commissioners of Income Tax for the opinion of the King's Bench Division of the High Court of Justice. The following facts are taken from the Case Stated.

At a meeting of the commissioners held on Jan. 18, 1924, for the purpose of hearing appeals, Mr. Henry Stubbs (hereinafter called "the respondent") appealed against assessments to income tax in the sums of £1,982, £4,200 and £4,302 for the years ending April 5, 1921, April 5, 1922, and April 5, 1923 respectively, made on him by the additional commissioners for the Division of Liverpool under the provisions of the Income Tax Acts. The assessments under appeal were made on the respondent under Sched. D of the Income Tax Act, 1918, in respect of profits from private transactions in "cotton futures" entered into by him in the circumstances hereinafter set out.

The respondent was a partner in the firm of Richard Stubbs & Co. which carried on the business of cotton brokers (i.e., selling cotton on commission to spinners and merchants and buying and selling for clients on future delivery contracts) and cotton importers (i.e., acting as merchants on their own account). In all material years up till the death of Richard Stubbs, senior, in 1919, the partners in the firm were Richard Stubbs, senior, the respondent, and Richard Stubbs, junior. After the death of Richard Stubbs, senior, the partners were the respondent and Richard Stubbs, junior. On the death of Richard Stubbs, junior, on Oct. 2, 1922, the business ceased and the respondent retired temporarily from business. He resumed business as a cotton broker after an interval of about six months.

The course of business of cotton merchants in general and of the respondent's firm was as follows: Owing to the uncertainty of the quantity and quality of the cotton crop the price of cotton is subject to violent and rapid fluctuations. In order to protect himself against such fluctuations between the time of buying and selling or vice versa, a merchant usually effects a cover or hedge each time that he makes a purchase or sale of actual cotton. On a purchase by a merchant of actual cotton, for which he has not yet found a purchaser, the merchant effects a hedge by making a contract for the sale of the same quantity of cotton for delivery in some month in the future. Conversely on a sale of actual cotton not yet purchased the merchant effects a hedge by making a contract for the purchase of the same quantity of cotton for delivery in some month in the future. These hedging contracts

A are known as future delivery contracts. The future delivery contract, though differing in some important respects from the contract for the purchase or sale of actual cotton, provides for the delivery of actual cotton, but it is only exceptionally that a future delivery contract is entered into with the intention of taking up actual cotton, and it is almost invariably closed out, as explained below, by entering into another future delivery contract to cancel out with the one originally entered into.

B By means of these hedges at any given time the total amount of cotton bought or contracted to be bought by the merchant (whether as actual cotton or under a future delivery contract) balances his total commitments for sale of cotton (either as actual cotton or under future delivery contracts) and thus the risk of any rise or fall in the general price of cotton between the time of purchase and sale of the actual cotton is eliminated. On the subsequent sale or purchase of the actual cotton the relative

C hedging contract is nearly always closed out by the merchant.

Future delivery contracts are dealt in on the Liverpool, New York, and New Orleans cotton markets. Under the rules of the Liverpool Cotton Association, of which the respondent was a member, there is a provision that where purchases and sales are made between the same members of the association for the same quantity of cotton for delivery in the same month, the contracts are closed out, and the transaction is concluded by the receipt or payment of differences. The vast

D majority of future delivery contracts are closed out in this way in Liverpool, New York, and New Orleans.

Besides the ordinary future delivery contracts, the respondent's firm from time to time entered into the operation known as a straddle, which consists of entering

E into a future delivery purchase contract in Liverpool and a future delivery sale contract for the same amount of cotton in New York or New Orleans, or vice versa. When actual cotton was bought or sold one side of the straddle would be closed, leaving the firm with the other side of the straddle as a hedge against the actual cotton. Straddles were entered into in anticipation of subsequent transactions in actual cotton, and in some cases these straddles would be closed without any actual cotton being bought. While a complete hedge against fluctuations in the price

F of cotton could be effected by the ordinary future delivery contract, the straddle was useful in the import business as a protection against fluctuations in the rate of exchange and in the cost of shipping actual cotton.

The firm varied their hedges frequently in consequence of fluctuations in the market: for instance, they altered a future delivery contract for one month into a

G future delivery contract for another month, or they sold future delivery contracts in Liverpool and bought corresponding future delivery contracts in New York or New Orleans if they thought that the course of business would make the alteration advantageous.

In accordance with a common custom among cotton merchants, the firm employed an arrivals salesman to transact on the Exchange the future delivery contract

H business of the firm. In addition to the future delivery contracts necessary to the firm or their clients for hedging which were bought or sold on the instructions of the firm, the arrivals salesman was allowed to deal on his own initiative in future delivery contracts not required for hedging. This dealing was entered into not so much with the object of profit, as with the object of enabling the arrivals salesman to keep in touch with the future market. All these deals were closed out at the end of the day, so that no great risk of loss was involved. It is the common

I practice of cotton merchants to authorise their arrivals salesman to enter into such deals. The arrivals salesman received 30 per cent. of the profits on these deals, the balance going to the firm who bore any losses. The average number of these transactions was between 1,000 and 1,100 a year. The firm's profits or losses on these transactions were included in the accounts of their business.

The respondent's firm entered into future delivery contracts, including the straddles, as a protection or hedge against their transactions in actual cotton, and the commissioners found that these contracts formed a legitimate and, in fact,

an essential part of their business of cotton merchants, and that the speculative deals entered into by the arrivals salesman were ancillary to this business. A

Future delivery contracts are also entered into by members of the Liverpool Cotton Association and others, not as hedges to transactions in actual cotton, but purely as speculative transactions, with a view to making a profit on the rise or fall, as the case may be, in the market price of these contracts. Future delivery contracts entered into with this object are always closed out by entering into a similar contra B contract as described above, differences being received or paid. The profit or loss on the transaction is then ascertained. This form of transaction constituted, in the opinion of the commissioners, nothing more or less than gambling in differences.

During the material years the respondent entered into speculative transactions on his own behalf in future delivery contracts without any intention of taking up actual cotton, or of using the contracts as hedges for actual cotton transactions. C His partners had knowledge of, but no interest in, these transactions. Nearly all the transactions were done through the respondent's own firm, which, except in the last year, charged him brokerage on buying or selling the contracts. These transactions differed from the speculative transactions entered into by the arrivals salesman for the firm, as the respondent's transactions were generally open for more or less lengthy periods, whilst the firm's speculative transactions were invariably D closed on the same day.

The numbers of separate transactions entered into by the respondent for the three years ended Sept. 30, 1922, were as follows :

For the year to Sept. 30, 1920	38
" " " " 1921	51
" " " " 1922	61

It was contended on behalf of the respondent (i) That his dealings in future delivery contracts did not constitute the carrying on of a trade and the profits arising from these dealings were not assessable to income tax under Case I of Sched. D; and (ii) that these dealings were gambling transactions and as such were not assessable to income tax under Case VI of Sched. D. E

It was contended on behalf of the Crown (*inter alia*): (i) That the profits arising to the respondent from his dealings in future delivery contracts were annual profits or gains arising or accruing to him from a trade, profession, or vocation carried on by him and were chargeable to tax under Sched. D 1 (a) (ii) of the Income Tax Act, 1918; (ii) alternatively that the profits arising to the respondent from his dealings aforesaid were other annual profits or gains not charged under Scheds. A, B, C, or E, and not specially exempted from tax and were chargeable to tax under Sched. D 1 (b) of the said Act; (iii) that the said assessments were correct and should be confirmed. F

The commissioners held that the respondent did not deal in future delivery contracts so habitually and systematically as to constitute these dealings the carrying on of a trade, and that the profits arising therefrom were accordingly not assessable under Case I of Sched. D. They further held that the dealings were gambling transactions and that the profits arising therefrom were not annual profits assessable under Case VI of Sched. D. They accordingly discharged the assessments under appeal. The appellants, immediately on the determination of the appeal, declared his dissatisfaction therewith as being erroneous in point of law and in due course required the commissioners to state a case for the opinion of the court. The question of law for the opinion of the court was whether the profits arising to the respondent from his dealings in future delivery contracts were profits assessable to income tax under Sched. D. ROWLATT, J., held that the profits were so assessable. G

From that decision the respondent appealed. H

Sir Leslie Scott, K.C., A. M. Latter, K.C., and H. P. Glover for the taxpayer. *The Attorney-General (Sir Douglas Hogg, K.C.) and Reginald P. Hills* for the Crown. I

A SIR ERNEST POLLOCK, M.R.—This is an appeal by Mr. Henry Stubbs, the taxpayer, against a judgment of ROWLATT, J., who held that he was liable in respect of three assessments to income tax made on him for the years 1921, 1922, and 1923, on sums respectively in these years, amounting to £1,982, £4,200, and £4,302. It appears that the taxpayer is a cotton broker, and during the years in question he was a partner in a firm which was carried on by him in company with members of his family. There were three partners in the first year, but Mr. Richard Stubbs, senior, died, and then the business was carried on by Mr. Richard Stubbs, junior, and the taxpayer until some time in October, 1922, when on the death of Mr. Richard Stubbs, junior, the business came to an end. Although the last and third year ending on April 5, 1923, is a broken year, because the partnership ceased at some time somewhere near October, 1922, still the partnership business was going on throughout those three years; the taxpayer apparently after some date about October, 1922, ceased business for about six months and then resumed it, beginning again in a period which, I suppose, is outside the period of assessment and was something like April, 1923, which would be a period falling for assessment to tax 1923–24.

D During those three years in which the assessments are made on him we have been told, in the Case which has been stated by the commissioners, the mode in which the business was carried on of the partnership on the Liverpool Cotton Exchange, but no question arises as to the assessment of the firm on the trade carried on by the firm. We have been told by the commissioners how business is carried on by cotton brokers in order to make a contradistinction between the business of the firm and the business in respect of which it is now said the taxpayer is liable to pay income tax. It appears that the taxpayer, in addition to the business which was carried on by the firm of which he was a partner, had individual and separate private transactions. Those transactions were in respect of future delivery contracts which he entered into, and during the material years we are told that the taxpayer entered into these future delivery contracts without any intention of taking up actual cotton or of using the contracts as hedges for actual transactions in order to safeguard his position whatever the price of cotton might be in the future; but they were entered into as speculative transactions, and they are termed by the commissioners to be in their opinion nothing more or less than gambling in differences.

G It is important to observe what were those transactions. They were contracts for future delivery. They were transactions of which his partners had knowledge, but no interest. Nearly all the transactions were done through the taxpayer's own firm, and that firm, except in the last year, charged him brokerage on buying or selling contracts. It appears that on the cotton exchange it is a common practice to make future delivery contracts sometimes for the purpose of testing the market, sometimes for the purpose of hedging against actual business done; but in the contracts which are the subject-matter of this assessment the taxpayer's transactions were done a little differently from those sort of transactions, because he kept these contracts open generally for more or less lengthy periods, whereas the firm's speculative or testing transactions, if you will, were invariably closed on the same day. Now the number of these transactions was considerable. In the several years in respect of which assessments are made there were thirty-eight in the first year, fifty-one in the second, and sixty-one in the third. The profits which were derived from them were also considerable, for the figures which I have already recounted indicate that in the first year something like a profit of £2,000 was made, whereas in the subsequent years a profit of over £4,000 was made. Inasmuch as that class of business showed a personal profit or gain to the taxpayer, it would appear *prima facie* that the commissioners would be right in assessing him in respect of those profits and gains so made, but it is claimed that, in fact, they were mere gambling transactions, that the taxpayer was not a person who carried on the business of gambling in the sense that a bookmaker carries on the business of

gambling and is assessable to income tax, and that they were a number of transactions carried on for the purposes of obtaining fortuitous gains if possible, but that they must be treated and considered as quite apart from anything like his business or any business in which he was engaged, and so are not part of his profits or gains for the several years of assessment.

Those are the facts. The difficulty that we have in this case is as to what has been found by the commissioners who have stated the Case which went before ROWLATT, J. The commissioners came to the conclusion that the dealings which are in question were gambling transactions, and that the profits arising from them were not annual profits assessable to income tax. It is perfectly clear that the commissioners are the masters of the facts. It is for them to find the facts. The court—whether the court of the first instance, before whom the Case Stated comes or the Court of Appeal—are bound by the facts which have been found by the commissioners, and if they have rightly directed themselves in law their decision cannot be interfered with. ROWLATT, J., came to the conclusion, as I understand his judgment, that the commissioners had not rightly directed themselves in law, and he held that the taxpayer was liable to be assessed in respect of these profits and gains. It has been forcibly and strenuously argued that the commissioners, having come to that conclusion, came to that conclusion on a question of fact, and that ROWLATT, J., was not entitled to set aside their decision, and equally that this court is disabled from so doing; but after very careful consideration I have come to the conclusion that the basis on which the commissioners have placed their decision is not sound in law, and, therefore, is capable of being reviewed, and must be reviewed by the court before whom the Special Case comes. The commissioners' finding of fact is contained in para. 11 of their Case, and it is as follows:

"We held that the respondent did not deal in future delivery contracts so habitually and systematically as to constitute these dealings the carrying on of a trade, and that the profits arising therefrom were accordingly not assessable under Case I of Sched. D."

Case I is the ordinary case under which annual profits or gains are subjected to income tax. The commissioners proceed:

"We further held that the dealings were gambling transactions, and that the profits arising therefrom were not annual profits assessable under Case VI of Sched. D."

Case VI is what has been termed before now the sweeping-up clause, which refers to annual profits or gains not comprised in or embraced under any of the previous cases.

I do not think that the commissioners intend that their two findings are to be antithetic, or that we are to take it that they have found that it is not the carrying on of a trade because it was gambling; but I think one must take these two findings separately. Even so, however, it appears to me that in their first finding the commissioners have not rightly directed themselves in law. It does not appear to me that a habit or system were characteristics necessary to finding a trade in this case. The taxpayer carried on a trade or business. He was a cotton broker, and he had the means and the knowledge of engaging in certain transactions on the cotton exchange, according to his own business ability and experience, and he entered into a number of transactions which are real transactions. It is clear from *Thacker v. Hardy* (1) and other cases, that these future delivery contracts which are made on the cotton exchange or the contracts which are made on the Stock Exchange in London are real contracts in the sense that the party with whom they are made is a real party, and if the dealer or broker making them should desire at any moment to have the contract implemented he can do so. There is no distinction between contracts which are made for the purpose of speculative dealings and contracts which are made for the real purpose of securing the sale

A or purchase of stock or cotton. The taxpayer himself carried on the trade of a cotton broker, and he has entered into a number of these real transactions. He was charged by his firm brokerage on them. It may be that they were speculative in the sense that they were for his own purposes a speculation. It may be that in a loose and colloquial sense of the word they were gambling, one may say that the taxpayer was gambling in making these contracts, but the purpose for which B he made them does not alter the character or nature of the contracts that he made: they were real transactions, although the purpose of them may have been, in respect of all or some of them, to fulfil his desire to gamble in speculative transactions. Testing these transactions from that point of view, it does not appear that the habit or system affords a true test of whether or not they are such dealings as C indicate a carrying on of a trade. Apparently the commissioners treat them so, judged apart from his other transactions, that they were not so many or so habitually and systematically entered into as per se if taken alone prove that this business, if one treats it as an independent business, was such a business as indicated a separate trade on his part; but the basis of their finding is that there was no habit or system in them. On the other hand, it is clear that these adventures were D entered into by him successively in a number of years in large amounts. They amounted to a number of transactions, and in all it is important to remember that they were real contracts which no one except the taxpayer himself could treat or deal with otherwise than as real contracts. If he was minded at the end of his own time to close them, well and good; if, on the other hand, he was minded at any time to take delivery or to give delivery he could have done so. It appears to E me, therefore, that the test that has been applied in this first limb of para. 11 of the Case is not a true test in law, and, therefore, that the commissioners have misdirected themselves in holding that this business so carried on by the taxpayer did not constitute the carrying on of a trade. If it were the carrying on of a trade then he is liable under Case I of Sched. D, and when one is dealing with the question whether a man is carrying on a trade it is important to notice the alternative words F which are to be found from s. 237 of the Act of 1918 that trade "means manufacture, adventure or concern in the nature of trade." The taxpayer was a cotton broker; he carried on these dealings in the course of his business for his own purposes, but they were real contracts made for his own purposes, and because he was a cotton broker. It appears that he engaged in trade in the sense in which that is to be understood, and therefore these profits fall to be assessed under Case I of Sched. D.

G The commissioners say: "We further hold that the dealings were gambling transactions." I am not quite certain what they mean by that, and it is not necessary to decide. It appears to me rather that they have used the word "gambling" in some colloquial sense, and to say it may be they were fortuitous profits obtained by these independent transactions—independent therefore from H the necessary transactions of the business—and it may be that the second part of the finding is coloured by this, that there was not a system or habit in the gambling transactions so as to bring the taxpayer within the decisions under which a bookmaker is held to be carrying on a trade, and they also held that did not fall under Case VI of Sched. D. Case VI sweeps in all other profits and gains which are not included in the other Cases under Sched. D. But to my mind, when I rightly tested the contracts which were made by the taxpayer over these years in successive series of contracts constitute a business, and it is not a right test in law to try and apply the touchstone of habit or system as to whether or not a trade was carried on.

For these reasons it appears to me that the commissioners misdirected themselves on the point that they had to consider, and that ROWLATT, J., was right in the conclusion to which he came, viz., that the commissioners, having misdirected themselves, the case falls within Case I of Sched. D, and the taxpayer is liable to be assessed.

I would like to add that the claim was not only placed under Sched. D 1 (a) (ii) of the Act of 1918, but also under Sched. D 1 (b) which is the forerunner of Case VI, and it may well be that these profits or gains could be dealt with and be charged under Case VI. The simpler form, however, appeals to me, and I think the Crown is right in saying that the subject is entitled to know what is the specific case under which he is charged, and if they fall under Case I, it is unnecessary and. I think, wrong to put them under the lesser case rather than under the more specific Case I.

For these reasons, while I desire to adhere most closely to the rule that the court ought not to interfere with the commissioners on a finding of fact, I have come to the conclusion that the commissioners have misdirected themselves, and that on the facts as they have found them the true conclusion in law is that the dealings of the taxpayer are such as to constitute a trade, adventure or concern in the nature of trade and to bring these dealings, entered into it may be for his own purpose and in his own mind as speculative transactions, within the subject of a charge under Case I, and therefore that the assessments have been rightly made, and the appeal must be dismissed because ROWLATT, J., came to the conclusion that the taxpayer was liable.

The appeal, therefore, must be dismissed with costs.

WARRINGTON, L.J.—I am of the same opinion, though not for quite the same reasons.

The question submitted to the court by the Case stated by the commissioners is thus expressed :

"The question of law for the opinion of the court is whether the profits arising to the respondent from his dealings in future delivery contracts are profits assessable to income tax, under Sched. D."

The charging section under Sched. D so far as material, is in these terms :

"Tax under this Schedule shall be charged in respect of (a) the annual profits or gains arising or accruing to any person residing in the United Kingdom from any trade, profession, employment or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere."

"Trade" is defined as including "every trade, manufacture, adventure or concern in the nature of trade." Then sub-s. (b) says :

"All interest of money, annuities, and other annual profits or gains not charged under Schedules. A, B, C, or E and not specially exempted from tax."

The question is whether the profits mentioned in the Case come under either of those two charging provisions.

The taxpayer is a member of a firm of cotton brokers or merchants carrying on an extensive business in Liverpool. In that business they have made considerable profits on which income tax has been assessed and paid, and as to which no question arises. But the taxpayer, in common with many other persons engaged in the business in which he was engaged, on his own account and independently of his firm, had dealings in future delivery contracts which, at all events so far as he was concerned, were simply speculations in future differences. The question is whether the profits arising from these dealings of the respondent are assessable to tax. The dealings in question, and the taxpayer's part in them, are thus described in paras. 6 and 7 of the Case :

"(6) Future delivery contracts are also entered into by members of the Liverpool Cotton Association and others, not as hedges to transactions in actual cotton, but purely as speculative transactions, with a view to making a profit on the rise or fall, as the case may be, in the market price of these contracts. Future delivery contracts entered into with this object are always closed out by entering into a similar contra contract as described in para. 4 (d),

differences being received or paid. The profit or loss on the transaction is then ascertained. This form of transaction constitutes, in our opinion, nothing more or less than gambling in differences. (7) During the material years the respondent entered into speculative transactions on his own behalf in future delivery contracts without any intention of taking up actual cotton, or of using the contracts as hedges for actual cotton transactions. His partners had knowledge of, but no interest in, these transactions. Nearly all the transactions were done through the respondent's own firm, which, except in the last year, charged him brokerage on buying or selling the contracts. These transactions differed from the speculative transactions entered into by the arrivals salesman for the firm, as the respondent's transactions were generally open for more or less lengthy periods, whilst the firm's speculative transactions were invariably closed on the same day."

Then in the next paragraph of the Case the commissioners state the amount and number of these particular dealings on the part of the respondent, and we have the details more or less complete of those transactions for six years. It is enough to say that they were considerable in amount; that in some years the profits were large and in some years there were losses; but the profits were of a considerable amount and they were regular in every year of the six years to which the documents before us relate. It is to be borne in mind also that these dealings were dealings by a man who was skilled in the knowledge of the market—experienced in the particular trade, and using, no doubt, his skill and knowledge and experience with a view to determining whether a particular speculation was likely to turn out profitable, or the reverse. Moreover, there was nothing whatever in the facts found by the commissioners to show that as regards the other parties to the contracts they were anything but ordinary commercial contracts.

Two questions on these facts arose for decision by the commissioners. They are thus stated in their statement of the contentions raised on behalf of the respondent. Those contentions are thus stated by the commissioners:

"(i) That his dealings in future delivery contracts did not constitute the carrying on of a trade and the profits arising from these dealings were not assessable to income tax under Case I of Sched. D; and (ii) that these dealings were gambling transactions, and as such were not assessable to income tax under Case VI of Sched. D."

The findings of the commissioners were thus expressed:

"We held that the respondent did not deal in future delivery contracts so habitually and systematically as to constitute these dealings the carrying on of a trade, and that the profits arising therefrom were accordingly not assessable under Case I of Sched. D. We further held that the dealings were gambling transactions, and that the profits arising therefrom were not annual profits assessable under Case VI of Sched. D."

Those two findings are, in my opinion, quite separate and independent findings. The first is on what is really a question of fact, that the dealings in question did not constitute the carrying on of a trade. The second one is not so much a finding of fact as a decision of law turning on their independent findings of fact that the dealings were gambling transactions, and, therefore, in their opinion not assessable. ROWLATT, J., before whom the Case came, came to the conclusion that the commissioners were not justified in finding that the dealings of the respondent did not amount to a trade, and on that ground, without dealing with the further question as to Case VI of Sched. D, allowed the appeal from the commissioners.

The commissioners are the judges of fact, and this court, and every Court of Appeal from the commissioners which has jurisdiction in questions of law only, is very much tempted, when it feels that it cannot agree with the commissioners in the finding of fact, to find some reason in law by which that finding can be reversed.

In my opinion the Court of Appeal ought to be careful not to yield to that temptation, except in very clear cases, where either the commissioners have come to their conclusion without evidence which should support it, that is to say, have come to a conclusion which on the evidence no reasonable person could arrive at, or have misdirected themselves in point of law. I do not say for a moment that ROWLATT, J., was wrong in the conclusion at which he arrived, if he had been the judge of facts. On the contrary, although it is purely irrelevant as to what my own opinion is, I should have been inclined to agree with him; but he is not the judge of the facts, nor am I; and I am not prepared to go so far as to say that there was no evidence on which a tribunal such as the commissioners could reasonably have come to the conclusion at which they arrived. It must be borne in mind that the commissioners are men of business who are for that reason selected to deal with these questions relating to income tax and, as a tribunal, particularly well qualified to decide such questions of facts, and ought not, nor ought the King's Bench, lightly to set aside their findings on such subjects. I do not think that this is a case in which it can be said that there was no evidence on which the commissioners could arrive at that conclusion. I think, therefore, if it be material, that the findings of the commissioners with regard to Case I is one which ought to be accepted. But then arises the second question, and on that I think the conclusion ought to be that the profits arising from the dealings in question are annual profits or gains under para. 1 (b) of Sched. D, and would be classified under Case VI, which is this :

"Tax in respect of any annual profits or gains not falling under any of the foregoing cases and not charged by virtue of any other schedule."

The commissioners have come to the opposite conclusion, and I think they have done so on the ground, and on the ground alone, that these dealings were gambling transactions. In a sense they were gambling transactions, but in my view that circumstance, on the facts of the present case, at any rate, is irrelevant. They were gambling transactions so far as the taxpayer is concerned, because, as the commissioners have said, he entered into them without any intention of taking up actual cotton, or using the contracts as hedges for actual cotton transactions; but they were not wagering contracts, for the reason to which I have already alluded, that, so far as the other parties to the contracts were concerned, there was no evidence whatever that from their point of view they were not real contracts for the purchase or sale of cotton, and the question then is simply whether these dealings and transactions were entered into with a view to producing, in the result, income or revenue for the person who entered into them. If they are, then, in my opinion, they are annual gains and profits within the meaning of para. 1 (b) of Sched. D. On the findings of the commissioners themselves they were contracts entered into with a view to making a profit on a rise or fall, as the case may be, in the market price of the contracts. They extended over a considerable number of years. There were large numbers of transactions in each of those years, from which in some years the taxpayer derived considerable revenue; and, for myself, I cannot see what there is to exclude that revenue from the tax which is charged under Sched. D. It seems to me, therefore, that, in this case, whatever may be the case under different facts, at all events the profits made by these transactions are annual profits or gains, and must be assessable to income tax.

I desire to reserve for consideration when, if at all it ever comes before this court, the question of whether or not betting transactions which produce a revenue to the person who engages in them may not result in profits which are assessable to tax. That question, when it arises, will have to be decided on the facts of the particular case, but I think, so far as I am concerned, I should like to reserve that for consideration when the question arises. So far as this case is concerned, I think, for the reasons I have given, that the question stated by the Case ought to be answered by saying that the profits arising to the taxpayer from his dealings in

future delivery contracts are profits assessable to income tax under Sched. D para. 1 (b), and that they should be classified under Case VI.

The result is that the appeal must be dismissed, and dismissed with costs.

ATKIN, L.J.—I agree that the appeal should be dismissed with costs, and I agree it should be so for the reasons given by my brother WARRINGTON in the judgment he has just delivered, and as, therefore, I differ from the view expressed by the learned judge below, and as I find I also differ from the reasons given by the Master of the Rolls, I think it would be desirable that I should put into words the ground for the decision I have come to.

The case, it has been said, has been coloured throughout by the view taken by the commissioners that these dealings in future contracts in cotton were gambling transactions, and as I shall point out, I think that that is true as to one of the findings of the commissioners, although I do not think that it did in fact colour their view as to their findings that the taxpayer was not carrying on a trade. As I take it, the view that the commissioners formed was that the transactions were in truth gambling transactions, but whether they were gambling transactions or whether they were real transactions, one could not say that he was carrying on a trade or a vocation unless one proved a certain amount of habitual or systematic operations either in gambling or real transactions, and that the transactions in question did not partake of that nature, and, therefore, whatever they were, could not properly be described as a trade. But in order to dispose of the point about gambling, it appears to me it is sufficient to say that on the evidence in this case it seems reasonably clear that all the contracts that were entered into by the taxpayer, whether he entered into them through his firm or through other brokers, were in fact real transactions. They gave rise to real contractual rights: they were contracts for the purchase of cotton in the future or for the sale of cotton in the future which could be enforced, and so far as the other party to the contract, who might be a dealer in this country, or a dealer in Liverpool, was concerned, he would not know whether the contract which he had entered into would be eventually closed by a contract or whether it would not; for these reasons it seems to me to be plain law that transactions such as the taxpayer entered into were real transactions and were not mere bets. I think that the principle in respect of wagering is this, that it takes two parties to make a bet, and, where one party alone is being considered, you do not sufficiently consider all the elements of the case; you have to consider the other party, and unless the other party is betting there cannot be a bet. Therefore these transactions were, as I have said, real and enforceable contracts in which the differences could have been sued for on one side or the other. It is true that they were speculations, and I think myself that that may be one of the material facts to be considered in respect of the question as to whether or not this gentleman was engaged in a trade, because for my part I see some difficulty in trying to form an opinion of a trade which consists solely of entering into transactions which would merely result in differences, and when the supposed trader never intends to get possession of any commodity, so that he may in fact have the disposal of it by himself or to any third party. Although I do not say it is impossible to have a trade or an adventure in the nature of trade of that kind, I think it is a fact to be taken into account.

Now the first question is whether or not the taxpayer on the footing that he was entering into real transactions for the purchase and sale of a commodity, namely, cotton, was or was not engaged in a trade or vocation, and it seems to me that that must be in the circumstances a question of fact. Unfortunately or fortunately—I do not propose to express any moral judgment about it—one knows that a great number of people whose ordinary life does not lie in the way of commerce do engage in speculations of this kind in commodities, and when a commodity is found which offers tempting fluctuations of price, so that there are good chances of a profit with equally good chances of a loss, one does find individuals from time to time

coming into the market and making purely speculative purchases; and one knows that there have been, at any rate in one's own experience, three commodities in which that kind of speculation has been quite common at different times. One is this commodity, cotton; another has been in the past, and may be in the present, copper; and another has been in the past, and no doubt is in the present, rubber. There are, no doubt, laymen who do indulge in speculative purchases in these commodities, and they repeat those speculative purchases more than once, being probably buoyed up by their initial successes. Nevertheless, it seems to me to be still a question of fact whether the professional man, to quote an extreme case, who makes purchases of that kind, and makes more than one of them in a year, can be said to be engaged in a trade or a vocation in the course of these purchases. I should think it would probably be a question of degree. Now if it is a question of degree it must be a question of fact, and there is no tribunal more competent to deal with that question of fact than the special commissioners; but whether they are competent or not, the point is that the legislature has confided to them, and to them alone, the duty of determining that question of fact, and the courts of law have no jurisdiction to deal with the matter at all. Their jurisdiction is confined to the question of law. Of course, in all these matters there may be a state of facts which can only lead to one conclusion of law, but when it is, as I have said, a question of degree, it seems to me it must necessarily be a question of fact, and I would just like to cite two passages from *Currie v. I.R. Comrs.* (2), which was cited to the learned judge below and which was cited before us. There the question was whether a gentleman who made it his business to advise as to income tax recovery carried on a business as an Income Taxpayers' Appeal Agency or was not within the exception of the Excess Profits Duty Act carrying on a profession. The special commissioners found he was not carrying on a profession. That is not quite this case; it is rather a stronger case giving rise to possibilities of law, because there is no doubt there are certain elements of a profession which would perhaps be decided as part of their condition as a matter of law. But LORD STERNDALE says it may depend on circumstances:

"There may be circumstances in which nobody could arrive at any other conclusion than that what the man was doing was carrying on a profession. . . . That reduces it to a question of law. On the other hand, there may be facts on which the direction would have to be given the other way. But between those two extremes there is a very large tract of country in which the matter becomes a question of degree; and where that is the case the question is undoubtedly, in my opinion, one of fact; and if the commissioners come to a conclusion of fact without having applied any wrong principle, then their decision is final upon the matter."

There is one further passage in SCRUTTON, L.J.'s judgment in which he discusses the question whether it was a profession or not and says this man carried on a profession, and he cited the case of the photographer and whether he was an artist or not. He says:

"Art is a matter of degree, and to determine whether an artist is a professional man again depends, in my view, on the degree of artistic work that he is doing. All these cases which involve questions of degree seem to me to be eminently questions of fact, which the legislature has thought fit to entrust to the commissioners, who have, at any rate from their very varied experience, at least as much knowledge if not considerably more, of the various modes of carrying on trade than any judge on the Bench."

Now, in this case the commissioners without, so far as I can see, applying any wrong principle, considering the question of habitual and systematic operations, which I do not think can be disputed are relevant to the question of whether a man is carrying on a trade or not so come to the conclusion that the operations in this case are not so habitual and not so systematic as that the person can be properly

A said to be carrying on a trade in those particular transactions. As it appears to me that is an inference of fact pure and simple, I think that their finding must stand, and therefore it is immaterial what view I, or any judge on the Bench takes of the matter. I am not saying that I agree with them, because I think it is irrelevant. It may very well be, if one were left to oneself, one would find on these transactions that there was a vocation of speculating in these futures, or
B it may be a trade, but I have not formed a definite view at all about it, and I think that the commissioners' view on this matter must stand as a finding of fact.

That does not dispose of the matter, because the other question arises under para. 1 (b) of Sched. D which has been referred to, which says:

C "Tax under this schedule shall be charged in respect of (a) the annual profits or gains arising or accruing (i) to any person residing in the United Kingdom from any kind of property whatever, whether situated in the United Kingdom or elsewhere; and (ii) to any person residing in the United Kingdom from any trade, profession, employment or vocation, whether the same be carried on in the United Kingdom or elsewhere; and (iii) to any person, whether a British subject or not, although not resident in the United Kingdom, from any property whatever in the United Kingdom, or from any trade, profession,
D employment, or vocation exercised within the United Kingdom; and (b) all interest of money, annuities, and other annual profits or gains not charged under Scheds. A, B, C, or E and not specially exempted from tax."

E Those profits and gains must include, therefore, and I think are put in to include, profits and gains which are not derived from any kind of property whatever and are not derived from any trade, profession, employment, or vocation exercised within the United Kingdom. They are something wider and larger than that. Now, what is there to prevent these from being annual profits or gains? The commissioners in this respect seem to me to have gone wrong in law. They have held that these transactions were gambling transactions by which they must have meant what I have been discussing already, that they were wagering transactions, and on that they are wrong. It appears to me that their view must be taken to be that they would be annual profits or gains if it were not that they were wagering transactions, and therefore in their view not chargeable; but whether that is so or not it appears to me that in this case there can be only one inference which can be drawn in respect of them, and that is that they were annual profits or gains.
F For that purpose no doubt one has to consider not merely whether they are profits or gains. For my part I can see no reason to doubt that they are profits or gains. I do not think that that can be disputed. They arise from having made a real contract which gives one rights, and then, taking advantage of that contract, selling the commodity, or the right which one has acquired by contract to have delivery of that commodity, either to the person who has made the contract or to somebody else; it does not matter, one makes a gain. There is no doubt that speculations in
G commodities of this kind are just like speculations in shares. They may under some circumstances be such as one could not reasonably call it an annual profit or gain. It may very well be that transactions may be so carried out as to be nothing but in the nature of temporary investments repeated several times over, and sometimes in the nature of capital accretions which could not be brought within the title or meaning of "annual profit or gain" which, to my mind, must mean something which is of the nature of revenue or income, although I also think that it is plain that it need not be repeated every year so as to be a continuous source of income. It may come in only as income or revenue in the one year, but still it has to be in the nature of an annual profit or gain. In this case one has to look at the facts and when one looks at the facts one finds that the taxpayer has been making these profits or gains, not investing his capital, because he never invested any money in the matter; he made an executory contract and closed it by another executory contract. He invested no money as such in the matter at all. But
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we have figures in the schedule to the Case which show that the taxpayer has been entering into these transactions every year from 1915—1915, 1916, 1917, 1918, 1919, 1920, 1921, and 1922; this is, for eight years running he has been in receipt of money from these transactions; I was going to say in receipt of revenue, but that perhaps begs the question, but it appears to me to be really expressive of the true facts. He has had an annual revenue from these transactions throughout the whole of this period.

Under these circumstances it appears to me that there can be but one conclusion from the facts. I think the commissioners meant to find it apart from the question of gambling, but whether they did or not, it seems to me the true view is that here there were annual profits or gains and that these ought to be brought into charge. Therefore, I think that the assessment is properly made.

Like WARRINGTON, L.J., I wish to reserve the question what the position would be if these transactions had turned out to be bets, but if the bets had proved to be as continuous as these particular bets were, I express no opinion about it, I suppose the matter may some day arise in the courts.

For these reasons I think the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: Pritchard, Englefield & Co., for Forwood, Williams & Co., Liverpool; Solicitor of Inland Revenue.

[Reported by J. S. SCRIMGEOUR, Esq., and GEOFFREY P. LANGWORTHY, Esq., Barristers-at-Law.]

THE BATAVIER III

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hill, J.), October 20, 1925]

[Reported 134 L.T. 155; 42 T.L.R. 8; 70 Sol. Jo. 75;
16 Asp. M.L.C. 563]

Ship—Damage—"Fault" of vessel—No collision—Moorings parted by wash from vessel passing at excessive speed—Inefficient moorings—Both vessels to blame—Maritime Conventions Act, 1911 (1 & 2 Geo. 5, c. 57), s. 1 (1).

The Maritime Conventions Act, 1911, s. 1 (1), is not confined to cases where vessels have been in collision, but applies also to cases where the vessels in fault have not been in actual contact, as when one vessel suffers damage as the result of the excessive wash caused by another.

Notes. As to damage or loss by collision, etc., between ships see 30 HALSBURY'S LAWS (2nd Edn.) 836 et seq., and for cases see 41 DIGEST 784 et seq. For the Maritime Conventions Act, 1911 s. 1, see 23 HALSBURY'S STATUTES (2nd Edn.) 830.

Case referred to:

(1) *The Cairnbahn*, [1914] P. 25; 83 L.J.P. 11; 110 L.T. 230; 30 T.L.R. 82; 12 Asp. M.L.C. 455, C.A.; 41 Digest 799, 6597.

Action in which the plaintiffs, owners of the steamer *Bromsgrove*, claimed damages for injuries received by the vessel while she was lying moored at buoys in the Thames when the defendants' steamship, *Batavier III*, passed, bound up-river. The facts are set out in the judgment of HILL, J.

The Maritime Conventions Act, 1911, s. 1 (1), provides:

"Where, by fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on

board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault. . . ."

Hayward, for the plaintiffs.

Digby, for the defendants.

HILL, J.—In this case I have to consider altogether three ships: the *Bromsgrove* and the *Batavier III*, which are the two ships actually involved in the litigation, and a third ship, the *Camberwell*. The *Bromsgrove* is a steamship of 1,445 tons gross, 240 ft. long and 36 ft. beam. She was laden and drawing 17 ft. The *Camberwell* was somewhat larger and was also laden. These two ships were lying at the Deptford Buoys on the south side of the river at the time the *Batavier III* passed up. The *Camberwell* parted some of her ropes; the *Bromsgrove* parted all her head ropes, her head swung in, she stranded forward and had to take tug assistance. She complains that the breaking adrift was caused by the excessive speed of the *Batavier III* causing an excessive wash. The defendants deny excessive speed and say that no properly moored vessel could have been affected by any wash made by the *Batavier III*. The *Batavier III* is a steel screw steamship of 1,333 tons gross, 261 ft. long; she had a part general cargo on board and was drawing 12 ft. 6 in. and 14 ft. 7 in. She was in charge of a pilot; she was bound up for her berth at Custom House Quay. The time was 11.45 on Jan. 4, which was a Sunday. There was some dispute as to the wind, but at the place in question it was not of importance. The tide was ebb. High water at London Bridge was 9.30 and about an hour earlier at Gravesend. At the time and place in question it was running about three knots, and there was a set of about one and a half points towards the south shore. The *Bromsgrove* moored on the morning of Jan 3. Forward she had out two $2\frac{1}{2}$ in. wires and one $3\frac{1}{4}$ in. wire. Aft she had two $2\frac{1}{2}$ in. wires and one $3\frac{1}{4}$ in. wire. She was moored head up. Ahead she was moored close up to the upper buoy, which was a little abaft and on the port side of her stem. The two $2\frac{1}{2}$ in. wires lead from the foc'sle head and were straight up and down; the $3\frac{1}{4}$ in. lead from the well deck on the port side. There were similar moorings aft. The length of the tier was 315 ft. On the morning of Jan. 4 the *Camberwell* moored outside the *Bromsgrove* to the same buoys. She moored head down. Her moorings were similar to those of the *Bromsgrove*, except that aft (that is, to the upper buoy) she had in addition one 7 in. manilla. She had two small wires as breast ropes to the *Bromsgrove*. The upper buoy continued to be on the port side of the *Bromsgrove's* stern. It was not between the two ships. On the ebb the *Bromsgrove* bore part of the weight of the *Camberwell*. I find as a fact that, while the *Batavier III* was passing, some of the ropes of both the *Bromsgrove* and the *Camberwell* parted. On the *Camberwell* one of the $2\frac{1}{2}$ in. wires forward (that is, to the lower buoy) parted first, and then one of the $2\frac{1}{2}$ in. wires and the 7 in. manilla aft. On the *Bromsgrove* both the $2\frac{1}{2}$ in. wires forward (that is, to the upper buoy) parted and then the $3\frac{1}{4}$ in. forward, and immediately afterwards the two $2\frac{1}{2}$ in. aft. This left her free forward and she swung into the south shore and grounded forward.

The questions in controversy, on the one side and the other, are (i) the moorings of the *Bromsgrove*, and (ii) the speed of the *Batavier III*. No complaint is made of the number or quality of the moorings. The complaint is that they were so placed in relation to the upper buoy that they were inefficient, and still more inefficient after the *Camberwell* made fast and added some of her weight to the *Bromsgrove* on the ebb tide. I am advised that they were inefficient. The two $2\frac{1}{2}$ in. wires leading straight up and down were of no real value; it was the $3\frac{1}{4}$ in. from the well deck which alone had to take the strain. It is true that the *Bromsgrove* had been to the same moorings from the morning of Jan. 3, and on that day (Saturday) many ships must have passed up and down. But on Jan. 4 the *Camberwell* was a new factor, and I do not know what traffic there was between the mooring of the *Camberwell* and the passing of the *Batavier III*. On the other hand, I find

in fact that the *Batavier III* passed at a speed which I am advised was excessive and did cause a wash which was excessive, and that such wash was the immediate cause of the parting of the moorings. The plaintiffs' evidence puts the speed at ten to twelve knots; the defendants admit seven. But it is clear that it was more than seven. According to times proved by the plaintiffs, the *Batavier III* took two hours thirty-four minutes from Gravesend Railway Pier to Tower Bridge; according to times given in evidence by the defendants two hours forty-five minutes. The distance is, I am advised, twenty-two sea miles. This gives an average of eight knots without any allowance for tide, and the tide was at the end three knots and substantial all the way. The pilot said that for the first hour he was going full speed, which was twelve knots, with perhaps occasional easings. Assume it was twelve knots (at sea it was eleven and a half), and set off the easings against the tide, the *Batavier III* covered twelve sea miles in the first hour; that leaves ten miles in the remaining one hour forty-five minutes or one hour thirty-four minutes, with a three knot ebb tide. Take it at one hour forty-five minutes and you get an average of $5.7 + 3$ of tide = 8.7 , and there were times during that hour and three-quarters when the *Batavier III* slowed down. I incline to think that, in fact, the full speed was eleven and a half and not twelve knots, and that the plaintiffs' times should be accepted rather than the defendants, but it is sufficient to condemn the defendants to take their full speed and their times. There was every reason why the *Batavier III* should be pressing. She only reached her berth just in time, and, on arrival, had only 14.6 on the berth. As the log records, she berthed "on the mud." I cannot accept the defendants' evidence of speed in passing the *Bromsgrove*. I find that the speed was at least eight and a half knots, and probably substantially more. I am advised that, in the locality in question, that was excessive, and such as might endanger the safety of ships lying at the buoys. It is significant that the first mooring to part was a mooring of the *Camberwell* to the lower buoy, as to which no complaint can be made. Whether if the *Bromsgrove* had been efficiently moored the wash was such that she would have broken adrift is a matter of speculation. It cannot be said with certainty that the moorings would or would not have withstood the strain. What I can and do say is that the speed was improper, the wash excessive, and the moorings, in point of position, inefficient. And, as it actually happened, two causes contributed to the breaking adrift, the wash and the position of the moorings, and, in my opinion, the proper finding of fact is that the damage to the *Bromsgrove* and the loss to her owners were caused by the fault of those in charge of the *Batavier III* and of the *Bromsgrove*. If so, the Maritime Conventions Act, 1911, s. 1, applies. The section, as pointed out by LORD PARKER and WARRINGTON, J., in *The Cairnbahn* (1), is not confined to cases of collision.

I hold both to blame. Should I apportion the loss otherwise than equally? I think the excessive speed in a river like the Thames is the graver fault—two-fifths to the *Bromsgrove* and three-fifths to the *Batavier III*.

Solicitors: Botterell & Roche, for Botterell, Roche & Temperley, Newcastle-on-Tyne; R. H. Behrend & Co.

[Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.]

ZACHARIASSEN v. LONDON GENERAL INSURANCE CO., LTD.

[KING'S BENCH DIVISION (Roche, J.), April 24, 1925]

[Reported 133 L.T. 604; 41 T.L.R. 463; 69 Sol. Jo. 542;

16 Asp. M.L.C. 524]

Judgment—Judgment debt—Interest—Marine insurance policies underwritten—Representative action—Liability of underwriters to pay interest—Judgments Act, 1838 (1 & 2 Vict., c. 110), s. 17.

The plaintiff insured his vessel under certain policies of insurance. The defendants, together with other underwriters, had underwritten one of the policies. The vessel was lost and the plaintiff brought an action against underwriters other than the defendants, it being agreed that the action should be a representative action and that the defendants would be bound by its result. The plaintiff recovered judgment in the action, and the defendants in the action appealed to the Court of Appeal who affirmed the judgment in favour of the plaintiff. The money due under the judgment was deposited, the interest received being less than 4 per cent. There was an interval of nearly half a year between the date of the judgment and the decision of the Court of Appeal. The plaintiff claimed interest at the rate of 4 per cent. under the Judgments Act, 1838, s. 17, and the defendants contended that all that they were liable for was their proportionate share of the judgment debt together with the addition of the interest on the money deposited.

Held: the defendants were bound by the result of the representative action and were liable to pay interest on the judgment debt just as if that judgment had been against themselves, and, therefore, were liable to pay the interest under the Judgments Act, 1838, s. 17.

Notes. As to the effect of judgments and orders see 22 HALSBURY'S LAWS (3rd Edn.) 780 et seq., and for cases see 30 DIGEST (Repl.) 202 et seq. For the Judgments Act, 1838, s. 17, see 13 HALSBURY'S STATUTES (2nd Edn.) 369.

Action in the Commercial List.

The plaintiff, who was the assured under certain policies of marine insurance on his sailing vessel the *Albyn*, claimed to recover from the defendants, who, with other underwriters, had underwritten one of the policies, their proportionate part of the interest due under s. 17 of the Judgments Act, 1838, on a judgment which had been recovered against the underwriters in a representative action, the defendants having agreed to be bound by such judgment. The facts are set out in the judgment.

Malcolm Hilbery for the plaintiff.

W. L. McNair for the defendants.

ROCHE, J.—This action raises a very short and comparatively simple point. In 1923, the plaintiff, being insured for £35,000 under policies of insurance on a sailing vessel called the *Albyn* on a voyage from Newport Mews to Gothenburg, brought an action on one or more of those policies; and he brought it against underwriters other than the present defendants. The present defendants had underwritten one of the policies on the *Albyn*. The defendants in the action so brought in 1923 I will describe as the underwriters in the test action. The plaintiff ultimately recovered judgment in the test action, but before he had recovered judgment in the test action the present defendants had, with others, entered into an agreement with the plaintiff, agreeing, as it is compendiously stated in ordinary phraseology, to be bound by the result of the test action. The present proceedings raise a question with regard to the meaning and construction of that agreement.

The agreement was dated Jan. 5, 1922. At that date the claim under the insurance policies was being put forward to the several underwriters. The plaintiff recovered judgment on July 24, 1923, against the underwriters in the test action. Under the Judgments Act, 1838, s. 17, the amount adjudged, being the judgment debt, carried

interest at the rate of 4 per cent. per annum from the time of entering up the judgment, or from the time of the commencement of the Act in cases of judgments then entered up and not carrying interest, until the same should be satisfied, and such interest might be levied under a writ of execution on such judgment. The case was carried to the Court of Appeal by the defendants in the test action. The Court of Appeal was of the same opinion as ROWLATT, J., and, accordingly, the plaintiff held his judgment. Owing to the intervention of the Long Vacation and the ordinary period of proceeding to the Court of Appeal, there was a period of nearly half a year between the dates of the judgment of the court of first instance and the judgment of the Court of Appeal. Underwriters in the test action, of course, had to pay interest at 4 per cent. for the period that elapsed between the judgment of ROWLATT, J., and the date at which, after the judgment of the Court of Appeal, they satisfied that judgment. There was, during that period, a form of stay in being which was accompanied by a deposit in joint names in accordance with a very common practice. The interest earned on that deposit was less than the statutory interest of 4 per cent.; and the difference between the statutory interest and the deposit interest had to be paid by the defendants in the test action out of their own pockets.

The question which arises in this action is, whether the present defendants, having agreed to be bound, in a certain manner, were under liability to pay merely a proportion of the sum originally adjudged by the judge of first instance as due under the policy for the amount of the loss and interest from the time when the loss became payable until the judgment, or whether they were liable in addition to pay their proportion and equivalent amount in respect of the statutory interest which accrued after the date of the judgment of the court of first instance until the date of payment? The plaintiff claims that he is entitled to recover from the present defendants, as well as from the defendants in the test action, interest in that sense from the date of the judgment of the court of first instance. The present defendants, on the other hand, contend that all that they are liable for is their own equivalent sum due from them in respect of the sum adjudged in the test action, with the addition of deposit interest which was earned under the deposit arrangement which existed.

The matter turns principally on the construction of cl. 1 of the agreement of Jan. 5, 1922, which provides as follows:

"That in consideration of the matters which are mentioned we ["we" includes the present defendants] will be bound by the result of the said action against the said defendants ["the said defendants" are the defendants in the test action] or any substituted defendants as hereinafter mentioned, so far as such result relates to the policies subscribed by us respectively in the same way and upon the same terms as we respectively should have been bound by such result if such separate actions had been commenced against us and such several actions had been upon one application consolidated by the usual consolidation order."

Now the plaintiff says that that clause provides quite simply that the present defendants will be bound by the result of the action, and that the result of the action was that a judgment was obtained; and that, by the operation of the statute, that judgment carried certain interest, and the certain interest became added to and included in the judgment; and that, accordingly, the present defendants are bound to pay just as if that judgment was against themselves, not because they are parties to the judgment or the judgment is against them, but because of their agreement to be bound by the result of the action. That contention is, I think, a sound contention; but it was put that, whatever might have been the effect of cl. 1, if it stopped after the words "hereinafter mentioned," or stopped at the words "so far as such result relates to the policies subscribed by us respectively," and if the end of that clause is looked at, and also if cl. 3 of the same agreement is looked at, it is plain that the parties did not contemplate any such result.

A Counsel for the present defendants, whose very ingenious and elaborate argument I appreciated in every respect, put the matter in this way. He said that, by cl. 3 of the said agreement, there was a provision for payment of certain interest by a defendant in the position of the present defendants, and that interest meant interest given or adjudged to be due or proper to be paid in an action on the policy by virtue of the Civil Procedure Act, 1833, and referred to interest such as was, in fact, adjudged by ROWLATT, J., as payable under this policy; and it did not refer to, B and was not capable of being held to refer to, interest payable under the Judgments Act, 1838. He further said that it was manifest by reason of divers provisions in cl. 3, including in particular a clause stipulating the payment by a defendant in the position of the present defendants within fourteen days after taxation, that it was not intended that there should be an obligation to satisfy such a defendant's liability within fourteen days or to pay interest unless the sum was paid in satisfaction. I have only to say this, that there is nothing at all to show that the word "interest" which is followed by the words "or otherwise," has not the widest possible significance in cl. 3; and there is no reason why it should not refer to interest due under the statute or recovered under the Judgment Act, 1838, quite as much as interest due under the statute or recovered under the Civil Procedure Act, 1838. In the second place, the other provisions of the clause do not seem to me to be at all sufficient to remove from the present defendants the obligations which fell on them, in my judgment, by virtue of cl. 1. There is nothing, I think, making it at all plain that it is not intended that a defendant in the position of the present defendants should not be liable to exactly the same measure of liability as the defendants in the test action. Indeed, the whole scheme, both of cl. 3 and of the agreement taken as a whole, seems to me to be directed to, and to accomplish the object of, putting all the defendants, whether in the test action or in the stayed actions (those defendants on what may be called the waiting list), in exactly the same position.

The other argument on which I should say something is one which goes back to cl. 1 of the agreement, and depends on a consideration of the terms of the usual consolidation order, which consolidation order is referred to in cl. 1 of the agreement. The usual consolidation order appears to be the order set out in CHITTY'S FORMS (15th Edn.), at p. 265, that is to say, in the course of Part 5, chapter 9, of that work. I do not intend to devote any length of time to the interpretation of that order, but I observe that the penultimate paragraph on p. 266 of CHITTY'S FORMS, on which counsel for the present defendants' argument mainly depends, seems to me to be wrongly stopped in the edition to which I am referring; and I think that the comma which appears after the word "default" should really appear, if a comma should appear at all, after the word "amount," and if the fourth and fifth paragraphs on that page are read together, interpreting them as I interpret them, I see nothing to preclude the present defendants from a liability to pay pursuant to such an order just this amount of interest which it is now claimed that they should pay. Accordingly, a reference to the order in question seems to me to do nothing in its turn to take away from the present defendants the liability which I think was imposed on them by the agreement in this case.

For these reasons, the defence, in my judgment, fails, and there will be judgment for the plaintiff for £49, together with the costs of this action; and, this being a test action involving other sums, and an action which, by its very nature is very proper to be considered in the High Court and not in the county court, I certify that the costs shall be on the High Court scale.

Judgment for the plaintiff.

Solicitors : *Henry Hilbery & Son ; Ballantyne, Clifford & Co.*

[*Reported by T. W. MORGAN, Esq., Barrister-at-Law.*]

Re TAYLOR. HOCKLEY v. O'NEAL

[CHANCERY DIVISION (Eve, J.), May 21, 22, 1925]

[Reported [1925] Ch. 739; 95 L.J.Ch. 43; 133 L.T. 602]

Will—"Children"—Inclusion of illegitimate child—Testatrix not aware of illegitimacy.

The testatrix by her will made in 1917 gave her residuary estate to her trustees upon trust for sale and conversion, and after payment of debts, &c., directed them to hold one-fourteenth part thereof to pay or apply the income thereof at their absolute discretion for the benefit of the widow of H. and their issue and others as therein mentioned and subject thereto for the children of H. at twenty-one or marriage and if no such children then over. H. predeceased the testatrix in 1916 leaving one child born before his marriage to his widow. The testatrix, who died in 1918, knew of his death, but not of the illegitimacy of the child. A summons was taken out by the surviving trustee against the beneficiaries and sole next of kin asking whether the income of the share was applicable for the benefit of the child and if it took any share of the capital on the decease of the widow of H.,

Held: the words "child" or "children" in a will *prima facie* mean legitimate issue unless there is clear evidence in the will of an intention to establish another application of the words; there was no such evidence in the present case to merit the conclusion that the testatrix was putting an artificial meaning on the word "children" since she believed the child to be legitimate, and so did not know that there could be no legitimate child to take; and, therefore, the infant was not entitled to any part of the share of income for her maintenance nor any interest in the capital.

Notes. As to circumstances in which illegitimate children take see 34 HALSBURY'S LAWS (2nd Edn.) p. 49 et seq., 292 et seq., and for cases see 44 DIGEST 807 et seq.

Cases referred to:

- (1) *Re Herbert's Trusts* (1860), 1 John. & H. 121; 29 L.J.Ch. 870; 2 L.T. 743; 6 Jur. N.S. 1027; 8 W.R. 660; 70 E.R. 687; 44 Digest 818; 6693.
- (2) *Holt v. Sindrey* (1868), L.R. 7 Eq. 170; 38 L.J.Ch. 126; 19 L.T. 669; 33 J.P. 260; 17 W.R. 249; 44 Digest 813, 6655.
- (3) *Lord Woodhouselee v. Dalrymple* (1817), 2 Mer. 419; 35 E.R. 1000; 44 Digest 811, 6638.
- (4) *Hill v. Crook* (1873), L.R. 6 H.L. 265; 42 L.J.Ch. 702; 22 W.R. 137, H.L.; 44 Digest 808, 6614.
- (5) *Dorin v. Dorin* (1875), L.R. 7 H.L. 568; 45 L.J.Ch. 652; 33 L.T. 281; 39 J.P. 790; 23 W.R. 570, H.L.; 44 Digest 809, 6616.
- (6) *Re Pearce, Alliance Assurance Co., Ltd. v. Francis*, [1914] 1 Ch. 254; 83 L.J.Ch. 266; 110 L.T. 168; 58 Sol. Jo. 197, C.A.; 44 Digest 810, 6627.

Adjourned Summons.

By her will made in 1917 the testatrix, after making certain specific bequests, gave her residuary estate to her trustees therein named upon trust for sale and conversion, and, after payment thereof of her debts and funeral and testamentary expenses, directed then to invest the net residue thereof, and as to one-fourteenth part thereof to apply the income at their absolute discretion for the benefit of the widow of H. and their issue and others as therein mentioned and subject thereto for the children of H. to males at twenty-one and females at that age or marriage, and if there were no such children with a gift over. H. predeceased the testatrix leaving one child by his widow born before their marriage. The testatrix was aware of his death but not of the illegitimacy. She died in 1918. This summons was taken out by the surviving trustee asking whether the income of the one-fourteenth

A share was applicable to the benefit of the child and whether it was entitled to any share of the capital thereof on the death of the mother.

Chetwynd Leech for the plaintiff.

Horace Freeman, for the first defendant, a beneficiary and sole next of kin, referred to *Re Herbert's Trusts* (1).

Timins, for other beneficiaries.

W. G. Hart, for the infant defendant, referred to *Holt v. Sindrey* (2), *Lord Woodhouselee v. Dalrymple* (3), *Hill v. Crook* (4).

EYE, J., stated the facts and continued: The letter of Dec. 6, 1916, written by the testatrix herself proves her knowledge of the fact that H. had died leaving a widow and one child. It turns out that the child was born before the marriage of the parents and is therefore illegitimate. Two questions are raised by the summons, one whether in the exercise of their discretion the trustees can apply any part of the income of the one-fourteenth share for the maintenance of this child and the other whether on the death of the widow this child can take anything under the trust in remainder for "the child or children of H. who being a son shall attain twenty-one or being a daughter shall attain that age or marry." The answers depend upon the further question whether the will of the testatrix ought to be construed as including this illegitimate child. *Primâ facie* the words child or children mean legitimate child or children, and no other meaning can be given to them unless there is clear evidence in the will itself of an intention to establish another application of the words. There are, as I read the authorities, two classes of cases only in which the *primâ facie* meaning can properly be departed from. They are stated by LORD CAIRNS in *Hill v. Crook* (4), where he says (L.R. 6 H.L. at p. 282):

"One class of cases is where it is impossible from the circumstances of the parties that any legitimate children could take under the bequest. A familiar example of that might be given in this way. Suppose there is a bequest 'to the children of my daughter Jane,' Jane being dead and having left illegitimate children but having left no legitimate children. Then, inasmuch as the testator must be taken to have known the state of his family and must be taken to have intended to benefit some children of his daughter Jane, and inasmuch as she had no children who could be benefitted except illegitimate children, rather than that the bequest should fail altogether the courts will hold that those illegitimate children are intended and they will take under the term children. The other class of case is of this kind. Where there is upon the face of the will itself and upon a just and proper construction and interpretation of the words used in it an expression of the intention of the testator to use the term 'children' not merely according to its *primâ facie* meaning of legitimate children but according to a meaning which will apply to and which will include illegitimate children."

That the only exceptions are the two classes mentioned is clear from the judgment in *Dorin v. Dorin* (5) and *Re Pearce, Alliance Assurance Co., Ltd. v. Francis* (6). The second exception has no application on the present occasion, but counsel for the infant defendant has argued on behalf of the child that the circumstances bring the case sufficiently within the former class to make her an object of the testator's bounty. I cannot see my way to accede to his argument. The first exception is only made in cases where the testator must be taken to have known that the circumstances were such that there could be no legitimate child to take. What does this involve? Is it enough that the testatrix knew that H. was dead and had left a widow and one child? I think not. LORD CAIRNS, it is true, states the exception as applying where it is impossible in the circumstances of the parties that any legitimate child can take, but he takes into account, as the circumstances of the parties, the testator's knowledge of the state of his family, and, therefore, it is that I have expressed the view that the exception is only made in cases where the

testator must be taken to have known that there was an illegitimate child and that there will be no legitimate one to take. LORD PHILLIMORE, in his judgment in *Re Pearce* (6), expresses a doubt whether the rule applies when the testator has an incorrect belief as to the state of the family; by which, I take it, he means to express a doubt whether the exception applies to cases where the testator knows there can be no more children but is ignorant of the fact that those in existence are all illegitimate. In the present case the testatrix certainly had no knowledge of the illegitimacy; she knew that the father was dead and had left this child surviving, and in the circumstances she must, I think, be regarded as having used the words child or children—it would almost seem from the language as though she were providing for the contingency of a possible posthumous child—in their primary meaning and in circumstances which preclude the application of the exception relied upon. As was said by SARGANT, J., in his judgment in *Re Pearce* (6):

“The fact that a testator did not know of the illegitimacy prevents the conclusion that the testator is putting any artificial meaning on the word children.”

Counsel relied on *Holt v. Sindrey* (2) and *Lord Woodhouselee v. Dalrymple* (3), but I do not think they are applicable to the circumstances with which I have to deal here. Each was a case

“in which on the face of the will and from the expressions used you could gather that the testator intended to describe and denote the existing illegitimate children as children. They were sufficiently described in the will as legatees.”

I am again quoting from SARGANT, J.’s, judgment. Much as I regret the conclusion at which I have arrived I am constrained to hold that the infant is not entitled to have any part of the income of this one-fourteenth share applied for her maintenance nor has she any interest in the capital.

Solicitors: *M. Ll. Evans; Hicks, Arnold & Bender; W. H. Elwes.*

[Reported by A. W. CHASTER, Esq., Barrister-at-Law.]

Re DRAKE. DRAKE v. WILSON AND OTHERS

[COURT OF APPEAL (Sir Ernest Pollock, M.R., Warrington and Sargant, L.JJ.), May 7, 8, 26, 1925]

[Reported [1926] Ch. 559; 95 L.J.Ch. 386; 134 L.T. 362]

Estate Duty—Incidence—Property passing on death—Property charged with portion for younger son—Assignment by younger son of a fixed sum out of portion—Liability of assignee for rateable part of estate duty—Finance Act, 1894 (57 & 58 Vict., c. 30), s. 14 (1).

In 1910, by a disentailing deed, the D. estate was limited to trustees, subject to the life interest of W., the tenant for life, for a term of a thousand years for raising portions for the younger children of W., and subject thereto to H. in fee. By deed poll, W. in 1910 charged the D. estate in favour of his second son, E., in the sum of £15,000. In 1915 H. died, and in 1919 W., the life tenant, died. Doubts arose as between E. and P. as to the effect of H.’s will, and in 1921 a settlement of the D. estate was executed to which both E. and P. were parties. By cl. 29 of the settlement of 1921 it was provided that as between the parties and their sequels the trustees of the term of one thousand years should hold the said term to raise £10,000 (part of the £15,000 charged by the deed poll of 1910) and pay that sum to P. “as if such sum of £10,000 . . .

had immediately after the execution of the said deed poll been assigned by [E.] to [P.] absolutely and free from incumbrances as a first charge on the said sum of £15,000." A question arose as to the incidence as between E. and P. of estate duty exigible on W.'s death in respect of the D. estate.

Held: no part of the estate duty ought to be apportioned to the £10,000 payable to P., because the sum of £15,000 was itself made subject to duty only by the Finance Act, 1894, s. 14 (1), as a sum charged on property passing on the death of W., and no provision was made for recoupment from another (in this case, P.) who took from and under the person (E.) who was entitled to the sum charged on the property.

Berry v. Gaukroger (1), [1903] 2 Ch. 116, distinguished.

Notes. *Re Fuchs, Westminster Bank, Ltd. v. Chew*, [1944] 1 All E.R. 338; *Re Keele Estates, Aveling v. Sneyd*, [1952] 2 All E.R. 164.

As to apportionment of estate duty, see 15 HALSBURY'S LAWS (3rd Edn.) 136 et seq., and for cases see 21 Digest 38 et seq.

Cases referred to :

- (1) *Berry v. Gaukroger*, [1903] 2 Ch. 116; 72 L.J.Ch. 435; 88 L.T. 521; 51 W.R. 449; 19 T.L.R. 445; 47 Sol. Jo. 490, C.A.; 21 Digest 27, 155.
- (2) *Re Langham and Langham Hotel Co., Ltd.* (1890), 60 L.J.Ch. 110; 39 W.R. 156, C.A.; 21 Digest 113, 853.
- (3) *Re Lord Fitzhardinge, Lord Fitzhardinge v. Jenkinson* (1899), 80 L.T. 376; 15 T.L.R. 225; 43 Sol. Jo. 296, C.A.; 21 Digest 41, 262.
- (4) *Re Charlesworth's Trusts, Tew v. Briggs*, [1912] 1 Ch. 319; 81 L.J.Ch. 267; 105 L.T. 817; 56 Sol. Jo. 108; 21 Digest 28, 161.
- (5) *Re Rayer, Rayer v. Rayer*, [1903] 1 Ch. 685; 72 L.J.Ch. 230; 87 L.T. 712; 51 W.R. 538; 21 Digest 41, 264.

Appeal by the defendant, Guy Percival Tyrwhitt Drake, from part of an order made by EVE, J., on Feb. 17, 1925, whereby he made a declaration that on the true construction of cl. 29 in an indenture of settlement, dated March 21, 1921, a sum of £10,000 therein referred to was payable to the defendant, Guy Percival Tyrwhitt Drake, subject to its rateable proportion of the death duties payable on the death of William Wykeham Tyrwhitt Drake, the late tenant for life of the estates on which the same was charged.

The facts are shortly stated in the headnote and will be found fully set out in the judgment of SIR ERNEST POLLOCK, M.R.

Dighton Pollock for the trustees.

Rooke Reeve, K.C., and *Howard Wright* for the defendant, Guy Percival Tyrwhitt Drake.

J. M. Gover, K.C., and *Israel* for the remaining parties.

Cur. adv. vult.

May 26. SIR ERNEST POLLOCK, M.R.—This is an appeal from part of an order made by EVE, J., on Feb. 17, 1925, on an originating summons, whereby he made a declaration that on the true construction of cl. 29 in an indenture of settlement dated March 21, 1921, a sum of £10,000 therein referred to, is payable to the defendant Guy Percival Tyrwhitt Drake subject to its rateable proportion of the death duties payable on the death of William Wykeham Tyrwhitt Drake, the late tenant for life of the estates, "on which the same is charged." These last six words indicate the nature of the problem which has to be solved. The relevant facts may be shortly stated.

Mr. William Tyrwhitt Drake above mentioned was in 1910 tenant for life of large estates situate in several counties of England, and in particular of an important estate in Kent, hereinafter referred to as the Deptford estates. On April 28, 1910, Herbert, the eldest son of William Tyrwhitt Drake, as tenant in tail in remainder expectant on the death of his father, executed with his father's consent a disentailing

deed whereby the Deptford estate, subject to the life interest of William, were limited to the use of trustees for a term of a thousand years for raising portions for the younger children of William Tyrwhitt Drake, and subject thereto to Herbert in fee. On April 29, 1910, William Tyrwhitt Drake by deed poll under the trust of the term of a thousand years charged the Deptford estate in favour of his second son in the sum of £15,000. On April 15, 1915, the son Herbert, who was serving in the Great War, made his will and died. Doubts arose as to the effect of this will under which in certain events the estates were to pass to his uncle, Percival Tyrwhitt Drake; and so on Feb. 15, 1917, Edward Tyrwhitt Drake and his uncle Percival Tyrwhitt Drake came to an agreement whereby the uncle released all his interest to his nephew, Edward, while in return the nephew was to pay his uncle a sum of £10,000. On July 29, 1919, William Tyrwhitt Drake died, and on March 21, 1921, a settlement of the family estates was executed by Edward Tyrwhitt Drake, to which Percival Tyrwhitt Drake was a party, and provision was made for the payment of the £10,000 to the uncle. This was effected by cl. 29 of the settlement, which is as follows :

(a) As between the parties to these presents and their respective sequels in right the trustees or trustee for the time being of the said term of a thousand years created by the said indenture of disentail shall hold and be deemed to hold the same term upon trust by means of the powers vested in them by the same indenture to raise the sum of £10,000, part of a sum of £15,000 and the interest thereon appointed in favour of the said Edward Thomas Tyrwhitt Drake by a deed of poll dated April 29, 1910, under the hand and seal of the said William Wykeham Tyrwhitt Drake and to pay the said sum of £10,000 and interest to the said Percy Tyrwhitt Drake and in such manner in all respects as if such sum of £10,000 and interest part of the said larger sum of £15,000 and interest had immediately after the execution of the said deed poll been assigned by the said Edward Thomas Tyrwhitt Drake to the said Percy Tyrwhitt Drake absolutely and free from incumbrances as a first charge on the said sum of £15,000.

Under the Finance Act, 1894, death duties have to be paid on the property passing within the meaning of ss. 1 and 2 of that Act on the death of the father, William Tyrwhitt Drake; duties, the scale of which is enhanced by the aggregation of the estates; and the question to be decided is whether the £10,000 thus given to his uncle by Edward has to bear its portion of such duties.

By s. 1 of the Finance Act, 1894, estate duty is granted on all property which passes on the death of a person dying after the commencement of the Act; and by s. 9 a rateable part of the duty in proportion to the value of any property which does not pass to the executor as such, is made a first charge on the property in respect of which duty is leviable. By s. 8 (4), in the case of property passing, and where the executor is not accountable for the duty in respect of such property, every person to whom any property so passes for any beneficial interest in possession, and "every person in whom the same is vested in possession by alienation or other derivative title, shall be accountable for the duty" on the property, and is to deliver an account in respect of it.

It is claimed that s. 14 (1) apportions the duty and provides for its recovery in the present case from Percival Tyrwhitt Drake. Section 14 (1) is as follows :

In the case of property which does not pass to the executor as such, an amount equal to the proper rateable part of the estate duty may be recovered by the person who being authorised or required to pay the estate duty in respect of any property has paid such duty, from the person entitled to any sum charged on such property (whether as capital or as an annuity or otherwise) under a disposition not containing any express provision to the contrary.

One point may be cleared away at once. Clause 29 does not contain any "express provision to the contrary": see *Re Langham and Langham Hotel Co., Ltd.* (2)—

A where it is decided that the above words do not include a future charge which is imposed from an extrinsic source such as arises from the duty that on a subsequent event becomes payable. An express provision to the contrary is such as arises from the words "free from all taxes and deductions" as in *Re Lord Fitzhardinge, Lord Fitzhardinge v. Jenkinson* (3). But how far does s. 14 (1) carry the right to recover the duty paid where, as here, the property does not pass to the executor as such? B It enables recovery to be made from a person entitled to the sum charged under the disposition creating the charge. That is here Mr. Edward Tyrwhitt Drake, but does it give a right to recoupment? It is to be observed that the words that are found in s. 8 (4) "in whom the same is vested in possession by alienation or other derivative title" are not repeated in s. 4 (1).

C As VAUGHAN WILLIAMS, L.J., said in *Berry v. Gaukroger* (1) ([1903] 2 Ch. at p. 131):

"the whole scheme of the Finance Act so far as it relates to property passing on the death of the deceased, in respect of which his executor is not responsible for estate duty, is to tax the property itself so passing, and to make the estate duty a first charge"

D which must be paid ultimately by the persons beneficially entitled in proportion to their shares. But it appears to me that Mr. Percival Tyrwhitt Drake does not hold, nor did he become entitled to a charge on the property within s. 14 (1). That section provides for recoupment as between two persons—the one who has paid the duty, the other, a person who is entitled to a sum charged on that property in respect of which the first has paid the duty. It does not provide for recoupment from E another who takes from and under the person who is entitled to the sum charged on the property. In the present case the uncle became entitled to the sum of £10,000 by assignment from his nephew. True the source from which the sum assigned to him is indicated, but that does not bring Mr. Percival Tyrwhitt Drake within the ambit of s. 14 (1) as a person entitled to a sum charged on the property under a disposition creating the charge. His title is derived from a contract and F a deed independent of that under which his nephew became entitled to the sum charged by Mr. William Tyrwhitt Drake in the nephew's favour on the property.

The point that we have to decide falls under s. 14 (1) only. It is a question of recoupment as between Edward and Percival Tyrwhitt Drake. We have not to decide whether the defendant, Percival Tyrwhitt Drake falls within the terms of s. 8 (4), above quoted, and can be held to have taken property which passed on the G death of William Tyrwhitt Drake for a beneficial interest in possession, or is a person in whom an interest in the property so passing is vested in possession by alienation or other derivative title. There are difficulties in so holding, but it is not necessary upon the present appeal to come to a decision. As to the cases cited, I will refer to *Berry v. Gaukroger* (1) again, only to point out that it does not afford authority in the present case. The legacies in that case were held to be property H which passed to the legatees for a beneficial interest in possession on the death, and to come within s. 8 (4) and not within s. 14 (1).

The appeal must be allowed and a declaration made that the sum of £10,000 is payable to the defendant, Guy Percival Tyrwhitt Drake, as a clear sum free from any part of the duties payable in respect of the said portions.

I **WARRINGTON, L.J.**—This is an appeal from so much of an order of EVE, J., dated Feb. 17, 1925, as declared that a sum of £10,000 part of a sum of £15,000 therein and hereinafter mentioned was subject to a rateable proportion of the estate duty payable on the death of the tenant for life of the estates on which the said £15,000 was charged.

At the date of the deed poll of April 29, 1910, hereinafter mentioned, an estate in the County of Kent which is conveniently described as the Deptford estate, stood limited by virtue of certain family settlements and of a disentailing assurance dated April 25, 1910, and in the events which had happened to the use of William

Wykeham Tyrwhitt Drake for life with remainder to trustees for a term of a thousand years on certain trusts for raising portions for the younger children of W. W. Tyrwhitt Drake with remainder to Herbert William Tyrwhitt Drake in fee.

By a revocable deed poll dated April 29, 1910, W. W. Tyrwhitt Drake charged the Deptford estate with a sum of £15,000 in favour of his younger son Edward Tyrwhitt Drake. Such sum became payable on the death of W. W. Tyrwhitt Drake without having revoked the appointment made by the deed poll. Herbert William Tyrwhitt Drake died on March 11, 1915, having made a will dated the same day whereby he devised all his real and personal estate to Edward Tyrwhitt Drake should he survive the war, but if not then to his uncle Guy Percival Tyrwhitt Drake in the will named Percy Tyrwhitt Drake. The will contained a definition of the termination of the war. Questions having arisen between Edward Tyrwhitt Drake and Percy Tyrwhitt Drake as to the construction and effect of the said will a family arrangement was arrived at and was embodied in an agreement dated Feb. 19, 1917. W. W. Tyrwhitt Drake, the tenant for life, died on July 29, 1919, and the Deptford estate together with other large estates of which he was also tenant for life became subject to estate duty as property passing on his death.

We are only concerned with the Deptford estate, the existence of the others is only material because under the principle of aggregation the other estates that passed on the death of William increases the rate of estate duty chargeable on the Deptford estate.

By a deed dated March 21, 1921, executed in pursuance of the family arrangement above mentioned the Deptford estate and certain other of the family estates were settled to the use of Edward Tyrwhitt Drake for life with remainders over and are in strict settlement. By cl. 29 the following provision was made in favour of Percy Tyrwhitt Drake. [His Lordship read cl. 29 already set out in the judgment of the Master of the Rolls, and continued:] The question is whether the £10,000 should be paid to Percy Tyrwhitt Drake free of the estate duty chargeable on the Deptford estate, or whether it should bear a rateable proportion thereof. EVE, J., adopted the latter view and Percy appeals.

We have unfortunately no record of the judgment of EVE, J., and do not know what are the reasons for his decision, but the question raised in argument were two: First, whether under the Finance Act, 1894, a proportionate part of the estate duty was by statute made payable out of the £10,000; and secondly, if not, whether according to the true construction of the deed of March 21, 1921, the £10,000 was or was not to be paid free of duty. In support of the declaration made by EVE, J., counsel relied chiefly on the provisions of the statute, and in my opinion rightly. for I think it is plain on the construction of the deed that the £10,000 was intended to be paid as a net sum out of the £15,000, and not to bear any part of the charges statutory or otherwise which might be cast on the £15,000. The real question is whether a rateable proportion of the estate duty is by the statute cast on the £10,000. The answer to this question turns upon the true construction and effect of s. 14 (1) of the Finance Act, 1894.

In my opinion this section, which no doubt provides for the recovery from the person entitled to the £15,000 chargeable on the Deptford estate of a rateable part of the duty in respect of that estate, does not affect the rights of the persons entitled amongst themselves to various parts of such sum, but leaves these rights to be determined by their contractual arrangements. I can state my view I think very shortly: The "property" referred to in the section is that property which either passes on the death (s. 1), or is to be deemed to be included in such property (s. 2). The sum of £15,000 is not property which passes on the death of W. W. Tyrwhitt Drake, nor is it within the description in s. 2 of property which is to be deemed to so pass. The sum of £15,000 is made subject to duty not as property passing on the death, but as a sum charged on such property, in this case the Deptford estate. The £10,000, if it can be treated as a charge at all, is a charge on the £15,000. Section 14 (1) makes no provision for the case in which several

A persons are entitled to various interests in the "sum charged," and I think the necessary inference is that the question whether and if the "rateable part" recovered under the section is indeed a part to be apportioned amongst such persons, is left to the contractual arrangements affecting their various interests. This view of the limited effect of the section is strongly confirmed by the fact that the "disposition" referred to in the closing words is that under which the sum is charged
B in the instrument creating the charge. Effect may be given to a provision in such an instrument expressly excluding the effect of the section, but if the section extends to the persons entitled amongst themselves to various interests in the charge, no exception at all is made to the generality of the first part of the section, a result which seems to me an impossible one to attribute to the legislature.

C Great reliance was placed by the respondent on *Berry v. Gaukroger* (1), but in that case the Court of Appeal held that the legacies there in question were themselves part of the property passing on the death of the legatee, viz., the fund arising from the sale of realty and not merely charged on such property, and that the several persons to whom the property so passed for a beneficial interest were, therefore, directly accountable under s. 8 (4) of the Act. As the legatees were not persons "entitled to a charge" within the words of s. 14 that section had no
D application.

E In the present case it is not necessary to decide whether or not Edward Tyrwhitt Drake, as owner of the charge, is, under s. 8 (4) accountable to the revenue for any and what part of the estate duty, or whether under that section Percy Tyrwhitt Drake can be regarded as a person in whom an interest in property passing on the death is vested by alienation or other derivative title, and is, therefore, also
F accountable for duty. For myself I am not satisfied that either of these questions should be answered in the affirmative, but as I am of opinion that if they were both so answered the conclusion I have come to on s. 14 would still be the same, I express no definite opinion and leave the matter open.

I am of opinion, therefore, that the right of Edward and Percy respectively in reference to the division of the £15,000 ought to be determined entirely by the contract, and that under this I have already said Percy is entitled to be paid the £10,000 without deduction for estate duty.

The appeal ought to be allowed and the declaration varied according to the view above expressed.

G **SARGANT, L.J.**—This appeal raises the question whether on the true construction of cl. 29 of the indenture of settlement of March 21, 1921, mentioned in the heading of the originating summons and herein called the 1921 settlement, the sum of £10,000, part of a portions sum of £15,000 raisable under a term of a thousand years out of certain hereditaments (hereinafter referred to as the Deptford estate), is payable to the defendant, Percival Tyrwhitt Drake (hereinafter called Percy Drake),
H subject to or free from a portion of the estate duty payable on the said portions sum of £15,000 on the occasion of the previous death, on July 29, 1919, of the late tenant for life, William Wykeham Tyrwhitt Drake (hereinafter called William Drake). The limitations of the Deptford estate, apart from the 1921 settlement and the contents of that settlement and particularly of cl. 29 thereof, have been sufficiently set out in the judgments just delivered and need not be repeated by
I me.

On the mere language of cl. 29 itself there would seem to be little, if any, difficulty in answering this question. The fixed and definite sum of £10,000 is to be raised and paid to Percy Drake, and, although it is described as part of the portions sum of £15,000, there is no statement or suggestion that it forms an aliquot or fractional share, such as two-thirds, of that larger sum or is liable to suffer a corresponding or pro rata loss should that larger sum abate or be diminished for any reason. And the final direction in the clause, that the £10,000 is to be paid as if it had, immediately after the execution of the deed poll appointing it, that is

on April 29, 1910, been assigned by the respondent, Edward Thomas Tyrwhitt Drake (hereinafter called Edward Drake), to Percy Drake absolutely and free from incumbrances as a first charge on the said sum of £15,000, rather emphasises than diminishes the reasons for considering the £10,000 as a fixed sum independent of the precise amount of the larger fund out of which it was payable. It would seem to be quite immaterial for this purpose whether the £15,000 was to be regarded as diminished by an accrued liability for estate duty, on William Drake's death, as was the case at the date of the 1921 settlement, or was to be regarded as merely liable to be diminished by the subsequent accrual of a clause for estate duty on that death, as would have been the case had the assignment of the £10,000 taken place on April 29, 1910.

Indeed, this view of the matter has not been contested by counsel for the respondent. Their argument, which succeeded before the learned judge, was based solely on the special provisions of the Finance Act, 1894, and particularly on those contained in s. 9 (1), s. 14 (1), and s. 8 (4) of that Act, and may be summarised as follows: The portions sum of £15,000 was included in and part of the Deptford estate which passed on the death of William Drake, and his executor was not accountable for duty on that estate or on the £15,000 as part of it; this being so, under s. 9 (1) the estate duty on the £15,000 is thrown rateably on the £10,000 as being a beneficial interest pro tanto in the £15,000; and the trustees of the term of a thousand years, who are liable to pay the duty on the £15,000 under s. 8 (4), can and ought to recover this pro rata proportion from Percy Drake as the beneficial owner of the £10,000; and further, inasmuch as the £10,000 is expressed to be a charge on the £15,000, and the assignment in cl. 29 contains no express disposition to the contrary, Edward Drake, when called on to bear the duty on the whole £15,000, is entitled under s. 14 (1) to recover a proper rateable proportion of the duty from Percy Drake as the person entitled to the charge of £10,000 on the £15,000. Further, certain cases, including in particular that of *Berry v. Gaukroger* (1), were relied on in support of this general view of s. 8 (4) and s. 14 (1); and a number of other cases, of which *Re Charlesworth*, *Tew v. Briggs* (4) may be taken as an example, were relied on as establishing that, assuming the correctness of this general view, the words used in cl. 29 were not sufficient to amount to an express disposition to the contrary within the language of s. 14 (1).

The foregoing argument was very forcibly urged by counsel for the respondents, and was attractive from some points of view, but it does not satisfy a closer examination. In the first place, as WARRINGTON, L.J., pointed out in the course of the case, though what passed on the death of William Drake was the source of the portions sum of £15,000, there was no passing of that sum as a separate item or asset. That which passed was the Deptford estate itself, and the effect of s. 9 (1) is to apportion the estate duty rateably between the hereditaments constituting that estate; not to split the estate up notionally into the £15,000 charge, and the equity of redemption subject to that charge, and to make an apportionment as between these two notional items. Briefly put, the splitting up is lateral not vertical. Further, the effect of s. 14 (1) is that the person authorised or required to pay the estate duty on the property, that is, the Deptford estate, is entitled to recover the proper rateable proportion of that duty from the person or persons entitled to the charge of £15,000 on that estate, that is, from the trustees of the term of a thousand years, so that the sum of £15,000 available in their hands for their beneficiary, Edward Drake, is diminished to that extent. When that has been done the force of s. 14 (1) is apparently exhausted, and it has no further operation to effect a further statutory apportionment or right to reimbursement as between Edward Drake and anyone taking under him by sub-charge partial alienation or other derivative title. The concluding words of that sub-section, viz., "under a disposition not containing any express provision to the contrary," refer, in my judgment, not to a disposition creating a sub-title or derivative title by way of partial alienation or otherwise, but to the original disposition under which the

A primary charge is created, and would have been appropriate and have operated in this case to free the original portions sum of £15,000 from any liability to contribute, had the document creating the £15,000 charge contained a sufficient express provision to that effect.

B All the cases cited for the respondent in which a question arose as to whether a disposition did or did not contain a sufficiently express provision to the contrary, such as *Re Rayer*, *Rayer v. Rayer* (5), *Re Lord Fitzhardinge* (3), and *Re Charlesworth's Trusts* (4), were cases in which the disposition was one originally creating a charge, and had nothing to do with a sub-disposition creating a derivative title. Counsel for the defendant, Guy Percival Tyrwhitt Drake, was, I think, fully justified in saying that the statutory liability to apportionment and reimbursement had never been held to extend beyond the original charge.

C Further, when *Berry v. Gaukroger* (1) is carefully examined, it will be found not to conflict in any way with the above view of the statute, and indeed to have little, if any, bearing on the present case. There the property passing on the death was not land as here, but a fund arising from the sale of real estate and settled by a will made many years previously; and the person on whose death the property passed was the annuitant secured by the income of that fund and personal estate mixed with it, which was protected from any claim to duty for other reasons. D In that case a portion of the fund liable for duty, viz., sums payable for legacies, went one way, and the rest of the fund went another way; and the case fell directly within the provisions of s. 8 (4) and s. 9 (1), if, as the Court of Appeal thought, the first portion of the fund was not charged on the second portion. While, if it had been so charged, the case would have fallen within the provisions of s. 14 (1). E The case had nothing to do with a case like the present, where there is a sub-charge on a portions sum passing on the death, viz., certain lands and hereditaments.

Again, if it is contended that the £15,000 portions sum, as constituting a beneficial interest in the Deptford estate, is in an analogous position to the legacies which in *Berry v. Gaukroger* (1) were held to constitute a beneficial interest in the settled fund, and so is liable to duty under s. 8 (4), the answer is substantially the same as to the claim under s. 14 (1). F For what is sought is not merely to render the £15,000 itself liable, but to carry on the effect of s. 8 (4) a step further and to make every sub-interest in the £15,000 itself accountable for an apportioned amount of the estate duty which has by the terms of s. 8 (4) itself been thrown on the £15,000. It is as if the decision in *Berry v. Gaukroger* (1) had not only cast duty G on the legacies in question there, but had gone on to cast an apportioned part of such duty on sub-interests created by the legatees in these legacies. The language of s. 8 (4) does not, in my judgment, justify any such further step, nor is *Berry v. Gaukroger* (1) any authority for taking it. And to do so would, in my view, be to introduce unnecessary and unwarrantable complications into the scheme of the Act.

H In my judgment, therefore, there is nothing in the Finance Act, 1894, to create any special relationship between Edward Drake as the beneficial owner of the £15,000, and Percy Drake, as the assignee of the £10,000, or to do more than diminish the capital value of the £15,000 itself, the question between them must be decided on the language of cl. 29 of the 1921 settlement alone, and Percy Drake takes his £10,000 clear.

I *Appeal allowed.*

Solicitors: *Hunters; Oliver, Richards & Parker; Bircham & Co.*

[Reported by GEOFFREY P. LANGWORTHY, Esq., Barrister-at-Law.]

BROKEN HILL PROPRIETARY CO., LTD. v. BROKEN HILL MUNICIPAL COUNCIL

[PRIVY COUNCIL (Viscount Cave, L.C., Lord Carson and Lord Blanesburgh and Duff, J.) July 28, 30, November 10, 1925]

[Reported [1926] A.C. 94; 95 L.J.P.C. 33; 134 L.T. 335]

Australia—New South Wales—Valuation for rating—Annual value—“Average annual value of ore won during three years next preceding year in which valuation made”—Computation of average annual value—Local Government Act, 1919 (N.S.W.) (No. 41 of 1919), ss. 4, 153, Sched. III, ss. 12, 20 (1) (a).

By s. 153 (3) of the Local Government Act, 1919, of New South Wales: “In the case of a mine other than a coal or shale mine the unimproved capital value thereof ascertained by valuation based on output shall be a sum equal to 20 per cent. of the average annual saleable value to the mineowner of the ore or mineral won from the mine; or of the product derived from such ore or mineral during the three years next preceding the year in which the valuation is made, or during such part of that time as the mine has been worked . . .” During 1919, 1920, and 1921 the appellants’ mine had been worked for a total of 205 days only, partly by reason of strikes and partly owing to the low price of material rendering the production of ore unprofitable, although maintenance work was continued all through the time.

Held: the average annual value of the ore won during the three years ought to be arrived at by dividing the value of the output during those three years by three.

Res Judicata—Valuation for rating—Annual value—Previous decision relating to value in previous year.

The High Court of Australia had previously given a decision to the opposite effect with regard to the output of the years 1917, 1918 and 1919.

Held: the previous decision related to the valuation for a year other than that now under consideration; the present case raised a new and separate question; and, therefore, the doctrine of *res judicata* did not apply to compel the court to decide in the same way as the earlier court had.

Notes. Referred to: *Falk v. Haugh*, (1935) V.L.R. 238; *Workington Dock Board v. Trade Indemnity Co.*, [1937] 3 All E.R. 139; *O’Donel v. Road Transport Comrs.*, (1938) A.L.R. 305; *New Brunswick Rail. Co. v. British & French Corpn., Ltd.*, [1938] 4 All E.R. 747; *Blair v. Curran*, (1941) A.L.R. 365; *Re Finkelstein*, (1944) A.L.R. 281.

As to *res judicata* see 15 HALSBURY’S LAWS (3rd Edn.) 184–187, and for cases see 21 DIGEST 159 et seq.

Cases referred to:

- (1) *Broken Hill Municipal Council v. Broken Hill Proprietary Co.* (1922), 30 C.L.R. 400.
- (2) *Badar Bee v. Habib Merican Noordin*, [1909] A.C. 615; 78 L.J.P.C. 161, P.C.; 21 Digest 168, 253.
- (3) *Duchess of Kingston’s Case* (1776), 1 East, P.C. 468; 1 Leach, 146; 20 State Tr. 355; 2 Smith, L.C. (12th Edn.) 754; 21 Digest 159, 213.
- (4) *Peareth v. Marriott* (1882), 22 Ch.D. 182; 52 L.J.Ch. 221; 48 L.T. 170; 31 W.R. 68, C.A.; 21 Digest 157, 199.
- (5) *North Broken Hill, Ltd. v. Broken Hill Municipal Council* (1921), 21 S.R.N.S.W. 758.

Appeal from an order of the Supreme Court of New South Wales on a Special Case stated by the Land and Valuation Court, under s. 17 of the Land and Valuation Court Act, 1921, in the matter of the New South Wales Local Government Act, 1919,

and in the matter of the objection of the appellants to the valuation for rating purposes for the year 1923 by the respondent council of mineral leases 11, 12, and 13, situated at Broken Hill, together with the mine offices and buildings thereon. The question for determination was whether the average saleable value of the ore won during the three years 1919, 1920, and 1921 should be arrived at by dividing the value of all the ore won during the said three years by three, as the appellants contended, or by dividing the said value by a fraction represented by the number of days worked during the said three years over the number of days in a year viz., 205/365, as the respondent council contended. The Supreme Court held, following the previous decision in *Broken Hill Municipal Council v. Broken Hill Proprietary Co.* (1), that as the appellants' mine had been worked for only a portion of the three years preceding the year of valuation, the average annual saleable value under sub-cl. 3 of cl. 12 of Sched. III to the Act of 1919 was to be ascertained by dividing the total value of the ore won from the mine in those three years by the time expressed in years and a fraction of a year during which the mine was worked during that period. The appellants appealed to His Majesty in Council.

Clauson, K.C., and Geoffrey Lawrence, K.C., for the appellants.

Latter, K.C., and Vernon, for the respondents.

The following authorities were cited: *Badar Bee v. Habib Merican Noordin* (2), *Duchess of Kingston's Case* (3), *Peareth v. Marriott* (4).

Nov. 10. **LORD CARSON.**—The appellants are the occupiers of a mine of lead and silver within the municipality of Broken Hill. The respondents are the rating authority of the municipality. The question in this appeal arises on the construction of the Local Government Act, 1919, of New South Wales (No. 41 of 1919), and relates to the ascertainment of the "unimproved capital value" of the mine of the appellants for rating purposes under s. 153 (3) (identical with cl. 12 of Sched 3 to the said Act). The said section reads as follows:

"In the case of a mine other than a coal or shale mine the unimproved capital value thereof ascertained by valuation based on output shall be a sum equal to 20 per centum of the average annual saleable value to the mine owner of the ore or mineral won from the mine or of the product derived from such ore or mineral during the three years next preceding the year in which the valuation is made, or during such part of that time as the mine has been worked, such value to be determined as such ore, mineral, or product leaves the area, within which such mine is situate."

The Act of 1919 repealed and replaced the Local Government Act, New South Wales, of 1906 (No. 56 of 1906). The provisions of s. 153 (already quoted) and cl. 12 of the schedule to the Act are in substitution for those of s. 132 of the Act of 1906 and are substantially to the same effect, with this difference, that the words "or during such part of that time as the mine has been worked," are not in s. 132 of the Act of 1906 and appear for the first time in s. 153 and cl. 12 of the schedule of the Act of 1919. In the year 1923 the respondents assessed the appellants in respect of the Broken Hill mine. The value was based on the output during the years 1919, 1920, and 1921. It appears that during these years ore to the total value of £274,792 2s. 9d. had been produced, and the mine had been worked for a total of 205 days only during the three years by reason at one time of strikes and at another time owing to the low price of material rendering the production of ore unprofitable. All through, however, maintenance work was continued, such as keeping the surface works in repair, pumping the mine, and keeping the underground workings in order.

The question that arose between the appellants and respondents, and which this Board is now called upon to decide, is whether under the terms of s. 153 and cl. 12 of the third schedule to the Act of 1919, already set forth, the average value of the ore won during the three years 1919, 1920, and 1921, should be arrived at by dividing

the value of all the ore won during the said three years (i.e., £274,792 2s. 9d.) by three, as the appellants contended and now contend, or by dividing the said value by a fraction represented by the number of days worked during the said three years over the number of days in a year, viz., $\frac{365}{365}$ or, in other words, that the sum of £274,792 2s. 9d. should be multiplied by 205 and divided by 365. The case was first heard before PIKE, J., the judge of the Land and Valuation Court, who, following a decision in a previous year (which will hereafter be referred to) of the High Court of Australia, decided in favour of the contention of the respondents, but stated a Case for the opinion of the Supreme Court of New South Wales, who on June 25, 1924, sustained the judgment of PIKE, J., holding that the case was covered by the High Court decision. From that judgment the present appeal comes before this Board, and the appeal involves therefore a consideration of the decision of the High Court on which the judgment appealed from was based.

In that case the appellants had been assessed by the respondents in respect of the Broken Hill mine under the Act of 1919 on the unimproved capital value calculated on the output of the mine for the years 1917, 1918, and 1919. It appeared that during the said three years the mine had been worked during the whole of the years 1917 and 1918 and for a period amounting to 160 days only in the year 1919. To ascertain the unimproved capital value the respondents divided the total saleable value of the output during the said three years by $2 \frac{160}{365}$ in order to arrive at the annual average saleable value.

The appellants appealed from the valuation to a judge of the District Court, who upheld the valuation of the respondents. On an appeal by the present appellants to the Supreme Court of New South Wales, that court, consisting of the Chief Justice (SIR WILLIAM CULLEN) and two other judges, unanimously reversed the decision of BEVAN, J., holding that the valuation must be made by taking the total actual output for the three years and dividing it by three and not by two and a fraction. The reasons for the decision were the same as the reasons for the decision in *North Broken Hill, Ltd. v. Broken Hill Municipal Council* (5). The respondents then appealed from this decision to the High Court of Australia, where, by a majority of three judges to one, the appeal was allowed and the decision of the district judge restored. KNOX, C.J., who dissented, adopted the view taken by the judges of the Supreme Court: *Broken Hill Municipal Council v. Broken Hill Proprietary Co.* (1) (30 C.L.R. at p. 400).

Their Lordships are of opinion that the decision of the Supreme Court and of KNOX, C.J., was right and that upon the true construction of s. 153 and cl. 12 of the third schedule, the average annual value of the ore won during the three years ought to be arrived at by dividing the value of the said ore by three. It is to be noted, as pointed out by SIR WILLIAM CULLEN, C.J., in his judgment in the Supreme Court, that the respondents are given several alternative methods of ascertaining the unimproved capital value by s. 153, and among these was the one which they adopted, viz., "by valuation based on output in accordance with this section." The Chief Justice says:

"That, I conclude from the wording of the section, to be actual output, not some potential or hypothetical output arrived at by a calculation of what might have been produced, but was not actually produced from the mine."

There is nothing in the section from which it could be inferred that anything but actual output was intended, but, on the contrary, it seems to be impossible to construe such words as:

"the saleable value to the mineowner of the ore or mineral won from the mine . . . such value to be determined as such ore, mineral or product leaves the area within which such mine is situate"

as referring to any estimated or hypothetical output. There may, no doubt, be cases when it would be impossible to find an average output, as, for instance, when a mine had only been worked for a portion of a year, but it must not be

A forgotten that the respondents have other methods of valuation open to them if such difficulties arise.

B It was urged before this Board that the introduction into s. 153 of the words "during such part of that time as the mine has been worked," ought to be construed as providing for such a case as the present, and thereby supporting the contention of the respondents. Their Lordships cannot accept that view having regard to the other terms of the section already referred to, and it is not unimportant to observe that, notwithstanding the introduction of those words, the Act of 1919 still retains the words at the end of s. 153 (3), viz.: "such value to be determined as such ore or mineral product leaves the area within which such mine is situate," which are taken from s. 132 (2) (b) of the Act of 1906. Having regard to the language of the section it is unnecessary to lay down any construction or limitation of the words in question, but their Lordships see no reason for disagreeing with the view of the Chief Justice, when he says :

C "The words 'or during such part of that time as the mine has been worked' obviously guard against the difficulty which would have arisen in the case of mines which had not commenced to be worked three years prior to the year in which the rate is to be struck."

D It was also contended before this Board on behalf of the respondents that having regard to the said decision of the High Court of Australia the question raised by this appeal is *res judicata* as between the appellants and the respondents, and the appellants are estopped from contending that such decision of the High Court of Australia is wrong. It has been pointed out that no such question was raised or pleaded either before the District Court or the Supreme Court in New South Wales, nor has there been any adjudication or finding upon it. There is, however, no substance in this contention. The decision of the High Court related to a valuation and a liability to a tax in a previous year, and no doubt as regards that year the decision could not be disputed. The present case relates to a new question, viz., the valuation for a different year and the liability for that year. It is not *eadem questio*, and therefor the principle of *res judicata* cannot apply. Their Lordships are of opinion that this appeal should be allowed with costs here and in both the courts in New South Wales, and that a declaration should be made that upon the true construction of s. 153 (3) of the Act of 1919 in ascertaining the unimproved capital value of the mine the saleable value of all the ore won from the mine during the years 1919, 1920, and 1921 should be divided by three. Their Lordships will humbly advise His Majesty accordingly.

Appeal allowed.

Solicitors : *Light & Fulton ; Kimbers, Williams & Co.*

[*Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.*]

BUCKLE v. HOLMES

[KING'S BENCH DIVISION (Shearman and Sankey, JJ.), December 3, 4, 1925]

[Reported [1926] 2 K.B. 125; 95 L.J.K.B. 547; 134 L.T. 743;
90 J.P. 109; 42 T.L.R. 369; 70 Sol. Jo. 464]*Animal—Cat—Trespass—Damage while trespassing—Liability of owner.*

A cat is in the same position as a dog at common law with regard to its unprovoked trespasses, and the owner cannot be liable for damage caused by it while so trespassing, unless this damage is due to some special character distinguishing it from cats in general and the owner is aware of that acquired character.

The plaintiff was a fancier of pigeons and poultry which he kept on his premises. He observed that some of his pigeons were disappearing, and he saw the defendant's cat, while on his premises, carrying a pigeon in his mouth and, on another occasion, catch a bantam chicken. The plaintiff brought an action against the defendant for damage which he alleged was caused to him through the destruction by the cat of seventeen pigeons and two bantams.

Held: a cat was for all purposes a tame animal and its owner was not liable for damage done by that cat while trespassing unless the plaintiff was able to prove that the owner had knowledge that the cat had acquired vice more than the vice of a common cat; the plaintiff had failed to do this; and, therefore, his claim must fail.

Notes. This case was affirmed by C.A.: see [1926] All E.R. Rep. 90.

Considered: *Wormald v. Cole*, [1954] 1 All E.R. 683. Referred to: *Cutler v. United Dairies (London), Ltd.*, [1933] All E.R. Rep. 594; *Tallents v. Bell and Goddard*, [1944] 2 All E.R. 474.

As to liability of owner of domestic animal for damage done by trespass of that animal see 1 HALSBURY'S LAWS (3rd Edn.) 668 et seq. and for cases see 2 DIGEST (Repl.) 309 et seq.

Cases referred to:

- (1) *Ellis v. Loftus Iron Co.* (1874), L.R. 10 C.P. 10; 44 L.J.C.P. 24; 31 L.T. 483; 39 J.P. 88; 23 W.R. 246; 2 Digest (Repl.) 312, 158.
- (2) *Lee v. Riley* (1865), 18 C.B.N.S. 722; 34 L.J.C.P. 212; 12 L.T. 388; 11 Jur. N.S. 527; 13 W.R. 751; 144 E.R. 629; sub nom. *Riley v. Lee*, 6 New Rep. 147; 2 Digest (Repl.) 312, 155.
- (3) *Manton v. Brocklebank*, [1923] 2 K.B. 212; 92 L.J.K.B. 624; 129 L.T. 135; 39 T.L.R. 344; 67 Sol. Jo. 455, C.A., 2 Digest (Repl.) 331, 229.
- (4) *Mason v. Keeling* (1699), 1 Ld. Raym. 606; 12 Mod. Rep. 332; 91 E.R. 1305; 2 Digest (Repl.) 382, 566.
- (5) *Filburn v. People's Palace and Aquarium Co., Ltd.* (1890), 25 Q.B.D. 258; 59 L.J.Q.B. 471; 55 J.P. 181; 38 W.R. 706; 6 T.L.R. 402, C.A.; 2 Digest (Repl.) 329, 219.

Appeal from Leeds County Court.

The plaintiff was a fancier of pigeons, and poultry, and kept both upon his premises. Certain valuable racing and homing pigeons were kept by him in a dovecot, and there were also bantams and other fowls in a poultry run. The defendant, who was a neighbour of the plaintiff, owned a cat. In March, 1925, the plaintiff observed that some of his pigeons were disappearing, and on his premises he saw a cat carrying a pigeon in its mouth. On another occasion he saw the same cat catch a bantam on his premises. He communicated with the defendant, believing the cat to be his, and the defendant advised him to trap the cat. The plaintiff did this, and called in the defendant, who admitted that the cat was his and destroyed it on the spot. The plaintiff subsequently brought an action for £8 against the defendant, being the damage caused to him through the

A destruction of thirteen pigeons and two bantams by the defendant's cat. The defendant admitted the facts, but denied that he was under any liability in law. The county court judge held that the cat is a domestic animal of a roaming disposition, and prone to be destructive to birds, and that the responsibility rested upon the owner of birds to keep them safe from cats; and that the plaintiff had failed to prove that the defendant knew that this was a peculiarly wicked cat, or that its nature differed from the ordinary nature of cats. Accordingly, the plaintiff having failed to prove scienter, he gave judgment for the defendant. The plaintiff appealed.

B Harold Sutcliffe (*Russell Vick* with him), for the plaintiff, referred to *Ellis v. Loftus Iron Co.* (1), *Lee v. Riley* (2), *Manton v. Brocklebank* (3), *SALMOND'S LAW OF TORTS* (5th Edn.) p. 440.

C The defendant did not appear.

D **SHEARMAN, J.**—In my judgment this appeal must be dismissed. The plaintiff was the owner of some pigeons and chickens, and the defendant was the owner of a cat. It appears to have been proved before the learned county court judge that this cat had taken a number of pigeons and, I think, more than one chicken. It also appears that the moment it was brought home to the owner what this cat had done he drowned it. The judge says that, although the cat was then killed, there was evidence that the cat had done damage to the plaintiff's pigeons and chickens, that the defendant had no knowledge that the cat had anything other than the ordinary characteristics of a common cat, and there he dismissed the case on the ground that it was necessary for the plaintiff to prove scienter; that he had not proved it and the action therefore failed. In my judgment, that was right.

E According to the time-honoured principles of English law, which followed originally the old civil law, animals are divided into two classes. I am not proposing to be exhaustive as to what animals are included in these classes but certainly the first class, namely domestic animals—sometimes described as animals domitae nature—includes cattle, horses, sheep, pigs, poultry, cats, dogs and all other animals which live in association with man. As regards the common law, the owner is not responsible for any malicious damage that they do, unless the owner is aware that they have acquired a character different from the ordinary character of such an animal; he must be aware that he owns a vicious horse, a vicious dog, or, I think, a vicious cat, that is to say, a cat with some acquired vice other than its ordinary characteristics. Then there is an exception, with a good many sub-exceptions, to the effect that notwithstanding this rule, an owner is generally responsible for damage done by a tame animal when it is trespassing. That is the general rule with regard to damage done by animals trespassing, subject again to certain exceptions. It has been well settled for hundreds of years that the dog is subject to different principles of law from those applying to other tame animals. In a case in the year 1625 it was held that there was a difference between a dog and other kinds of tame animals. It is settled law—a very proper expression is used—that a man is not responsible for the unprovoked trespass of his dog. The word explains itself. Besides that case, there is a case in 1700, *Mason v. Keeling* (4) where LORD HOLT says that, if a dog breaks a neighbour's close, the owner will not be subject to action. That is well settled in old English law. The owner of a dog is not responsible for the unprovoked trespass of the dog, but of course there are cases to the effect that a man cannot stand outside his neighbour's close, send his dog in poaching, and then say: "That is the dog's trespass, and I am not responsible." It is held on very good grounds that in such a case the action of the dog is the owner's action because he has provoked it. It is equally held that if it is brought home to a man's knowledge that his dog has a habit, or acquired propensity for trespassing and pursuing game, then he is responsible on the doctrine of scienter. It is said that the law is different as to cats. I cannot find any decision

as to the propensities of cats, but in my judgment one cannot draw a distinction between a dog and a cat. In numerous cases dealing with dogs the law is laid down. Both dogs and cats are animals with regard to which it is obviously known that the owners are not expected to keep them chained up, and if a man is not responsible for his dog, because it is the nature of the dog to wander in trespass, I think it is equally clear that a man cannot be held responsible in English law for what his cat does when trespassing, when it is well known that a cat even more than a dog is able and willing to trespass on other people's roofs, trees and gardens. Therefore, on the ground of trespass, it is impossible to distinguish a cat from a dog. Then it is said that there is a natural propensity for a cat to attack birds and therefore, as regards birds, a cat ought to be treated as an animal *feræ naturæ*, a wild animal. That means to say one must draw a third distinction and say that a cat by its ordinary nature is ferocious as regards birds. That may be so. It is impossible, however, in the English law as it now stands, to introduce a third class and say that a cat is for most purposes a tame animal, but that it is a wild animal if it does damage to birds. It is impossible at this stage in the history of our law to incorporate that distinction into our law. A cat obviously must be classed with a dog as not being responsible for trespass. Quite obviously too, a cat is a tame animal, and therefore unless the owner provokes it or unless he knows of a particular acquired vice more than the ordinary vice of a cat, the owner cannot be held to be responsible. In this case the judge held that there was no evidence to satisfy him that the man knew that there was any acquired vice of the cat over and above its ordinary characteristics: therefore the action failed. In my opinion, for the same reasons, this appeal fails also.

SANKEY, J.—I am of the same opinion, although I must confess that my sympathies are with the plaintiff in this case. It is quite clear that the learned judge in this case found that the owner of the cat in question did not know of these vicious propensities. In his judgment the learned judge says:

"If I am wrong in the first view about the cat, I hold that in this case scienter has not been proved, as it was not known that this was a peculiarly wicked cat."

Counsel for the plaintiff argues thus: the reason that a dog is allowed a certain immunity and that in the case of a dog it has to be proved that the owner knew it was accustomed to bite mankind is because the ordinary propensity of a dog is not to bite mankind, and therefore until the owner knows that it is accustomed to bite mankind, he is not liable for the vices of a dog and, counsel argues, the same rule ought to be applied, but in a different way, with regard to a cat. A cat is not accustomed to bite mankind, says counsel, but it is accustomed to chase and kill pigeons and therefore in such a case—that is to say, where it is a case of a cat pursuing pigeons—it is not necessary to prove scienter, and the cat must be classed with those animals which a man keeps at his peril. I am bound to say that that is a most attractive argument and one, if I thought that we could give effect to it, which I shall be disposed to adopt. But I can find no authority in English law for such a proposition.

I believe that from the very earliest days the law of England has divided animals into two classes. The first consists of animals like sheep and horses, oxen, dogs, and I think cats, which the law assumes not to be of a dangerous character, and therefore before the owner of such an animal can be made liable it must be shown, that that animal is an exception to its class, that it is accustomed to do mischief, and, therefore, unless the owner knows that, he is not liable for a first act. The second class consists of those animals which have not been shown to be harmless by nature, and there are numerous cases in the books with regard to such animals. There is a well-known case with regard to an elephant, the case of *Filburn v. People's Palace and Aquarium Co.* (5). There are other cases, including, I think, one with regard to a bear, but it is not necessary to go into them all, as these animals are a class well-known to everybody in the country. It seems to me that those

A being the only two classes, and a cat being in the first class, we must hold that in order to make an owner of a cat liable for mischief done by it, it must be shown that he knew it to have a vicious propensity. Counsel for the appellant wants us to introduce a third class, and, as far as I can understand from his argument, that class would contain certain animals such as a cat, which might also be in one of the other classes. He says that for certain purposes he agrees that a cat is within the first class, that is to say a domesticated animal, and not accustomed to do mischief; but that for certain purposes a cat must also be put into a new and third class, that is to say, when the cat is in proximity to a pigeon, one must classify it in a third and different class and hold that, although it is usually an animal of a tame character, it can for certain purposes be classed in this class of feræ naturæ. I rather agree with my Lord that, if we were starting over again, it would be a very reasonable thing to do, but I can find no authority for the proposition. I cannot help thinking, having regard to the hundreds and, I am sure, thousands of these cases which have happened, that there would have been an authority if counsel's point were a good one. I have come to the conclusion that the learned judge is right, although my sympathies are with the owner of the pigeons and not with the owner of the cat. I am of opinion that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Hammins, Grammer & Hamlin, for Harland & Plackett, Leeds.*

[Reported by T. R. F. BUTLER, Esq., Barrister-at-Law.]

KERSLAKE v. KNIGHT

[KING'S BENCH DIVISION (Lord Hewart, C.J., Salter and Greer, JJ.) May 19, 1925]

[Reported 94 L.J.K.B. 919; 133 L.T. 606; 89 J.P. 142; 41 T.L.R. 555; 69 Sol. Jo. 607; 23 L.G.R. 574; 28 Cox, C.C. 27]

G *Gaming—Lottery—Sale of tickets—Publication in newspaper of scheme for sale of tickets—No sale by proprietors of newspaper—Tickets sold by shopkeepers with goods—Tickets not priced separately from goods—Prize given by newspaper conditional on display of advertisement—Lotteries Act, 1823 (4 Geo. 4, c. 60), s. 41.*

H The respondent, the manager of a newspaper, furnished a supply of numbered tickets and counterfoils to tradesmen who advertised in the newspaper, and every purchaser at any of these tradesmen's shops received a ticket for each shilling spent in the shop, the number of tickets given with any one purchase being limited to 100. Once a week the counterfoils of the distributed tickets were taken by the respondent's servants to the newspaper office, and seventeen numbers were drawn to which money prizes were allotted, each holder of a ticket bearing one of those numbers being entitled to the amount of the allotted prize on signing a receipt and an undertaking to exhibit in his window for a certain period a card bearing the name of the newspaper. The respondent was summoned for publishing a scheme for the sale of tickets in a lottery contrary to s. 41 of the Lotteries Act, 1823, which makes it an offence: "If any person or persons shall sell any ticket or tickets, chance or chances, share or shares of any ticket or tickets, chance or chances in any lottery or lotteries authorised by any foreign potentate or State, or to be drawn in any foreign country, or in any lottery or lotteries, except such as are or shall be authorised by this or some other

Act of Parliament to be sold, or shall publish any proposal or scheme for the sale of any ticket or tickets, chance or chances, share or shares of any ticket or tickets, chance or chances, except such lottery or lotteries as shall be authorised as aforesaid . . ."

Held: (i) it was not material that the publisher of the scheme for the sale of tickets was not the actual seller of the tickets; (ii) although the price of the goods had not been increased, the tickets were just as much bought as if they had been priced separately from the goods; (iii) the chance of obtaining money, although for it a service (which was a colourable part of the scheme and nugatory) was rendered, was just as much a prize as any other article which might have been offered; and, therefore, the scheme had all the characteristics of a lottery, and the respondent was liable to conviction.

Notes. The Lotteries Act, 1823, was repealed by the Betting and Lotteries Act, 1934, s. 32 Sched. 2. Section 22 of the 1934 Act corresponds to s. 41 of the 1823 Act.

As to the nature of lotteries see 18 HALSBURY'S LAWS (3rd Edn.) 238 et seq., and for cases see 25 DIGEST 454 et seq., and for the Betting and Lotteries Act, 1934, see 10 HALSBURY'S STATUTES (2nd Edn.) 785.

The following cases were referred to in argument :

- (1) *Morris v. Blackman* (1864), 2 H. & C. 912; 28 J.P. 199; 10 Jur. N.S. 520; 159 E.R. 378; 25 Digest 455, 441.
- (2) *Taylor v. Smetten* (1883), 11 Q.B.D. 207; 52 L.J.M.C. 101; 48 J.P. 36, D.C.; 25 Digest 455, 443.
- (3) *Hunt v. Williams* (1888), 52 J.P. 821, D.C.; 25 Digest 455, 444.
- (4) *Caminada v. Hulton* (1891), 60 L.J.M.C. 116; 64 L.T. 572; 55 J.P. 727; 17 Cox, C.C. 307; sub nom. *R. v. Hulton*, 39 W.R. 540; 7 T.L.R. 491, D.C.; 25 Digest 463, 496.
- (5) *Stoddart v. Sagar*, *Sagar v. Stoddart*, [1895] 2 Q.B. 474; 64 L.J.M.C. 234; 73 L.T. 215; 59 J.P. 598; 44 W.R. 287; 11 T.L.R. 568; 39 Sol. Jo. 710; 18 Cox, C.C. 165; 15 R. 579, D.C.; 25 Digest 463, 497.
- (6) *Hall v. McWilliam* (1901), 85 L.T. 239; 65 J.P. 742; 45 Sol. Jo. 579; 20 Cox, C.C. 33; sub nom. *Hall v. M'William*, *M'William v. Bottomley*, 17 T.L.R. 561, D.C.; 25 Digest 455, 445.
- (7) *Willis v. Young and Stemberidge*, [1907] 1 K.B. 448; 76 L.J.K.B. 390; 96 L.T. 155; 71 J.P. 6; 23 T.L.R. 23; 51 Sol. Jo. 28; 21 Cox, C.C. 362, D.C.; 25 Digest 454, 434.
- (8) *Bartlett v. Parker*, [1912] 2 K.B. 497; 81 L.J.K.B. 857; 106 L.T. 869; 76 J.P. 280; 23 Cox, C.C. 16, D.C.; 25 Digest 455, 447.
- (9) *Bottomley v. D.P.P.* (1914), 84 L.J.K.B. 354; 112 L.T. 458; 79 J.P. 153; 31 T.L.R. 58; 24 Cox, C.C. 578, D.C.; 25 Digest 458, 463.
- (10) *Minty v. Sylvester* (1915), 84 L.J.K.B. 1982; 114 L.T. 164; 78 J.P. 543; 31 T.L.R. 589; 13 L.G.R. 1085; 25 Cox, C.C. 247, D.C.; 25 Digest 455, 448.
- (11) *Barclay v. Pearson*, [1893] 2 Ch. 154; 62 L.J.Ch. 636; 42 W.R. 74; 3 R. 388; sub nom. *Barclay v. Pearson*, *Oppler v. Pearson*, 68 L.T. 709; 9 T.L.R. 269; 37 Sol. Jo. 268; 25 Digest 464, 502.
- (12) *Wallingford v. Mutual Society* (1880), 5 App. Cas. 685; 50 L.J.Q.B. 49; 43 L.T. 258; 29 W.R. 81, H.L.; 25 Digest 453, 431.
- (13) *R. v. Harris* (1866), 10 Cox, C.C. 352; 25 Digest 455, 442.
- (14) *Shaw v. Blacker* (1924), *The Times*, Nov. 7, unreported.

Case Stated by justices for the county borough of Southend-on-Sea.

An information was laid by Henry Maurice Kerslake (hereinafter called the appellant) under the Lotteries Act, 1823, s. 41, that Walter Henry Knight (hereinafter called the respondent) did on Nov. 7, 1924, unlawfully publish a scheme in the "Southend Times" for the sale of tickets in a certain lottery called the

A " 'Southend Times' Shopping Scheme," such lottery not being authorised by Act of Parliament, which said information was heard on Jan. 30, 1925, and was dismissed. By agreement between the appellant and the respondent, and with the consent of the justices, five other informations for similar offences, on Nov. 14, 21 and 28, 1924, and Dec. 5 and 12, 1924, were to be governed by the decision in respect of the information as to Nov. 7, 1924.

B Upon the hearing of the information the following facts were proved or admitted.

(a) The respondent was the general manager of a local weekly newspaper called the "Southend Times," the proprietors of which were the Southend and Essex Publishers, Ltd. (b) The "Southend Times" was of recent origin, and was being produced at a substantial loss to the publishers. (c) In or about the month of October, 1924, the respondent devised a scheme for making the "Southend Times" better known and to stimulate and assist local trade, and published it in the "Southend Times" of Nov. 7, 1924. (d) The scheme was controlled from the offices of the proprietors of the "Southend Times."

(e) Local traders were invited by the respondent to have special one-eighth page advertisements inserted in the "Southend Times" for a period of ten weeks at the rate of two guineas weekly, and all such advertisers received from the publishers of the "Southend Times" a quantity of

D numbered tickets with counterfoils for the purpose of giving to a purchaser of goods at his or her shop or other place of business one of such numbered tickets for every shillingsworth of goods purchased, with a maximum of one hundred tickets with any one purchase. (f) At the end of each week the counterfoils of the tickets given by traders to their customers were collected by the respondent or his servants,

E placed in sacks and taken to the offices of the proprietors of the "Southend Times" or to the place of business of one of the advertising traders and there tipped into a heap in the presence of advertising traders, who were invited by the respondent to select seventeen tickets from such heap. Some selections were made by picking up seventeen tickets from the heap, and others by taking up a bundle of tickets and making a list of their numbers and finally selecting from such list seventeen numbers, but whichever method of selection was adopted it was done entirely by chance. (g) The selected numbers were published in the next issue of the "Southend Times," and the holders of tickets with the numbers corresponding to the selected numbers became entitled to receive sums varying in amount from £10 to 10s.

F according to the position in the list of selected numbers. (h) A person holding a ticket with a selected number upon it was required to go to the offices of the publishers of the "Southend Times" and there sign a form of receipt and an undertaking to exhibit in a window of his or her residence a card bearing the name "Southend Times" for a period varying, in accordance with the amount to be paid, from half a week to ten weeks. On the signing of the receipt and undertaking, such person was paid a sum of money corresponding to the amount allotted to the position of the number of his or her ticket in the list of selected numbers for the preceding week. Steps were taken by the respondent to ascertain that the under-

H taking to exhibit the card was performed. (i) The respondent was authorised by the proprietors of the "Southend Times" to expend £25 per week on the scheme.

(j) The tickets, of which 1,500,000 copies were printed, were issued only to advertisers in connection with the scheme and could only be obtained by the public by purchasing goods at the shops of such advertisers. The quality or price of such goods was not affected in consequence of the tickets passing from the sellers to the buyers with the goods purchased. (k) The exhibition of the cards in front

I windows of houses occupied by the holders of winning numbers would be of substantial value to the proprietors of the "Southend Times" in connection with the scheme. (l) It was not necessary to purchase a copy of the "Southend Times" in order to participate in the scheme, but it was necessary to do so or to inspect a copy of it at the public library in order to ascertain the shops at which the tickets could be obtained. (m) The scheme resulted in a loss to the proprietors of the "Southend Times" on the financial side, but it was expected to have the effect of

making the paper more widely known as a good advertising medium and that future benefit would result to the proprietors of the paper from the scheme.

The justices were of opinion from the facts proved before them and the inference to be drawn from them: That, although the tickets could only be obtained, first, by advertisers in the "Southend Times," and, secondly, by purchasers of goods from such advertisers, there was not a sale of such tickets within the meaning of s. 41 of the Lottery Act, 1823, and that the scheme published by the respondent was not a scheme for the sale of tickets in a lottery, as the holder of a winning ticket was required to undertake to render service to the respondent before becoming entitled to receive the amount allocated to such ticket. The justices therefore dismissed the information.

F. Hinde for the appellant.

W. Charles Pilley for the respondent.

LORD HEWART, C.J.—I am of opinion that this appeal ought to succeed. [He read the scheme and the justices' findings as set out in the Case.] The lucky seventeen, having in the fortuitous manner been selected, had the opportunity of getting a substantial sum for something ridiculously little. They got from 10s. to £10 for exhibiting in some pane of some window on some floor of their houses a card measuring 7 in. by 2 in. There was nothing to prevent it from being put in a pantry window at the back. It is difficult to see how the justices came to the conclusion that there was no sale of tickets in a lottery. It has been suggested that there was no offence because the respondent did not himself sell the tickets. If that argument were sound, anyone could publish a scheme for the sale of tickets in a lottery, provided that it was someone else's lottery. It was also contended that there was no sale of tickets, because the price of the goods was not increased and they were fair value for the money. I think that the purchaser bought for one undivided price an article and a chance. The ticket was just as much bought as if it had been priced separately. It was said that the ticket was not a ticket in a lottery because of the service. In this case the service was a colourable part of the scheme, which could be rendered nugatory. But even if it had been substantial, it is clear that the chance of rendering that service for money was as much a prize as if a book or any other article had been offered. After referring to *Willis v. Young and Stembridge* (7) and *Taylor v. Smetten* (2), his Lordship concluded by saying that this scheme exhibited all the characteristics of a lottery. The justices misdirected themselves on both points, and the Case must go back to them with a direction to convict.

SALTER, J.—I agree.

GREER, J.—I agree.

Appeal allowed: Case remitted.

Solicitors: *Sharpe, Pritchard & Co.*, for the Town Clerk, Southend-on-Sea; *R. H. Thurlow Baker*, Southend-on-Sea.

[Reported by J. F. WALKER, ESQ., Barrister-at-Law.]

FOX v. FOX

[COURT OF APPEAL (Sir Ernest Pollock, M.R., Warrington and Sargant, L.JJ.),
May 18, 19, June 17, 1925]

[Reported [1925] P. 157; 133 L.T. 499; 41 T.L.R. 584; 69 Sol. Jo. 691]

Divorce—Maintenance of wife—Permanent maintenance—Order made before decree absolute—Order to stand over until decree pronounced—Matrimonial Causes Act, 1907 (7 Edw. 7, c. 12), s. 1 (1).

A petition for divorce was presented by the wife on Oct. 15, 1923, and on Feb. 23, 1924, an order was made by consent fixing alimony pendente lite. On Mar. 24, 1924, a decree nisi was pronounced, the suit being undefended. No agreement was reached as to the amount of permanent maintenance, and no steps were taken by the wife to obtain a decree absolute. On April 2, 1925, the wife filed a petition for permanent maintenance for herself and the children, and on April 21, 1925, the husband issued a summons to dismiss the suit for want of prosecution. An affidavit, filed on behalf of the wife in opposition to the summons, stated that she would apply for a decree absolute as soon as the court made an order for the maintenance of herself and her children and the security ordered by the court had been given. No order was made on the summons except that "the same do stand adjourned pending maintenance order." On appeal,

Held: (i) orders under the Matrimonial Causes Act, 1907, s. 1 (1), for maintenance and alimony, might be made before the decree absolute was pronounced: *Waterhouse v. Waterhouse* (1), [1893] P. 284, and *Cavendish v. Cavendish* (2), [1913] P. 138, applied; (ii) the order for maintenance deriving its validity from the dissolution of the marriage, the judge ought to be reasonably assured that the decree absolute would be applied for and pressed with due diligence, and, therefore, the order must be amended so as to contain the words "stand over generally with liberty to restore," so that it should not be absolute.

Notes. The Matrimonial Causes Act, 1907, s. 1 (1), has been replaced by s. 19 (2) of the Matrimonial Causes Act, 1950.

Applied: *Warwick v. Warwick* (1928), 73 Sol. Jo. 12. Referred to: *Gilbert v. Gilbert and Bougher*, [1928] P. 1; *Skipworth v. Skipworth*, [1929] P. 93; *Stephen v. Stephen*, [1931] P. 197.

As to the provision of permanent maintenance after dissolution of marriage see 12 HALSBURY'S LAWS (3rd Edn.) 430 et seq., and for cases see 27 DIGEST (Repl.) 611 et seq. For the Matrimonial Causes Act, 1950, s. 19, see 29 HALSBURY'S STATUTES (2nd Edn.) 407.

Cases referred to:

- (1) *Waterhouse v. Waterhouse*, [1893] P. 284; 62 L.J.P. 115; 69 L.T. 618; 37 Sol. Jo. 617; 6 R. 630, C.A.; 27 Digest (Repl.) 626, 5870.
- (2) *Cavendish v. Cavendish*, [1913] P. 138; 82 L.J.P. 112; 108 L.T. 1039; 29 T.L.R. 653; 57 Sol. Jo. 741; 27 Digest (Repl.) 633, 5944.
- (3) *Ellis v. Ellis* (1883), 8 P.D. 188; 52 L.J.P. 99; 49 L.T. 223; 31 W.R. 942, C.A.; 27 Digest (Repl.) 497, 4384.
- (4) *Mycock v. Mycock* (1870), L.R. 2 P. & D. 98; 39 L.J.P. & M. 56; 23 L.T. 238; 18 W.R. 1144; 27 Digest (Repl.) 455, 3889.
- (5) *Parsons v. Parsons*, [1907] P. 331; 76 L.J.P. 159; 23 T.L.R. 749; 27 Digest (Repl.) 455, 3892.
- (6) *Bradley v. Bradley* (1878), 3 P.D. 47; 47 L.J.P. 53; 39 L.T. 203; 26 W.R. 831; 27 Digest (Repl.) 634, 5948.
- (7) *Goodden v. Goodden*, [1892] P. 1; 65 L.T. 542; 40 W.R. 49; 8 T.L.R. 32; 36 Sol. Jo. 60, C.A.; 27 Digest (Repl.) 603, 5644.

- (8) *Covell v. Covell* (1872), L.R. 2 P. & D. 411; 41 L.J.P. & M. 81; 27 L.T. 324; 20 W.R. 894; 27 Digest (Repl.) 603, 5645.
- (9) *Scott v. Scott*, [1921] P. 107; 9 L.J.P. 171; 124 L.T. 619; 37 T.L.R. 158, C.A.; 27 Digest (Repl.) 631, 5917.
- (10) *Midwinter v. Midwinter*, [1892] P. 28; 61 L.J.P. 1; 65 L.T. 438; 40 W.R. 33; 36 Sol. Jo. 12, C.A.; 27 Digest (Repl.) 637, 5991.
- (11) *Lewis v. Lewis*, [1892] P. 212; 61 L.J.P. 95; 67 L.T. 358; 8 T.L.R. 489; 27 Digest (Repl.) 687, 6573.
- (12) *Sidney v. Sidney* (1867), 36 L.J.P. & M. 73; 15 W.R. 1094, H.L.; 27 Digest (Repl.) 634, 5950.
- (13) *R. v. Arkwright* (1848), 12 Q.B. 960; 3 New Mag. Cas. 74; 18 L.J.Q.B. 26; 12 L.T.O.S. 271; 13 J.P. 4; 13 Jur. 300; 116 E.R. 1130; 16 Digest 422, 2820.
- (14) *R. v. Humphery* (1825), M'Cle. & Yo. 173; 148 E.R. 371; 16 Digest 226, 176.

Appeal by the husband from an order of SWIFT, J., in chambers, on a summons by him to dismiss his wife's petition for the dissolution of the marriage.

The question which was raised was whether, where a wife obtained a decree nisi of divorce, she must apply with due diligence to have that decree made absolute, or whether she might postpone doing so until she had obtained an order for permanent maintenance. The following statement of facts is taken from the judgment of POLLOCK, M.R.: On Oct. 15, 1923, Hilda Louise Fox filed a petition for the dissolution of her marriage with the respondent, Arthur William Fox, on the ground of his adultery. On Feb. 23, 1924, by consent, an order was made for the payment of alimony pendente lite at the rate of £2,000 per annum payable monthly free of tax, and on March 24, 1924, a decree nisi for the dissolution of the marriage was ordered, the husband not defending the suit, and the custody of the four children of the marriage was given to the wife. Negotiations as to the amount of the permanent alimony were entered on and continued for some time, but no result was reached, and, as no application was made to make the decree nisi absolute, on April 21, 1925, a summons was issued by the husband to dismiss the suit for want of prosecution. Meantime, on April 2, 1925, a petition for permanent maintenance of the wife and her children was issued. On April 27, 1925, the summons to dismiss for want of prosecution came before SWIFT, J., sitting in Divorce, and he made no order on it, "except that the same do stand adjourned pending maintenance order." From the affidavit filed on her behalf, the court was informed that the wife had not proceeded to apply for the decree absolute owing to the delay on the part of the husband in making provision for the wife and the children, and "Mrs. Fox will proceed to apply for the decree absolute as soon as the court has made the necessary order to secure maintenance for the petitioner, and to provide for the maintenance of the children of the marriage, and the security ordered by the court has been given." The husband appealed from the order of April 27, on the ground that the maintenance ought not to be made independently of, and unless on, the decree nisi being made absolute, and also on the ground that the wife was put under no terms or conditions as to the course that she would take, and that the general adjournment of the summons to dismiss the suit for want of prosecution "pending maintenance order" made such an order the key of the position, while the husband was left in uncertainty as to which of the three alternatives open to her the wife would adopt, namely, (i) apply for the decree nisi to be made absolute; or (ii) apply for a judicial separation; or (iii) abandon further proceedings. The husband appealed from SWIFT, J.'s, decision to make no order on the summons except that "the hearing do stand adjourned pending maintenance order."

By the Matrimonial Causes Act, 1907, s. 1 (1):

"The court may, if it thinks fit, on any decree for dissolution or nullity of marriage, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or such annual sum of money for any term

not exceeding her life as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it may deem reasonable . . .”

Sir John Simon, K.C., and T. J. O'Connor, for the husband, referred to Ellis v. Ellis (3), Mycock v. Mycock (4), Parsons v. Parsons (5), Bradley v. Bradley (6), Goodden v. Goodden (7), Covell v. Covell (8), Scott v. Scott (9), and Waterhouse v. Waterhouse (1).

Bayford, K.C., and J. Bucknill for the wife, referred to Bradley v. Bradley (6), Scott v. Scott (9), Midwinter v. Midwinter (10), Lewis v. Lewis (11), Cavendish v. Cavendish (2), Waterhouse v. Waterhouse (1), Sidney v. Sidney (12), Ellis v. Ellis (3), R. v. Arkwright (13), and R. v. Humphery (14).

Cur. adv. vult.

June 17. The following judgments were read.

SIR ERNEST POLLOCK, M.R., stated the facts, and continued: The power of the court to require the husband to secure to the wife permanent alimony was given to it under s. 32 of the Matrimonial Causes Act, 1857, now repealed and replaced by s. 1 of the Matrimonial Causes Act, 1907, but the effect of the two sections is for the present purpose of the appeal the same. The former section is obviously intended to refer to the decree absolute, for there was no decree nisi at that time, and the later section has, I think, the same intention. The power arises “on any decree for dissolution or nullity of marriage.” That does not mean that the order must be made at the same moment that the decree for dissolution is made. “On” may mean before, or simultaneously with, or after act done according as reason and good sense require with reference to the context: see the judgment of LORD DENMAN in *R. v. Arkwright* (13) (12 Q.B. at p. 970). It may be made before the decree and in anticipation of it, on materials available with a view to the court being able to make the order for the maintenance at the same time as the decree for dissolution: see *Waterhouse v. Waterhouse* (1), and *Cavendish v. Cavendish* (2). It may be made after the decree absolute for dissolution has been pronounced: see *Bradley v. Bradley* (6). The system provided is clear. Alimony pendente lite can be made as late as after a decree nisi for dissolution of the marriage, and is to continue until, on the decree absolute for dissolution, its effect ceases and it is replaced by the order—which comes into force at that moment for permanent alimony or maintenance, as the case may be: see *Ellis v. Ellis* (3), where the sequence of the orders is pointed out. CORRON, L.J., said (8 P.D. at p. 189), “until the final decree, the court can make no permanent provision for the wife.” SIR JAMES HANNEN, P., however, in his judgment in *Bradley v. Bradley* (6) (3 P.D. at p. 50), points out that the effect of the judgment of the House of Lords in *Sidney v. Sidney* (12) (36 L.J.P. & M. at p. 74) was to decide that the jurisdiction of the court to make an order for permanent alimony does not arise until the court has pronounced the decree of dissolution—that the decree for alimony is ancillary to the decree for dissolution of the marriage, though it may be made after the decree has been pronounced, for the word “on” is to be taken to have an elastic meaning. In effect it means “on the occasion of”: see also per LORD STERNDAL in *Scott v. Scott* (9) ([1921] P. at pp. 121, 125). None the less, the decree absolute is essential as creating the occasion when the jurisdiction arises.

In my judgment, therefore, the fact that a decree absolute for the dissolution of the marriage is to be, or has been, made, must be kept clearly in view, otherwise there would be no jurisdiction to make the order for permanent alimony.

The present order appears to overlook that fundamental consideration. Under it there is no power to bring the matter of the petitioner's delay before the court, unless and until an order for maintenance has been made, and without any undertaking to the court that the petitioner will ever take the course under which alone its jurisdiction as to the maintenance order arises. It does not appear clearly to this court that such was the intention of the learned judge with whose discretion, if judicially exercised, I should hesitate long before interfering. More likely the

order was drawn up without appreciation of its full effect, and it imperfectly represents the intention of the learned judge; but, as it stands, it appears to place the order for maintenance and diligence in the prosecution of the suit in their wrong order, and to afford an opportunity to a wife to exercise an unreasonable pressure on her husband.

By the Matrimonial Causes Act, 1859, s. 5, the court, after a final decree of nullity of marriage, or dissolution of marriage,

"may inquire into the existence of antenuptial or postnuptial settlements . . . and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the court shall seem fit."

In *Bradley v. Bradley* (6), SIR JAMES HANNEN treated "after" in this section as equivalent to "on" in the section referred to above—an interpretation which must be assented to as reasonable and necessary to the two sections fitting together. By s. 1 (1) of the Act of 1907, the court may suspend pronouncing the decree until such a deed as is necessary to secure the above purpose has been executed. These sections are important, as they enable the court to deal with the parties whose marriage is to be dissolved as man and wife, and thus to require a settlement to be made by a husband who has power to appoint to his wife, while it is still possible for him to do so, and before he loses the power on the dissolution of his marriage, and the court can impose the penalty of delay in pronouncing the decree in order to compel him to execute the deeds necessary. They prove that an order for permanent alimony can be made, otherwise than at the very moment of the decree absolute being pronounced, although such an order is founded on and is in close relation to the decree: see *Scott v. Scott* (9).

The order made in the present case ought, in my judgment, to have contained the terms "to stand over generally with liberty to apply to restore" so as to prevent the order for adjournment being absolute, and must be so amended. The result of this case is, I think, to make it clear that the duty of the judge before whom an application for permanent maintenance is made, is to keep in sight the necessity of there being a decree for the dissolution of marriage, and not to make an order which, in its effect, is independent of it. It is not necessary to be more precise, for, within the above limits, such orders must be left to the discretion of the judge who has to deal with them.

The order made below must be varied by the addition of the above words, but the husband has only succeeded so far and the appeal will be allowed without costs.

WARRINGTON, L.J., stated the facts, and continued: Under these circumstances, it would seem at first sight that the order appealed from, seeing that it merely directed the summons to stand over, was one essentially in the discretion of the learned judge, but it is contended by the husband that the court has no jurisdiction to make an order for maintenance until it makes the decree absolute, and that the learned judge ought to have made an order dismissing the suit unless within a limited time the petitioner should make and prosecute an application for a decree absolute.

The first question, then, is whether the court has jurisdiction, after a decree nisi and before making the decree absolute, to make an order for maintenance, which, of course, will not take effect so far as any payment thereunder is concerned until after the decree absolute. In two reported cases such orders have been made. The first of these is *Waterhouse v. Waterhouse* (1). In that case, the decree nisi was pronounced on March 14, 1893, and a petition for maintenance was presented immediately afterwards. The registrar made a report that it was reasonable that the respondent should be ordered to secure to the petitioner £1,000 by a charge to that amount on a reversionary interest to which he was entitled under the marriage settlement of his parents. The judge being asked to confirm this report doubted his jurisdiction to do so and refused the order, whereupon the application

A was renewed before the Court of Appeal. That court made an order confirming the registrar's report, and ordered that the respondent should, within one week after making the decree absolute, secure to the petitioner £1,000, and an injunction was granted until then restraining the respondent from parting or otherwise dealing with so much of his property mentioned in the report as would not leave sufficient to secure the £1,000. The respondent was not served as he was keeping
B out of the way, and there was evidence of danger to the property. But the decision was expressed in a reasoned judgment by LINDLEY, L.J., and is, in my opinion, an authority binding on this court. I ought to add that the order was made on June 30, 1893, long before the expiration of six months from the decree nisi. A similar order in principle was made by SIR SAMUEL EVANS, P., in *Cavendish v. Cavendish* (2). In this case, the decree nisi was pronounced on July 22, 1912, and the order
C in question was made on June 30, 1913, nearly a year afterwards.

These authorities are, in my opinion, sufficient to dispose of the husband's fundamental objection to the judge's order, and it may be said that the judgment of the Court of Appeal was on the construction and effect of the Act of 1857 and not on that of the Act now in force, namely, the Act of 1907. In my opinion, the two
D Acts are for the present purpose identical, and the judgment of the Court of Appeal is of as much weight in the construction of the later Act as of that in force at its date and can be read to construe s. 1 of the Act of 1907. I think it is clear that it contemplates the execution prior to the pronouncing of a decree absolute of a proper deed securing maintenance to the wife, seeing that in proper cases it has power to suspend the decree until this has been done. Now the settling of a proper
E deed and directing it to be executed presupposes an order fixing the amount to be secured and an order for the execution of the deed. Moreover, there are cases in which the maintenance of the wife can only be adequately secured by a deed executed while the woman is still the wife of her husband, as, e.g., while the husband has power to appoint to his "wife." An appointment after the dissolution of the marriage would—in ordinary cases at least—be ineffectual. Again, there may well
F be cases in which it is desirable, to say the least, that the maintenance should come into operation simultaneously with the dissolution, and in such cases preliminary orders of varying kinds directed to fixing the amount of and the mode of securing the maintenance may have to be made under the section. I am of opinion, therefore, that orders under s. 1 of the Act of 1907 may be made before the final decree is actually pronounced, and that the objection raised by the husband to the order of SWIFT, J., in point of law is not sustainable.

But that does not dispose of the matter. It may still be that the order is not one which in the exercise of a judicial discretion ought to have been made. On this question there are several points to be borne in mind. An order for maintenance derives its validity from the dissolution of the marriage. It seems to me, therefore, that the judge before making such an order ought to be reasonably assured that
H the decree absolute will be applied for and the application pressed with due diligence. It would not be fair to the husband, and would open the way to oppressive action on the part of a spiteful wife, actuated by some indirect motive, if she could prosecute an application for maintenance to the end and then refuse to apply for a final decree. The judge should, I think, retain a control over the matter, so that he might interpose at any time if there was reason to suppose anything in the nature of oppression were taking place. So, also, without laying down definite
I rules as to the exercise of his discretion, or saying what he ought to accept as sufficient assurance that in due time an application for a decree absolute will be made, I think he ought at least to retain the power of saying at any time that proceedings shall go no further unless a decree absolute is applied for within a limited time and such application is duly prosecuted.

In the present case, the order as drawn up directs the summons to stand over pending maintenance order, namely, until the order has been actually made. This is, in my opinion, too definite a postponement, and in terms prevents the husband

from making use of his summons to invoke the judge's aid if circumstances should arise to indicate that the wife is making unfair use of the proceedings for maintenance. It may be that the order as drawn up goes further than the learned judge intended. It seems to me to be essential that, in such matters, the judge should retain control. This would be effected if the husband's summons were directed to stand over generally with liberty to apply to restore, and I think the order should be varied to that extent, but with this variation should be affirmed. It may be that, at some time, the necessity for the drastic interference of the judge by putting the wife to the alternative of an immediate application for a decree or the dismissal of her suit may arise, but on the evidence I do not think it has arisen at present.

SARGANT, L.J.—In this case there has no doubt been unusual delay in applying to have the decree nisi made absolute. It is as long ago as March 24, 1924, that the decree nisi was pronounced, and ordinarily the application to make the decree absolute would have been made soon after Sept. 24 in that year. But much the greater part of the delay is shown to have been due to an effort which was being made to arrive by friendly negotiation at an agreed provision to be made by the husband for the wife and the children of the marriage. And it was not until after the failure of these negotiations—namely, on April 2 last—that the wife filed a formal petition for permanent maintenance for herself and for the maintenance of the children. Shortly after the filing of this petition—namely, on April 21 last—the husband applied to dismiss the suit for want of prosecution. And on this application, SWIFT, J., on April 27 last, in exercise of his discretion, in view of the pending of the maintenance petition, adjourned the application. In so doing, I have little doubt that the learned judge did not contemplate an indefinite adjournment and intended that the application to dismiss might be renewed at any time should there be further delay in proceeding with the maintenance petition. But unfortunately his order was drawn up in a rigid form, and so as to suggest that the application was to stand over until after the actual making of an order for permanent maintenance. This construction of the order might involve the husband in considerable difficulty and hardship, especially in view of certain indications on the part of the wife's advisers that she might in certain events decline to accept a proposed order for maintenance which she might not think to be adequate, and might in such a case elect not to apply to make the decree nisi absolute. Hence the appeal to this court.

On the hearing of the appeal, these indications were strengthened rather than weakened. And I certainly understood the wife's counsel as definitely refusing to pledge her to proceed to make the decree absolute whatever the interim decision of the court might be as to the provision for permanent maintenance. The question, therefore, arises in a definite form whether there is any jurisdiction to make an order for permanent maintenance, or to allow any proceedings or inquiries for that purpose, except as incidental and subsidiary to a decree absolute. And this question, which is obviously one of considerable importance, has been well and fully argued before us. Under the Matrimonial Causes Act, 1857, there was no preliminary decree nisi for divorce but merely a decree absolute. And it is plain, therefore, that, under s. 32 of that Act, which first made provision for permanent alimony, or what is now called permanent maintenance, such maintenance could be granted only in case of absolute dissolution of marriage and apparently only on the occasion of the decree. The preliminary decree nisi was introduced by the Matrimonial Causes Act, 1860, but no enlargement or alteration was effected of s. 32 of the Act of 1857. And again, when, in the Matrimonial Causes Act, 1866, the court was empowered to order a guilty husband to pay monthly or weekly sums to the petitioning wife during their joint lives, it is clear, on the language of the Act, that the power arose only on the making of a final decree for dissolution. It also appears from *Bradley v. Bradley* (6) that the ordinary practice was to make the order for permanent maintenance simultaneously with the decree for dissolution;

A and although that case only decided that the order for maintenance might be applied for and made within a reasonable time after the decree for dissolution, and did not in terms negative the possibility of its being made before that decree, it certainly indicates that the order is dependent on the making of the decree. *Midwinter v. Midwinter* (10) is to the effect that no actual settlement can be made prior to decree absolute, but that inquiries may be made before. But this decision is under another section, namely s. 45 of the Act of 1857; and there somewhat different considerations apply. *Waterhouse v. Waterhouse* (1) is a case in this court in which an interim injunction was granted after decree nisi to prevent the husband making away with his property and so defeating the order for maintenance which the court thought should be made to take effect from and after the granting of a decree absolute; and it is certainly the case which is most strongly in favour of the wife here. But, beyond the fact that there was no argument for the respondent, the court obviously assumed that a decree absolute would be applied for and made in the ordinary way, and the decision merely ensured that the order for maintenance, if and when made, should be effective. It throughout treated the prospective order for maintenance as dependent on, and incidental to, the decree absolute for dissolution.

D In this state of things, the Matrimonial Causes Act, 1907, was passed to amend the Acts of 1857 and 1866 by extending the powers of the court in relation to maintenance and alimony and leave to intervene. And it has been suggested for the wife that her position has been improved by s. 1 of that Act. But when that section is carefully examined, it is, in my judgment, clear that the decree for the dissolution of marriage there referred to is as before a decree absolute, and that, though the section gives an interim power after decree nisi to take steps to have a proper deed or instrument prepared, and to suspend the pronouncing of the decree absolute until a deed (where a deed is required) has been duly executed, this is only machinery for the purpose of ensuring that the decree for dissolution is accompanied by a proper provision for maintenance. There is nothing to suggest that the interim proceedings are not entirely conditional on, and incidental to, the ultimate pronouncing of a decree absolute for dissolution. And it would, I think, be inconsistent with the object of the Act that such proceedings should be taken except as an accompaniment to the single purpose of obtaining a decree absolute. To take them is incompatible, to my mind, with the wife retaining an election to subsequently abandon her suit or to ask for a judicial separation only.

G In ordinary cases, where there is no reason to doubt that the wife intends to proceed in any event to a decree absolute, and where the expense of the interim proceedings to obtain permanent maintenance is not serious, there can be little, if any, objection to allowing these proceedings to be instituted and carried on unconditionally pending the decree absolute, with a view to making the order for such permanent maintenance co-incidentally with, or even just before, the decree absolute. But in a case where there seems to be some doubt as to the ultimate intention of the wife, I think that the judge should keep such a control of the proceedings as will prevent the husband being harassed by troublesome and expensive inquiries which may prove in the end to have been quite unjustifiable. How this control should be secured, whether by a short adjournment only of the husband's application to dismiss for want of prosecution, or by conditional grant of the application, or by the requirement of some assurance or undertaking on the part of the wife, or by some other means, is a matter best left to the discretion of the judge in view of the circumstances of each particular case. But it is to be noted that, if the judge is not sufficiently satisfied of the fixed intention of the wife, he can stay the proceedings for permanent maintenance until after the decree absolute has been applied for and made, and leave the wife to obtain her permanent maintenance subsequently as in *Bradley v. Bradley* (6). Should she suffer in any case through less favourable terms being possible after the marriage

has been dissolved than while it was still subsisting (as is hinted to be the case here) that will be the result of her own recalcitrancy. And it will always be possible in such a case to provide her with subsistence between the date of the decree absolute and the subsequent order for permanent maintenance by making use of the power given by s. 1 (2) of the Act of 1907.

I agree that the order drawn up should be slightly varied in the way pointed out in the previous judgments so as to carry out what seems to have been the real intention of the learned judge in this case.

Appeal allowed in part.

Solicitors : *Freeman & Sons; Guedalla, Jacobsen & Spyer.*

[Reported by GEOFFREY P. LANGWORTHY, Esq., Barrister-at-Law.]

GRAHAM v. GREEN

[KING'S BENCH DIVISION (Rowlatt, J.), March 10, 11, 1925]

[Reported [1925] 2 K.B. 37; 94 L.J.K.B. 494; 133 L.T. 367;

41 T.L.R. 371, 69 Sol. Jo. 478; 9 Tax Cas. 309]

Income Tax—Profits—Trade or vocation—Winnings from systematic betting—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), Sched. D, Case II, Case VI.

The appellant's sole means of livelihood for many years had been betting on horses from his private residence with bookmakers and at starting prices only. He was assessed to income tax under Case II or alternatively under Case VI of Sched. D of the Income Tax Act, 1918, in respect of his winnings.

Held: the appellant was not following a vocation within Case II, nor were his winnings profits or gains within Case VI, and, therefore, his winnings were not assessable under either of those Cases.

Notes. The Income Tax Act, 1918, Sched. D, Case I and Case VI, were replaced by the Income Tax Act, 1952, s. 123.

Considered: *Townsend v. Grundy* (1933), 18 Tax Cas. 140. Distinguished: *Graham v. Arnott* (1941), 24 Tax Cas. 157; *Barry v. Cordy*, [1946] 2 All E.R. 396. Referred to: *Down v. Compston*, [1937] 2 All E.R. 475.

As to undertakings analogous to trade, see 20 HALSBURY'S LAWS (3rd Edn.) 287 et seq.; and for cases see 28 DIGEST (Repl.) 154 et seq.

Cases referred to:

- (1) *Partridge v. Mallandaine* (1886), 18 Q.B.D. 276; 56 L.J.Q.B. 251; 56 L.T. 203; 35 W.R. 276; 3 T.L.R. 192; 2 Tax Cas. 179. D.C.; 28 Digest (Repl.) 154, 594.
- (2) *Ryall v. Hoare*, *Ryall v. Honeywill* [1923] 2 K.B. 447; 92 L.J.K.B. 1010; 129 L.T. 505; 39 T.L.R. 475; 67 Sol. Jo. 750; 8 Tax Cas. 521; 28 Digest (Repl.) 216, 917.

Case Stated by the General Commissioners of Income Tax for the division of Burnham in the county of Buckinghamshire for the opinion of the King's Bench Division of the High Court of Justice.

At a meeting of the commissioners held at the Town Hall, Amersham, on Oct. 22, 1923, for the purpose of hearing appeals, Alexander Graham (senior), of Amersham (hereinafter referred to as "the appellant") appealed against an assessment of £300 to income tax made upon him under Sched. D of the Income Tax Act, 1918, for the year ending April 5, 1924, in respect of betting transactions.

A The following facts were proved or admitted: (i) That betting on horses from his own residence was the appellant's only means of livelihood apart from interest on his bank deposit; (ii) That for many years past this had been his sole means of livelihood.

B The appellant contended that the fact that he did not attend race meetings and was not a professional bookmaker but that his betting took place from his own residence with bookmakers only and at starting prices only and consisted only of his private betting exempted him from liability to taxation, and in support of this view the appellant referred to *Partridge v. Mallandaine* (1). The inspector of taxes contended that the appellant was assessable under Sched. D in respect of "The annual profits or gains arising or accruing . . . (ii) From any trade, profession, employment or vocation," and "other annual profits or gains not charged under Scheds. A, B, C or E, and not specially exempted from tax." It had been admitted by the appellant that for many years past betting on horses from his own residence was the only means of his livelihood apart from interest on his bank deposit. The liability was therefore properly assessable under Case II as being in respect of a vocation, or alternatively under Case VI in respect of "annual profits or gains not falling under any of the foregoing cases and not charged by virtue of any other schedule."

D The general commissioners having heard and considered the appeal were of the opinion that the assessment was rightly made and dismissed the appeal. The appellant expressed his dissatisfaction with the decision as being erroneous in law, and required a Case to be stated for the opinion of the court.

E *Barrington-Ward, K.C.*, and *Sandlands*, for the appellant.

The Solicitor-General (Sir Thomas Inskip, K.C.), and *Reginald Hills*, for the Crown.

ROWLATT, J.—In this case the appellant was in the habit of betting on horses at starting prices. He did it on a large and sustained scale, and with such shrewdness that he made an income out of it, and the general commissioners found that substantially it was his means of living. In these circumstances he has been assessed to income tax in respect of these emoluments and he now appeals.

F The question arises under Case II and under Case VI of Sched. D. It arises under Case VI on the question whether the winnings on his bets, as bets, are profits or gains within the meaning of that Case. It arises under Case II on the question whether, assuming that the winnings from the bets themselves are not profits or gains, the aggregate of his winnings, as the result of his sustained and continued action, are the profits or gains of a vocation within the meaning of Case II, or, possibly, it might have been put on the ground of a trade or adventure within the meaning of Case I which is really the same question.

G Looking first at Case VI, one is faced with the difficult question as to what is a profit or gain. I asked counsel for the Crown to tell me what was the essential characteristic of a profit or gain, and the only answer which I was able to obtain was that it was a question of fact, but this seems to me merely to be a polite way of saying that he had no observation to offer on that point. My attention was drawn to my own decision in *Ryall v. Hoare* (2), which was the case of a man who had guaranteed an overdraft for a company of which he was a director. For this guarantee he received commission, and this was the only occasion on which he did that kind of thing. The question before me there was not whether a commission paid to a man for a service of this kind was a profit or gain in itself, which it obviously was since it was paid for commercial services rendered, but whether it was an annual profit or gain. In the course of my judgment I said that a mere receipt by finding an object of value, or a mere gift, was not a profit or gain, and I do not feel much doubt about that. I further said that the winning of a bet did not result in a profit or gain. Until I am corrected, I think I was right in that. Whether it is a gift, or whether it is a finding, there is nothing of which there

is a profit. There is no increment, no service, but merely the picking up of something either by the will of the person who possessed it before or because there is no person to oppose that picking up.

In considering the question of a bet, it seems to me that the position is substantially the same. What is a bet? A bet is merely an irrational agreement that one person should pay another person something on the happening of an event. A. agrees to pay B. something if C.'s horse runs more quickly than D.'s. There is no relevance at all between the event and the acquisition of property. The event does not really produce it at all; it rests, as I say, on a mere irrational agreement.

I need say no more as to Case VI. But then there is no doubt that, if you set on foot an organised seeking after emoluments, which are not in themselves profits, you may create, by way of a trade, or an adventure, or a vocation, a subject-matter which does bear fruit in the shape of profits or gains. Really a different conception arises, a conception of a trade or vocation which differs in its nature, in my judgment, from the individual acts which go to build it up, just as a bundle differs from its odd sticks. One may say, I think, without an abuse of language, that there is something organic about the whole which does not exist in its separate parts. It is said that this appellant, by persistently betting with great shrewdness and good results, from his house or from any place where he could get access to the telegraph office, had set up a vocation. That is contended by the Crown on the facts of this case, and certainly the contention is one which, if sound, has very startling results. A loss in a vocation, or a trade, or an adventure can be set off against other profits, and we are confronted with this result: that a man earning a profit in some recognised form of industry, but having the bad habit of frequently, persistently, continuously, and systematically betting with bookmakers, might set off the losses, through which he squandered the fruits of his industry, for income tax purposes, against his profits—a very remarkable result indeed, and one, I am afraid, of very wide application. We have allowances to a man because of the family he has to support, and we are now threatened with a further allowance in respect of the loss which he makes by habitually betting. It certainly sounds very remarkable, and would entitle a person, when he wastes his earnings by betting, to make the State a partner in his gambling. However, the question must be faced.

As I have said, there is no doubt that one can create a trade by making an organised effort to obtain emoluments which are not in themselves taxable as profits, and the most familiar instance of all, of course, is a trade which has for its object the securing of a capital increment. A person who buys an object which subsequently turns out to be more valuable, and then sells it, does not thereby make a profit or gain. But he can organise himself to do that in a commercial and mercantile way, and the profits which emerge are taxable profits, not of the transactions but of the trade. In the same way, he may carry on the same trade or part of the trade by selling things which he has not got and buy them when the price has fallen. That is a capital accretion, only the operations are reversed. He sells first and buys afterwards. In that way he may make losses or he may make profits. If he makes losses, the losses cannot be said to be the results of the individual acts, they are the results of the trade as a whole. The following test may be applied: a person may organise an effort to find things. He may start a salvage or exploring undertaking and he may make profits. The profits are not the profits of the findings, they are the profits of the adventure as a whole. Applying the corresponding test: he may make a loss. It cannot be said that the loss was due to the failure to find. The loss was due to the trade. That tests it very well, because it shows the difference between the trade as an organism and the individual acts.

So much is clear, I think, about the cases of making a trade, or vocation, or adventure out of obtaining differences in prices, or obtaining things which are

A the subject of finding. The trade or vocation which is concerned with difference in prices may be popularly spoken of as gambling, as there is no intention really to accept or deliver the article. But the operations are in relation to the difference in prices of commodities, and there is an element of fecundity in them, and, indeed, these operations form the subject of a great deal of trade.

B Now we come to betting pure and simple. It has been settled that a bookmaker carries on a taxable vocation. What is the bookmaker's system? He knows that there are a great many people who are willing to back horses, and that they will back horses with anybody who holds himself out to give reasonable odds as a bookmaker. By calculating the odds in the case of various horses over a long period of time, and quoting them, so that on the whole the aggregate odds, if I may use the expression, are in his favour, he makes a profit. That seems to me to be
C organising an effort in the same way that a person organises an effort if he sets out to buy for himself things with a view to securing a profit by the difference in what I may call their capital value in individual cases.

D Now we come to the other side, the man who bets with the bookmaker, and that is this case. These are mere bets each time when he puts on his money, at whatever may be the starting price. I do not think he could be said to organise his effort in the same way as a bookmaker organises his. I do not think the subject-matter from his point of view is susceptible of it. In effect all he is doing is just what a man does who is a skilful player at cards who plays every day. He plays to-day and he plays to-morrow and he plays the next day, and he is skilful on each three days, more skilful on the whole than the people with whom he plays, and he wins. But I do not think that you can find in his case any conception arising in
E which his individual operations can be said to be merged in the way that particular operations are merged in the conception of a trade. I think all you can say of that man, in the fair use of the English language, is that he is addicted to betting. It is extremely difficult to express, but it seems to me that people would say that he is addicted to betting, and could not say that his vocation is betting. The subject is involved in great difficulty of language, which I think represents great
F difficulty of thought. There is no tax on a habit. I do not think "habitual" or even "systematic" fully describes what is essential in the phrase "trade, adventure, profession, or vocation." In my judgment, the income which this appellant succeeded in making is not profits or gains, and the appeal must be allowed.

Appeal allowed.

Solicitors: Mott & Parkes; Solicitor of Inland Revenue.

[Reported by J. S. SCRIMGEOUR, ESQ., Barrister-at-Law.]

ATTWOOD v. LLAY MAIN COLLIERIES, LTD.

[CHANCERY DIVISION (P. O. Lawrence, J.), October 15, 16, 20, 22, 23, December 2, 1925]

[Reported [1926] Ch. 444; 95 L.J.Ch. 221; 134 L.T. 268; 70 Sol. Jo. 265]

Water—Riparian rights—Right of riparian owner to take water for (a) ordinary (b) extraordinary purposes connected with riparian tenement—Right of lower riparian owner to restrain abstraction of water by upper riparian owner—Need to prove damage and possible acquirement by upper owner of prescriptive right—"Riparian tenement"—Meaning—Question of fact—Need for reasonable proximity to river of substantial portion of tenement.

A riparian owner may take and use the water to which his tenement gives him access for ordinary purposes connected with the riparian tenement (such as domestic purposes or the wants of his cattle) and in exercise of his right he may exhaust the water altogether. He may also take and use the water for extraordinary purposes if such user be reasonable and connected with the riparian tenement, provided that he restores the water so taken and used substantially undiminished in volume and unaltered in character. But he has no right whatever to take the water and use it for purposes unconnected with the riparian tenement.

The question whether a particular piece of land sustains the character of a riparian tenement or not is a question of fact and must be determined according to the circumstances. Where a company had acquired a strip of land about half a mile in length and having an average width of one chain along a river, the site of the company's works, to which the strip of land was connected, being a mile away from the river,

Held: the expression "riparian tenement" connoted (in addition to contact with the river) a reasonable proximity to the river bank; every piece of land in the same occupation which included a portion of the river bank and so afforded access to the river did not constitute a riparian tenement; and, therefore, the site of the defendant company's works was too far away from the river bank to be a riparian tenement.

Per P. O. LAWRENCE, J.: It could not reasonably be suggested that the whole of a large estate of, say, 2,000 acres was a riparian tenement because a small portion of it was bounded by a stream.

In the case of a claim by a riparian owner to restrain the abstraction of water from the stream by an upper riparian owner where what the upper riparian owner was doing amounted to a complete diversion of part of the stream and a confiscation of the rights of the lower riparian owner and the upper riparian owner claimed the right to continue that diversion and confiscation,

Held: the questions of damage suffered by the lower riparian owner and the possible acquisition of prescriptive rights by the upper riparian owner were immaterial, and the lower riparian owner was entitled to relief without proof of damage notwithstanding that the upper riparian owner could not as against him acquire a prescriptive right.

Mine—Lease—Lease of land for mineral railway—Right to lay water pipe under soil—"Surface of land"—Use of railway to carry building materials.

By a lease dated Nov. 11, 1924, the plaintiff demised to the defendant company for a term of 99 years the surface of a piece of land for the construction and working thereon by the defendant company of a mineral railway. The company erected pumping plant on the land and placed therein a seven-inch pipe to convey water from the plant to their works.

Held: it was well-established that if a lessor desired to except or reserve any interest or benefit in the subject-matter of the demise he must do so in clear

terms and that the court would not readily imply any such exception or reservation in the absence of express words, more especially where, as in the present case, the lease contained express exceptions and reservations, and, therefore, in the absence of any covenant not to use the land for any purpose other than the mineral railway the demise carried with it the right to occupy and use the surface for any purpose not inconsistent with its user for a miniature railway; (ii) where the expression "surface of land" was used in a grant, in the absence of any statement as to the depth and height granted, the purpose for which the surface was granted would govern the quantum of the grant; (iii) in the present case the demise of the surface included so much depth of soil as was required for the ordinary purpose of constructing and working a mineral railway, including so much soil as might be required to be removed in order to level up the land and also such depth of soil as might be required for any pipes to drain the land and supply water for steam engines or other machinery used in working the railway; the seven-inch pipe was laid no deeper than an ordinary drain or water pipe would be laid; and, therefore, its laying and maintenance were not inconsistent with the user of the land for a mineral railway and the plaintiff was not entitled to an injunction restraining its use.

Held, further: the use of the railway to carry building materials for a company formed and controlled by the defendant company to erect housing accommodation for the company's workmen and other buildings in connection therewith was not a use solely for the purpose of the colliery working the demised minerals.

Notes. As to wayleaves in mineral leases see 26 HALSBURY'S LAWS (3rd Edn.) 404-406, and as to the rights of riparian owners see *ibid.* 2nd Edn., p. 593 et seq. For cases see 34 DIGEST 717 et seq. and 44 DIGEST 11 et seq.

Cases referred to:

- (1) *Goodson v. Richardson* (1874), 9 Ch. App. 221; 43 L.J.Ch. 790; 30 L.T. 142; 38 J.P. 436; 22 L.R. 337, L.C. & L.J.J.; 26 Digest 326, 588.
- (2) *Tunbridge Wells Corpn. v. Baird*, [1896] A.C. 434; 65 L.J.Q.B. 451; 74 L.T. 385; 60 J.P. 788; 12 T.L.R. 372, H.L.; 26 Digest 330, 618.
- (3) *Battersea Vestry v. County of London and Brush Provincial Electric Lighting Co., Ltd.*, [1899] 1 Ch. 474; sub nom. *St. Mary, Battersea, Vestry v. County of London and Brush Provincial Electric Lighting Co.*, 68 L.J.Ch. 238; 80 L.T. 31; 15 T.L.R. 175; 63 J.P. Jo. 84, C.A.; 26 Digest 328, 602.
- (4) *Pountney v. Clayton* (1883), 11 Q.B.D. 820; 52 L.J.Q.B. 566; 49 L.T. 283; 47 J.P. 788; 31 W.R. 664, C.A.; 34 Digest 610, 86.
- (5) *McCartney v. Londonderry and Lough Swilly Rail. Co.*, [1904] A.C. 301; 73 L.J.P.C. 73; 91 L.T. 105; 53 W.R. 385, H.L.; 44 Digest 16, 82.
- (6) *Swindon Waterworks Co. v. Wilts and Berks Canal Navigation Co.* (1875), L.R. 7 H.L. 697; 45 L.J.Ch. 638; 33 L.T. 513; 40 J.P. 804; 24 W.R. 284, H.L.; 44 Digest 17, 85.
- (7) *Harrop v. Hirst* (1868), L.R. 4 Exch. 43; 38 L.J.Ex. 1; 19 L.T. 426; 33 J.P. 103; 17 W.R. 164; 44 Digest 27, 193.
- (8) *Sampson v. Hoddinott* (1857), 1 C.B.N.S. 590; 26 L.J.C.P. 148; 28 L.T.O.S. 304; 21 J.P. 375; 3 Jur. N.S. 243; 5 W.R. 230; 140 E.R. 242; affirmed 3 C.B.N.S. 596, Ex.Ch.; 44 Digest 21, 122.
- (9) *Sharp v. Wilson, Rotheray & Co.* (1905), 93 L.T. 155; 21 T.L.R. 679; 44 Digest 56, 405.

Witness Action in which the plaintiffs claimed a declaration that the defendant company was not entitled to take and use water from the River Alyn, in Denbighshire, or to carry building materials over a certain mineral railway, and injunctions restraining them from doing so.

A. Grant, K.C., and *R. F. MacSwinney*, for the plaintiff, referred to *Goodson v. Richardson* (1), *Tunbridge Wells Corpn. v. Baird* (2), *Battersea Vestry v. County*

of London and Brush Provincial Electric Lighting Co., Ltd. (3), *MACSWINNEY ON MINES* (5th Edn.) p. 433; *Pountney v. Clayton* (4), *McCartney v. Londonderry and Lough Swilly Rail. Co.* (5), *Swindon Waterworks Co. v. Wilts and Berks Canal Navigation Co.* (6).

F. H. Maugham, K.C., and *David Bowen*, for the defendants, referred to *Harrop v. Hirst* (7).

A. Grant, K.C., in reply, cited *Sampson v. Hoddinott* (8), *Sharp v. Wilson* (9), and per LORD MACNAGHTEN in *McCarthy v. Londonderry and Lough Swilly Rail. Co.* (5) ([1904] A.C. at pp. 304, 308).

Cur. adv. vult.

Dec. 2. **P. O. LAWRENCE, J.**, read the following judgment.—In this action the plaintiff complains of the following acts of the defendant company which he alleges to be wrongful: (a) the abstraction of water from the River Alyn, (b) the laying of a water main from the River Alyn to the defendant company's colliery, known as the Llay Main Colliery, and (c) the carriage of building materials over the mineral railway which connects the Llay Main Colliery with the Great Western Railway. The defendant company asserts that none of these acts is wrongful and claims the right to continue them.

The plaintiff, who is the owner in fee of certain lands situate in the parishes of Llay and Burton in the county of Denbigh lying to the east of the River Alyn, by a lease dated Nov. 11, 1924, demised to the defendant company for a term of ninety-nine years from July 1, 1913, first the minerals under so much of the lands coloured red on the plan A annexed to the lease as lay on the east side (wherever actually met with) of a fault known as the Wrexham Fault, the assumed position of which was shown on such plan, and on the south side (wherever actually met with) of a fault known as the Bala Fault, the assumed position of which was also shown on such plan, such minerals containing by estimation 357 superficial acres or thereabouts more or less as investigation might prove (which lands were therein-after referred to as "the described lands"), and, secondly, the surface of the land coloured blue on plan B annexed to the lease containing by admeasurement 5a. 2r. 12p. or thereabouts up to the middle of the River Alyn. The land coloured blue on plan B was acquired by the defendant company for the primary purpose of constructing and working thereon a mineral railway to connect the Llay Main Colliery with the Great Western Railway at a point to the west of the River Alyn. The defendant company has placed a pipe in the river Alyn and erected some pumping plant on the blue land at the spot where the mineral railway crosses the river. By these means the defendant company takes water out of the River Alyn and conducts it in a seven-inch water main to a storage reservoir situate about a mile to the east of the river near the pits of the Llay Main Colliery. The water thus taken and stored is used by the defendant company for the purpose of generating the steam necessary for working the defendant company's machinery at the colliery in which process the water is consumed. The pumping plant and main if used to their full capacity can take out of the river 333 gallons of water per minute, equal to about 480,000 gallons a day and to upwards of a million and a half gallons a week. The defendant company, however, has not hitherto worked its pumping plant and main to the full capacity; the practice has been to work the pumps for only six hours a day during the six working days of the week and the total water taken in the past amounts approximately to 100,000 gallons a day, equal to 600,000 gallons a week. The defendant company seeks to justify this abstraction of water from the River Alyn under cl. 9 of the lease, and, alternatively, under its riparian rights. No other justification has been suggested.

Clause 9 of the lease grants to the defendant company liberty and power (so far as the plaintiff could grant the same) to take and use water from any streams or watercourses flowing through or alongside the described lands and to pump, raise, and store the same for the purposes and for the use of the colliery, but not so as to foul or pollute the water. It is contended that the River Alyn is a stream or

A watercourse flowing alongside the described lands, and, consequently, that cl. 9 confers upon the defendant company the right to take, store, and use the water from that river for the purposes of the Llay Main Colliery. According to plan A the River Alyn does not flow either through or alongside the described lands as the assumed position of the Wrexham Fault shown on that plan lies a considerable distance to the east of the river. But the defendant company alleges that investigation has shown that the Wrexham Fault does not cross the Paper Mill Fault and that the assumed position of the Wrexham Fault is not the actual position of that fault, and contends that in these circumstances it follows that the River Alyn does flow through or alongside the described lands. This contention seems to me to be illogical and ill founded. Unless the defendant company establishes not only that the assumed position of the Wrexham Fault is erroneous in fact, but also that the true position of such fault is either under or to the west of the River Alyn it is clear that the defendant company cannot succeed in its contention that this river flows through or alongside the described lands. The defendant company has not worked any of the demised minerals in the immediate neighbourhood of the assumed position of the Wrexham Fault, but has adduced a considerable body of evidence directed to show that the Wrexham Fault stops short of and does not cross the Paper Mill Fault. Mr. Edward Stuart Clark deposed to the fact that between the month of June, 1895, and the month of June, 1896, his father, the late Mr. Edwin Stanley Clark, who then owned the Llay Hall Colliery, caused an exploratory drift to be driven through the Paper Mill Fault from the north-eastern corner of that colliery's working in the main coal. Mr. Edward Stuart Clark (who had joined his father in the summer of 1895 on leaving school) surveyed this exploratory drift after it had been completed in June, 1898, and plotted his survey on a plan which he produced. This plotting was kept secret as, apparently, the operations which it depicted were unauthorised and constituted a trespass. The defendant company suggested that the exploratory drift proved that the Wrexham Fault did not cross the Paper Mill Fault. If this were the case it is somewhat curious that Mr. Edwin Stanley Clark should on June 24, 1896, have written a letter to Mr. Poyser (the solicitor then acting for the neighbouring owner) in which he states in unequivocal terms that the Wrexham Fault continued northwards through the Paper Mill Fault right up to the Bala Fault. Mr. Edward Stuart Clark attempted to explain this letter by stating that his father might have had an ulterior motive which caused him to make such statement notwithstanding that he knew it to be untrue—an explanation which I confess struck me as strange as coming from a son concerning his dead father's statements. Be that as it may, however, I have come to the conclusion on the evidence as a whole that this exploratory drift does not afford sufficient evidence that the Wrexham Fault does not cross the Paper Mill Fault and in justice to the memory of the late Mr. Edwin Stanley Clark I prefer to believe that he had also come to that conclusion.

The plan D1, besides containing the plotting of the exploratory drift, shows the Llay Hall Colliery's workings in the main coal at the junction of the Wrexham and Paper Mill Faults, from which workings it appears plainly that the Wrexham Fault was met with in this seam right up to the Paper Mill Fault, and this fact not only explodes the defendant company's theory that the Wrexham Fault stops short of the Paper Mill Fault, but throws great doubt on the theory of the expert witnesses called on behalf of the defendant company that the Wrexham Fault does not cross the Paper Mill Fault, which theory is almost entirely based on the supposition that the Wrexham Fault does not reach as far north as the Paper Mill Fault. The expert evidence taken as a whole has satisfied me that in most, if not in all, cases in this neighbourhood where one fault crosses another there is a considerable displacement of one or other of the faults. There was no difference of opinion among the experts that if the Wrexham Fault did cross the Paper Mill Fault there was every likelihood that on the north side of the Paper Mill Fault the Wrexham Fault would be found to have been substantially displaced either to

the east or to the west, according to whether the Paper Mill Fault was a down-throw or an up-throw to the north at this point. The evidence has left it doubtful, however, whether the throw of the Paper Mill Fault to the north is up or down. At some distance to the east it is proved to be an up-throw, from the plan D1 it would appear to be a trough-fault at the point where the exploratory drift was driven and at a point far to the west on the other side of the River Alyn it was stated to be a very considerable down-throw, although I think it is open to doubt whether the fault at this point is in fact the Paper Mill Fault. In the result, I have come to the conclusion that the defendant company has failed to prove that the Wrexham Fault does not exist to the north of the Paper Mill Fault, and that the precise position of the Wrexham Fault in that locality is just as much in doubt now as it was when the lease was granted. In these circumstances I am of opinion that until the contrary has been established, the assumed position of the Wrexham Fault, as shown on plan A, must be the one which governs the rights of the parties under the lease and consequently that the described lands do not extend up to the river Alyn. Even if the defendant company had established that the Wrexham Fault did not cross the Paper Mill Fault, I am at a loss to understand how that fact would have helped the defendant company's case. On that assumption either the bulk of the minerals purporting to be demised would be excluded altogether from the lease or else, which I think is more probable, the lease would be so construed as to include all the minerals lying to the east of the assumed position of the Wrexham Fault. In neither case, however, would the described lands extend up to the river Alyn.

Counsel for the defendant company further contended that the liberty and power to take and use water contained in cl. 9 of the lease must have been intended, and ought, therefore, to be construed so as to authorise the taking and using of the water of the River Alyn because there was no other stream or watercourse flowing through or alongside the described lands. The conclusive answer to this argument is that no such intention is apparent on the face of the lease and that there are at least two, if not more, of such streams or watercourses. Even if there had been no such streams or watercourses the insertion of a common form clause frequently found in mining leases limited to "streams and watercourses flowing through or alongside the described lands" would not justify the court in holding that it authorised the taking and using of the water from the River Alyn which (even if it be a stream or watercourse within the meaning of that clause) does not flow through or alongside the described lands. In my judgment, therefore, the defendant company is not entitled to take and use water from the River Alyn under the liberty contained in cl. 9 of the lease.

The next question is whether the defendant company can justify the taking and user of the water from the River Alyn by reason of the demise of the surface of the land coloured blue on Plan B. This demise which includes the surface of half of the bed of the River Alyn, in my opinion, constitutes the defendant company a riparian proprietor and, apart from any express or implied reservation in favour of the lessor, entitles the defendant company to exercise the rights incident to its riparian tenement. The lease contains no express exception or reservation of water rights in favour of the lessor, and on the assumption that the demise is not limited to the sole purpose of a mineral railway (a question dealt with later), I am of opinion that no such exception or reservation ought to be implied.

In these circumstances it becomes necessary to consider whether the taking and user by the defendant company of water from the River Alyn in the manner and to the extent mentioned is in excess of the rights incident to the riparian tenement. Counsel for the defendant company at the trial protested that the statement of claim in this action was limited to the question whether or not the lease conferred on the defendant company the right to take and use the water from the River Alyn and that it was not open to the plaintiff to raise the case of an invasion of his rights as lower riparian owner. Counsel suggested that any question of riparian rights would have to be determined in another action if the plaintiff were minded

A to bring such an action, and that, in the meantime, the defendant company might go on taking and using the water even if it was decided in this action that the lease did not confer any such right. The plaintiff's counsel strenuously opposed this view, and contended that it was open on the statement of claim as at present framed to raise the case that as lower riparian owner he could stop the defendant company from taking and using the water for colliery purposes. The suggestion
B that the court ought to eliminate from this action all questions as to riparian rights and leave the parties to litigate those questions in a further action did not appeal to me, as I conceive it to be the duty of the court whenever possible to determine all questions in issue between the parties and avoid multiplicity of actions. Consequently, before deciding what was open or not on the pleadings, I offered to give each of the parties an opportunity to amend his pleadings, and stated that, if desired
C by either party, I would adjourn the trial. The plaintiff elected to stand by his pleadings without amendment, and thereupon the defendant company also elected not to amend. In these circumstances I stated my intention to take into consideration the plaintiff's rights as lower riparian owner, and to determine whether the defendant company was exceeding its riparian rights. My reason for adopting this course was that the plaintiff in the first paragraph of his statement of claim states
D that he is owner of certain lands which he describes by reference to plan A of the lease, and when that plan is compared with Plan B of the lease it clearly appears that the plaintiff is a lower riparian owner, a fact which could not be, and was not disputed by the defendant company. The plaintiff then states that the defendant company is wrongfully abstracting water from the river and that the defendant company alleges that it is entitled to do such wrongful act either under the terms
E of the lease or irrespective of such terms. In these circumstances it appeared to me that it was incumbent on the defendant company, if it desired to avoid an injunction, to plead not only its rights under the lease, but also any other rights it might possess, including its riparian rights. The trial, therefore, proceeded on the footing that the defendant company had pleaded its riparian rights, and these rights were fully gone into and discussed. At the conclusion of the trial I requested
F the parties to furnish me with a plan showing the extent of the land occupied by the defendant company which was claimed to be the riparian tenement, and stated that if there was any dispute as to the plan, the case might again be mentioned. Accordingly, a plan such as I had requested was furnished to me, but it was accompanied by a tracing which disclosed the existence of a line of earthenware pipes
G which had not been mentioned at the trial. I thereupon directed the case to be placed in the paper to be mentioned, and on this occasion counsel for the defendant company again protested that the claim of the defendant company, as riparian owner, ought not to be decided in this action. I then informed him that the question had been fully gone into at the trial, but I again offered to give him an opportunity of considering the position and of adding any further evidence he might consider material. This offer was declined. In these circumstances I think that the plaintiff
H ought not to be put to a further action, but is entitled to have the question whether the defendant company can justify the abstraction of water under its riparian rights determined now.

I The law on the subject of the right of a riparian owner to take and use the water to which his tenement gives him access is exhaustively dealt with and clearly stated by the House of Lords in *Swindon Waterworks Co. v. Wilts and Berks Canal Navigation Co.* (6), and in *McCartney v. Londonderry and Lough Swilly Rail. Co.* (5). For the purpose of this judgment it is sufficient to state that a riparian owner may take and use the water for ordinary purposes connected with the riparian tenement (such as domestic purposes or the wants of his cattle) and that in the exercise of his right he may exhaust the water altogether; that he may also take and use the water for extraordinary purposes if such user be reasonable and be connected with the riparian tenement, provided that he restores the water so taken and used substantially undiminished in volume and unaltered in character; and, lastly, that

he has no right whatever to take the water and use it for purposes unconnected with the riparian tenement. Applying these principles to the facts of this case, I have come to the conclusion that the defendant company is not justified in taking and using the water from the River Alyn in the manner mentioned. In the first place, I am of opinion that the water so taken is not used on or in connexion with the riparian tenement. The question whether a particular piece of land sustains the character of a riparian tenement or not is a question of fact and must be determined according to the special circumstances. In the present case the defendant company contended that the site of its works had become a riparian tenement because of the acquisition of the strip of land upon which the main portion of the mineral railway connecting the Llay Main Colliery with the Great Western Railway was constructed. The land coloured blue on Plan B formed part of this strip, and so far as it abuts upon the River Alyn consists of a narrow piece of land about half a mile in length, having an average width of one chain. The remainder of the site of the railway has been acquired by the defendant company partly from the plaintiff and partly from other persons. In my judgment, the occupation of the strip of land upon which the mineral railway has been constructed does not have the effect of converting the site of the defendant company's works, which is at least a mile away from the river, into a riparian tenement, an expression which, in my opinion, connotes (in addition to contact with the river) a reasonable proximity to the river bank. The proposition that every piece of land in the same occupation, which included a portion of the river bank, and, therefore, affords access to the river, is a riparian tenement is, in my opinion, far too wide. In order to test it let me take an extreme case. Nobody in their senses would seriously suggest that the site of Paddington Station and Hotel is a riparian tenement, although it is connected with the River Thames by a strip of land many miles long, nor could it reasonably be suggested that the whole of a large estate of, say, 2,000 acres was a riparian tenement because a small portion of it was bounded by a stream. Yet, if the argument submitted in the present case on behalf of the defendant company were carried to its logical conclusion both Paddington Station and Hotel and the hypothetical estate would be riparian tenements. In the present case the site of the defendants' works is, in my opinion, too far away from the river bank to sustain the character of a riparian tenement, and I find as a fact that it is not such a tenement.

Assuming, however, that I am wrong and that the site of the defendant company's works is in fact a riparian tenement I am clearly of opinion that the manner in which the defendant company uses the water there cannot be justified. The defendant company converts the whole of the water which it takes into steam for driving the machinery at its works and does not return any of the water so taken to the river. Thus, the defendant company takes the water for extraordinary purposes without returning it to the river which is a wholly unauthorised user.

It is contended, however, by the defendant company that in order to succeed in his claim as lower riparian owner it is essential that the plaintiff should establish either that he has suffered damage or that he will inevitably suffer damage, or at least that the defendant company, if not stopped, will acquire a prescriptive right and that he has not attempted, nor would he be able to establish any of these matters. In my opinion, this contention is not well founded. It is true that in several cases the reason given for granting relief where the plaintiff had sustained no damage was that unless stopped the defendant would acquire a prescriptive right, but, in my opinion, this is not the only reason which will induce the court to interfere. Here what the defendant company is doing amounts to a complete diversion of part of the River Alyn and a confiscation of the rights of the plaintiff as lower riparian owner and the defendant company claims the right to continue such diversion and confiscation. In such a case I am of opinion that questions of damage and of the possible acquisition of prescriptive rights become immaterial and that the plaintiff is entitled to relief without proof of damage, notwithstanding that the

A defendant company cannot as against him acquire a prescriptive right: see speech of LORD HALSBURY, L.C., in *McCartney v. Londonderry and Lough Swilly Rail. Co.* (5) ([1904] A.C. at pp. 304 and 308). In the result I hold that the plaintiff is entitled to prevent the defendant company from taking and using the water from the River Alyn for colliery purposes.

B The next point for consideration is whether the defendant company has committed a trespass on the plaintiff's land by laying the water main in the land coloured blue on Plan B. The solution of this question, in my opinion, turns entirely upon the construction of the lease. It is contended by the plaintiff, first, that the lease demises the surface of the blue land for the sole purpose of constructing and working the mineral railway and that there is an implied condition that it shall be used for no other purpose, and, secondly, that only the surface of the land coloured blue on Plan B is demised and that the defendant company has placed the main in the plaintiff's soil underneath such surface.

C In my opinion, neither of these contentions is well founded. As to the first contention, it, no doubt, appears from a perusal of the lease that the primary purpose for which the surface of the blue land was demised was that of a mineral railway, but it was demised to the defendant company without any exception or reservation
D in favour of the lessor, and in the absence of any such exception or reservation, and in the absence of any covenant not to use it for any purpose other than the mineral railway, I am of opinion that the demise carried with it the right to occupy and use the surface for any purpose not inconsistent with the user of it for a mineral railway. In my opinion, neither the liberty granted by cl. 8 to construct, use, and
E maintain a mineral railway on the surface of the land, nor the statement in cl. 15 that the surface of the land was demised for the purpose of the mineral railway, has, or taken together have, the effect of implying a prohibition of the user of such surface for any other purpose. It is well established that if a lessor desires to except or reserve any interest or benefit in the subject-matter of the demise he must do so in clear terms and that the court will not readily imply any such exception or reservation in the absence of express words more especially where, as here, the
F lease contains express exceptions and reservations.

The second contention that the main was laid in the plaintiff's soil underneath the surface raises the question as to what depth of soil passed to the defendant company by the demise of the surface of the land coloured blue on Plan B. The expression "surface of land" is a flexible expression and, according to the context
G in which it is used, may at one end of the scale bear the very restricted meaning of the mere vestimenta terrae, and at the other end of the scale the very wide meaning of the whole of the soil down to the centre of the earth except mines and the whole height above ground usquead coelum: see MACSWINEY ON MINES (4th Edn.), p. 52. Between these two extremes the expression may be used to denote so much depth of soil and so much height above the ground as may be required for the particular
H use in the contemplation of the parties. Therefore, where the expression is used in a grant, it seems to me necessary to ascertain whether the grant indicates the purpose for which the surface of the land is granted, because, in the absence of any other statement as to the depth and height granted, that purpose will govern the quantum of the grant. In the present case there is no difficulty in ascertaining the purpose for which the land coloured blue on Plan B was demised as this is
I clearly indicated, viz., a mineral railway. Therefore, I am of opinion that the demise of that surface includes so much depth of soil and so much height above as is required for the ordinary purpose of constructing and working a mineral railway, including so much soil as may be required to be removed in order to level up the land and also such depth of soil as may be required for the laying of any necessary or convenient pipes to drain the demised land and to supplying water for any steam engines or other machinery used in working the railway. The main which is complained of in this action is laid about 18 in. below the actual surface of the land, i.e., not any deeper than an ordinary drain or water pipe would be laid. That

being so, I am of opinion that the main has been laid in the demised land and that as the laying and maintenance of the main are not inconsistent with the user of the land for a mineral railway, the plaintiff is not entitled to have it.

The only remaining question to be determined is whether the defendant company has exceeded its rights under the lease by carrying over the mineral railway certain materials which were required for the erection of cottages, churches, a school, a doctor's residence, and other buildings intended to form a mining village now in course of construction near the Llay Main Colliery. By cl. 8 of the lease it is stipulated that the mineral railway is to be used by the defendant company solely for the purpose of the colliery working the demised minerals and for such other purposes as are in the lease specifically authorised. At the trial I experienced considerable difficulty in ascertaining the true facts with regard to the building materials carried on this mineral railway, which facts were much obscured, moreover, by a document, produced by the defendant company, purporting to be a tenancy agreement entered into between the Llay Housing Association, Ltd., and the defendant company. On closer investigation it becomes plain that this document was never to be acted upon and was in fact only executed to lend colour to the contention that the building materials were to be used on land in the defendant company's possession. In my judgment, this document was a mere sham and ought to be entirely ignored.

So far as relevant for the purposes of this judgment, the facts as ultimately ascertained are as follows. The defendant company employed a large number of miners and other workmen at the Llay Main Colliery. The housing accommodation in the proximity of the colliery was wholly insufficient, and a number of the employees had to come a long distance to their work. In these circumstances some of the directors and officers of the defendant company on Jan. 15, 1920, registered a society called the Llay Housing Association, Ltd. (hereinafter called the association) under the Industrial and Provident Societies Act, 1893, for the purpose of acquiring land in the neighbourhood of the Llay Main Colliery and of erecting thereon dwelling-houses and other buildings for the use of the employees at the colliery. The association, accordingly, purchased about 120 acres of land close to the colliery and commenced the erection of such dwelling-houses and other buildings, obtaining financial assistance for that purpose by way of loan from the defendant company and from the government under the Housing and Town Planning Act, 1919. After the association had erected 200 houses covering an area of about 21 acres it sold off a part of the remainder of the 120 acres to a company registered under the Companies Acts called the Industrial Housing Association, Ltd. (hereinafter called the industrial company). The industrial company later on purchased a further two and a half acres of land from another owner. On the land so acquired the industrial company caused 200 houses to be built. These houses were built at the request of the defendant company which undertook to accept a lease of them when completed. These 200 houses were on completion leased to the defendant company for thirty years at yearly rents amounting in the aggregate to £5,950. The industrial company has recently purchased a further piece of land from the association upon which the industrial company is now causing sixty-four houses to be erected. These houses are also being built at the request of the defendant company and on a similar undertaking to accept a lease. The association has from time to time sold further parts of the 120 acres to various religious and public bodies for the erection of churches and schools. The 200 houses which the association caused to be built in the first instance are now let to miners and other persons connected with the Llay Main Collieries, and the association received the rents of these houses. All the buildings caused to be erected by the association, the industrial company, and the other bodies were erected under contracts entered into with builders, who in turn contracted with the defendant company for the carriage of the necessary building materials, plant, &c., from a siding on the Great Western Railway to the Llay Main Colliery by the mineral railway in question, paying to the defendant company

A agreed rates for such carriage, which rates have amounted, in the aggregate, to a substantial sum.

It is not suggested that such carriage is specifically authorised by the lease, and the only question is whether it can properly be said to be a user of the mineral railway for the purposes of the colliery or of the lessees within the meaning of cl. 8. In my opinion, it would be unduly stretching the language of this clause if I were
B to hold that it extended to the carriage of goods for third parties, even though such goods were destined to be used in the erection of buildings some of which were to be acquired by the defendant company for the benefit of its employees. The fact that the association was promoted and that its affairs are conducted by the directors of the defendant company does not, in my opinion, help the defendant company's case, as the two bodies are distinct entities. Moreover, at the time of carriage the
C true owners of the goods were, in every instance, the builders, who (although no doubt they intended to use the goods in the erection of the buildings in question) were under no obligation to anyone to so use them, and might, if they had thought fit, have utilised them elsewhere or sold them on arrival, or otherwise dealt with them. In these circumstances I am of opinion that it cannot properly be said that
D in carrying the goods for the builders the defendant company was using the mineral railway for the purposes of the colliery or for its own purposes.

In the result, I hold that the plaintiff is entitled to a declaration that the defendant company is not entitled to take and use water from the River Alyn for the purposes of the Llay Main Colliery, nor to carry on the mineral railway building materials belonging to builders employed in the construction of buildings at the mining village now in course of erection near the Llay Main Colliery.

E As the plaintiff has expressed his willingness to come to an arrangement with the defendant company I do not propose to grant any injunction at present, but will give the plaintiff liberty to apply for an injunction, and for an inquiry as to damages, and generally as he may be advised. This will not only give the parties an opportunity of coming to terms, but will also give the defendant company an opportunity of having my judgment reviewed by the Court of Appeal should it so
F desire.

As the plaintiff has substantially succeeded, I think the defendant company ought to pay the general costs of the action. I, therefore, propose to make an order that the defendant company do pay to the plaintiff the costs of the action up to and including this judgment, except so far as such costs have been increased by the claim in respect of the laying of the water main in the land coloured blue on Plan B, which excepted costs must be paid by the plaintiff to the defendant company with the usual set-off. Any subsequent costs will be dealt with if and when the occasion
G arises.

Solicitors: *Faithfull, Owen & Fraser; Johnson, Weatherall, Sturt & Hardy, for Parker, Rhodes & Co., Rotherham.*

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

Re JONES. JOHNSON v. ATTORNEY-GENERAL

[CHANCERY DIVISION (EVE, J.), November 12, December 17, 18, 1924, March 23, 1925]

[Reported [1925] Ch. 340; 94 L.J.Ch. 341; 133 L.T. 601; 69 Sol. Jo. 460]

Intestacy—Personal estate—Right of executor—Contrary intention—Right of Crown—Bona vacantia.

By his will, made in 1913, the testator appointed his wife and the plaintiff as his executors, and, after directing them to pay his debts and funeral and testamentary expenses, bequeathed all his real and personal estate to his wife absolutely. She predeceased him, and, on his death in 1920, the testator left no heir-at-law or next of kin. It was admitted that the real estate passed to the Crown. On a summons asking who was entitled to the personal estate,

Held: the Executors Act, 1830, did not apply as there was no next of kin, and there was indication in the will that the plaintiff should not take beneficially; therefore, the plaintiff was a trustee, and, on failure of a cestui que trust, the beneficial interest in the personal estate vested in the Crown as bona vacantia.

Bennet v. Batchelor (1) (1789), 3 Bro. C.C. 28, and *Bishop of Cloyne v. Young* (2) (1750), 2 Ves. Sen. 99, applied.

Notes. The Executors Act, 1830, was repealed, except as to deaths before 1926, by the Administration of Estates Act, 1925, s. 56 and Sched. II, Part I. See now s. 49 of the Act of 1925.

As to distribution of personal estate on an intestacy before 1926 see 16 HALSBURY'S LAWS (3rd Edn.) 414 et seq., and for cases see 24 DIGEST (Repl.) 936 et seq. For the Executors Act, 1830, s. 1, see 9 HALSBURY'S STATUTES (2nd Edn.) 668, and for the Administration of Estates Act, 1925, s. 49, see *ibid.*, 757.

Cases referred to :

- (1) *Bennet v. Batchelor* (1789), 3 Bro. C.C. 28; 1 Ves. 63; 29 E.R. 389, L.C.; 24 Digest (Repl.) 950, 9612.
- (2) *Bishop of Cloyne v. Young* (1750), 2 Ves. Sen. 91; 24 Digest (Repl.) 950, 9612.
- (3) *Re Glukman, A.-G. v. Jefferys*, [1908] 1 Ch. 552; 77 L.J.Ch. 326; 98 L.T. 486; 24 T.L.R. 340, C.A.; affirmed sub nom. *A.-G. v. Jefferys*, [1908] A.C. 411; 77 L.J.Ch. 685; 99 L.T. 737; 24 T.L.R. 793; 52 Sol. Jo. 660, H.L.; 24 Digest (Repl.) 954, 9646.
- (4) *Mapp v. Elcock* (1849), 2 Phil. 793; 18 L.J.Ch. 217; affirmed (1851), 3 H.L. Cas. 492; 24 Digest (Repl.) 950, 9612.
- (5) *Walker v. Denne* (1793), 2 Ves. 170; 30 E.R. 577; 20 Digest 340, 819.
- (6) *Re Higginson and Dean, Ex parte A.-G.*, [1899] 1 Q.B. 325; 68 L.J.Q.B. 198; 79 L.T. 673; 47 W.R. 285; 15 T.L.R. 135; 43 Sol. Jo. 153; 5 Mans. 289, D.C.; 4 Digest 490, 4403.
- (7) *Powell v. Merrett* (1853), 1 Sm. & G. 381; 22 L.J.Ch. 408; 21 L.T.O.S. 98; 17 Jur. 449; 1 W.R. 243; 65 E.R. 167; 24 Digest (Repl.) 955, 9652.
- (8) *Read v. Stedman* (1859), 26 Beav. 495; 28 L.J.Ch. 481; 33 L.T.O.S. 115; 53 E.R. 989; 24 Digest (Repl.) 954, 9644.
- (9) *Taylor v. Haygarth* (1844), 14 Sim. 8; 2 L.T.O.S. 437; 8 Jur. 135; 60 E.R. 259; 24 Digest (Repl.) 954, 9651.
- (10) *Giraud v. Hanbury* (1817), 3 Mer. 150; 24 Digest (Repl.) 950, 9612.
- (11) *Mordaunt v. Hussey* (1793), 4 Ves. 117.
- (12) *Urquhart v. King* (1802), 7 Ves. 225; 24 Digest (Repl.) 950, 9612.

Adjourned Summons.

The testator by his will made in 1913, after appointing the plaintiff and his (the testator's) wife executor and executrix thereof, continued as follows: "I direct

- A** my executors to pay my just debts and funeral and testamentary expenses. I give and bequeath all my estate and effects real and personal which I may die possessed of or entitled to unto my wife Maria Jones absolutely." Maria Jones died in the testator's lifetime. He died in 1920, and his will was duly proved by the plaintiff as surviving executor. There was no issue and so far as could be ascertained no heir or next of kin. This summons was taken out by the plaintiff against the
- B** Attorney-General asking for inquiries as to who was entitled respectively to the testator's real and personal estate and that, if it should be certified that there was no next of kin, whether the plaintiff as surviving executor or the Crown was entitled to the residuary personalty. The right of the Crown to the real estate was admitted. On the certificate being made the case now came on for argument.
- C** *Stafford Crossman* for the plaintiff referred to *Re Glukman* (3), *Mapp v. Elcock* (4), *Walker v. Denne* (5), *Re Higginson and Dean* (6), and *HAWKINS ON WILLS* (2nd Edn.) p. 364.
- Dighton Pollock* for the defendant referred to *Powell v. Merrett* (7), *Read v. Stedman* (8), *Taylor v. Haygarth* (9); *BLACKSTONE'S COMMENTARIES*, vol. 1, p. 298; *THEOBALD ON WILLS* (7th Edn.) p. 796; *Giraud v. Hanbury* (10), *Bishop of Cloyne v. Young* (2), *Mordaunt v. Hussey* (11), and *Urquhart v. King* (12).

Cur. adv. vult.

March 23. **EVE, J.**, stated the facts, and continued: The question I have to answer is whether the executor or the Crown is beneficially entitled to the testator's personal estate. The Executors Act, 1830, which makes executors of undisposed of personalty trustees thereof for the next of kin, has no application to cases like the present where there are no next of kin, and the question here raised must be decided according to the law apart from that statute. According to **LORD MACNAGHTEN** in *Re Glukman* (3) a very clear statement of that law is to be found in *Mapp v. Elcock* (4) where **LORD COTTENHAM** says (2 Ph. at p. 796):

- F** "It must be borne in mind, that the title of an executor to personalty not otherwise disposed of, did not arise from any gift of the testator, but from the operation of law incident to the office. The law vested the property in the executor, and if the testator had not directly or indirectly declared any purpose to which he was to apply it, there was nothing to interfere with the legal title of the executor, and he therefore retained such property for his own benefit: but this result, being, as was supposed, generally unforeseen and not intended
- G** by the testator, equity considered many circumstances as indicative of an intention contrary to the claim, and, when they were found in the will, declared the executor trustee for the next of kin."

- The first point, therefore, to consider is whether there is anything in this will indicative of an intention on the part of the testator that the executor is not to take beneficially. Obviously there is: the residue is destined for Maria Jones, and the fact that the bequest lapsed by reason of her death in the testator's lifetime cannot alter the intent. Authority for these propositions is to be found in *Bennet v. Batchelor* (1) and *Bishop of Cloyne v. Young* (2). In the former of these cases, Lord Chancellor **THURLOW** says (3 Bro. C.C. at p. 29):

- I** "wherever the testator has, by the same instrument by which he appoints them executors, given everything away from them to a stranger, that must show he meant them only to take as trustees";

and in the latter, **LORD HARDWICKE**, L.C.'s, words were (2 Ves. Sen. at p. 99):

"This residuary clause shows an intent to dispose of it in some other manner, though imperfect, so that it cannot go to the executor, as that would be contrary to the intent."

What is the result? The executor is by the will made a trustee, not a beneficiary, and so remains. **LORD HARDWICKE**, L.C., put it thus (*ibid.*):

“an executor must take by the will; and therefore if at making the will the intent appears, that the executor should not take the beneficial interest in the surplus, no accident afterward can give it to him.”

In these circumstances, what is the position of the plaintiff? He is a trustee of this money and claiming to retain it because there is no beneficial owner forthcoming. That is, in my opinion, an impossible position. On failure of a cestui que trust the beneficial interest vests in the Crown as bona vacantia. In so deciding, I do not think I am raising any implied trust in favour of the Crown. The character of trustee is affixed to the executor by the will and is not altered by the accident that there is no cestui que trust to take beneficially.

Solicitors: *Hedley, Norris & Co.*, for *George John Hobbs*, Bristol; *Treasury Solicitor*.

[Reported by A. W. CHASTER, Esq., Barrister-at-Law.]

FOULSHAM v. PICKLES

[HOUSE OF LORDS (Viscount Cave, L.C., Lord Dunedin, Lord Atkinson, Lord Sumner and Lord Buckmaster), January 20, 22, 23, and February 19, 1925]

[Reported [1925] A.C. 458; 94 L.J.K.B. 418; 133 L.T. 5; 41 T.L.R. 323; 69 Sol. Jo. 411; 9 Tax Cas. 261]

Income Tax—Foreign possessions—Employment abroad by English company—Remuneration payable partly only in England—Source of relevant income—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), Sched. D, Case V.

The taxpayer was employed by an English company in Africa under an agreement providing for his employment for two years. He was to spend nine months of each year in Africa and the remaining six months were to be an interval between the two periods of nine months, to be spent voyaging to and from Africa and on furlough. The taxpayer was paid for his services a fixed amount and commission on the net profits. Payment of commission was to be made in Liverpool and not in Africa. Throughout the relevant year of assessment, the taxpayer rented a house in England, in which his wife and family lived, but the taxpayer was not himself in England during the year except for a few days at the end. The commissioners found that the taxpayer was resident in England. The whole of the taxpayer's salary and commission were paid by the company into a banking account in England. The taxpayer was assessed to income tax in respect of his earnings in Africa as being possessions out of the United Kingdom within the Income Tax Act, 1918, Sched. D, Case V.

Held: (i) although the taxpayers' employment in Africa was a "possession" within Case V, the whole source of the relevant income was not overseas, since part of his remuneration was payable in England only, and, therefore, the taxpayer's earnings were not taxable under Case V.

Colquhoun v. Brooks (1) (1889), 14 A.C. 493, followed.

(ii) the matter ought not to be remitted to the commissioners to make an assessment under another Case.

Decision of the Court of Appeal, [1924] 1 K.B. 323, affirmed.

Notes. The Income Tax Act, 1918, Sched. D, Case V, was replaced by the Income Tax Act, 1952, s. 123.

Considered: *I.R. Comrs. v. Lysaght*, [1928] All E.R. Rep. 575; *Proctor v. Ryall*, *Ryall v. Proctor* (1928), 14 Tax Cas. 204. Distinguished: *Chamney v. Lewis* (1932),

- A** 17 Tax Cas. 318. Applied: *McKenna v. Eaton-Turner*, [1936] 1 K.B. 1. Explained and applied: *Bennet v. Marshall*, [1938] 1 All E.R. 93. Considered: *McMillan v. Guest*, [1940] 4 All E.R. 452; *Archbishop Thyateira v. Hubert*, *Hubert v. Archbishop Thyateira* (1942), 168 L.T. 190. Applied: *Bray v. Colenbrander*, *Harvey v. Breyfogle*, [1953] 1 All E.R. 1090. Referred to: *Fleming v. Wilkinson* (1925), 10 Tax Cas. 416; *Levene v. I.R. Comrs.*, [1927] 2 K.B. 38; *Eaton-Turner v. McKenna*, [1936] 3 All E.R. 215; *Stransky v. Stransky*, [1954] 2 All E.R. 536.

B As to the scope of the charge under Case V of Sched. D, see 20 HALSBURY'S LAWS (3rd Edn.) 276 et seq., and for cases see 28 DIGEST (Repl.) 206 et seq.

Cases referred to:

- C** (1) *Colquhoun v. Brooks* (1889), 14 App. Cas. 493; 59 L.J.Q.B. 53; 61 L.T. 518; 54 J.P. 277; 38 W.R. 289; 5 T.L.R. 728; 2 Tax Cas. 490, H.L.; 28 Digest (Repl.) 206, 866.

- (2) *Thomson v. Bensted (Surveyor of Taxes)* (1918), 7 Tax Cas. 137; 28 Digest (Repl.) 251, *614.

D **Appeal** by the Crown from the decision of the Court of Appeal, reported [1924] 1 K.B. 323, in respect of an assessment to income tax in the sum of £500 made on the respondent for the year ending April 5, 1920, by the General Commissioners under Case V of Sched. D of the Income Tax Act, 1918, in respect of the respondent's earnings outside the United Kingdom under an agreement made between the respondent and his employers. The assessment was made on the respondent as a resident in the United Kingdom in respect of a possession abroad, and the two points raised by the appeal were, first, whether the respondent was in the circumstances properly held to be resident in the United Kingdom, and, secondly, whether, if so, the respondent's earnings under the agreement were a foreign possession under Case V.

E By an agreement made between the respondent and the African and Eastern Trade Corp., Ltd. (hereinafter called the company), the respondent, who had for a number of years been in the employment of the company on duties which required him to live abroad for the greater part of his time, agreed to serve the company for a period of two years in West Africa as their representative there. He was to spend nine months of each year in Africa, and to have three months' leave to be taken at the end of the first nine months' service, and a further three month's leave at the beginning of the second year, so that a period of six months was to be allowed for the respondent's journey to England on leave and his return to Africa for the second period of nine months. The respondent was to receive a salary at the rate of £500 a year while he was in Africa and travelling, and £750 a year while at home, and he was also to receive a commission, which was to be paid to him through the company's offices in Liverpool. It was expressly declared by the agreement that the relation between the parties was not that of partners, but that of master and servant. During the whole period of assessment the respondent was the tenant of a house in Blackpool, in which his wife and family resided during his absence in Africa. During the year of assessment the respondent was absent from England for all but the last few days of the period. The respondent's salary and commission were paid by the company into a banking account in England, on which the respondent's wife had the power of drawing.

I The respondent contended that the assessment was bad on the following grounds: (i) that he was not resident in the United Kingdom; (ii) that his salary and commission were not a foreign possession. The commissioners, however, were of opinion that the assessment was rightly made, and that the case was covered by *Thomson v. Bensted (Surveyor of Taxes)* (2).

The Court of Appeal held, affirming the decision of ROWLATT, J. ([1923] 2 K.B. 413), that residence was a question of fact on which there was evidence to support the finding that the respondent was resident in the United Kingdom, but that his

earnings from his employment abroad were not a foreign possession, and the assessment under Case V was bad; and that as the court had no power to assess the respondent, the appeal against the assessment must be allowed. A

The Crown appealed.

The Attorney-General (Sir Douglas Hogg, K.C.), the Solicitor-General (Sir Thomas Inskip, K.C.), and R. P. Hills for the appellant.

A. M. Latter, K.C., and G. R. Blanco White for the respondent. B

The House took time for consideration.

Feb. 19. The following opinions were delivered.

VISCOUNT CAVE, L.C.—The question to be determined on this appeal is whether the respondent was correctly assessed to income tax in respect of the earnings received from his employment in the financial year 1919–1920. C

During the period of assessment the respondent was employed by the African Association, Ltd., (an English company), as a district supervising agent in the colony of Nigeria on the terms contained in two agreements of which the more important was dated May 6, 1919. Under this agreement he was to serve the company for a period of two years, and was to spend nine months of each year in the execution of his duties in Africa, and the remaining six months' interval between the two periods of nine months was to represent time occupied in voyaging to and from Africa and on furlough. The company was to pay the respondent a salary of £500 per annum while in Africa and voyaging, and was also to pay for his board and other recognised expenses. While at home the company was to pay him salary at the rate of £750 per annum on the fulfilment by him of his obligations. E
The company also agreed to pay to the respondent a commission on the net profits realised on certain of their factories, the minimum commission being £500. It was provided by the agreement that the respondent should not draw or claim payment in the colony in respect of commission earned by him, but payment in respect thereof was only to be made to him through the office of the company in Liverpool.

Throughout the year of assessment the respondent rented a house at Blackpool, in Lancashire, and was rated as the occupier of the house. His wife and family resided there, but he was not himself in the United Kingdom except for a few days towards the end of the year. The whole of his salary and commission was paid by the company into a banking account in England on which his wife had power to draw. F

On these facts the general commissioners assessed the respondent to income tax in respect of his possessions out of the United Kingdom, viz., his earnings from his employment in West Africa. The notice of assessment is not forthcoming, but on the hearing of an appeal to the special commissioners it was stated by the representative of the Crown that the tax was charged under Case V of Sched. D. The special commissioners held that the respondent was a person residing in the United Kingdom during the year of assessment, and confirmed the assessment, increasing the amount, subject to a Case stated for the opinion of the High Court. H
On the argument of the Case Stated, ROWLATT, J., discharged the assessment on the ground that the respondent had no possession out of the United Kingdom in respect of which he could be assessed to tax under Case V, and declined to send the matter back to the commissioners in order that they might make an assessment under Case II. On an appeal to the Court of Appeal, that court confirmed the order of ROWLATT, J., and the revenue authorities have now appealed to this House. I

The greater part of the arguments on behalf of the Crown was directed to establishing the proposition that an employment could be a "possession" within the meaning of Case V of Sched. D to the Income Tax Act, 1918; and for myself I assent to that proposition. It was decided by this House in *Colquhoun v. Brooks* (1) that a trade carried on wholly in Australia was such a possession, and accordingly that a person resident in the United Kingdom was assessable to tax in respect of so

A much of his share of the profits of that trade as had been remitted to this country; and it appears to me that the reasoning which led the learned Lords who heard that case to their decision, applies not only to a trade but to each of the other sources of income which in para. 1 (a) of Sched. D are coupled with trades, that is to say, to a profession, employment or vocation. In the case cited, LORD MACNAGHTEN stated his conclusion as follows (14 App. Cas. at p. 516):

B "The word 'possessions' is not a technical word. It seems to me that it is the widest and most comprehensive word that could be used. Why, for instance, should not 'possessions in Ireland' mean everything, every source of income that the person chargeable has in Ireland, whatever it may be? Why should not 'profits from possessions out of Great Britain,' which is to be found in Sched. G, No. XI, and recalls the expression 'income out of Great Britain' in the Act of 1799, mean profits from every source of income abroad? I use the expression 'source of income,' because it is as a source of income that the Act contemplates and deals with property and everything else that a person chargeable under the Act may have, and the Act itself, in s. 52, uses the expressions 'sources chargeable under the Act' and 'all the sources contained in the said several schedules' as describing everything in respect of which the tax is imposed."

This conclusion appears to me to apply to an employment out of the United Kingdom which (like a trade) is a source of income; and I do not doubt that (to take two simple instances) a doctor residing in England and practising in France only, or a mining engineer having a residence here and wholly employed by a Spanish mining company in Spain, might be held to have a foreign possession and to be assessable under Case V. But assuming this to be so, it does not follow that the appellant is entitled to succeed in his appeal. For that purpose it is necessary for him to show that the respondent's employment was wholly out of the United Kingdom, and that (to use LORD MACNAGHTEN's expression) the whole source of his income was overseas; and this, in my opinion, he has not shown. I will assume—although I feel some doubt on the point—that the respondent's services to the company were to be rendered in West Africa only, and that he had no duties to his employers while he was in England; but it remains true that the commission, which was the principal remuneration for his services, was, under the terms of his employment, payable in England only, and that he was precluded by the express terms of his agreement from drawing or claiming payment of that commission in the colony. In other words, while the burdens incidental to his employment were to be borne wholly or mainly abroad, the principal benefit which he was to derive from it could only be claimed in the United Kingdom. In these circumstances I do not think it can be said that his source of income was wholly outside this country, so as to bring him within Case V.

H There is a further difficulty which stands in the appellant's way, i.e., that the whole of the respondent's remuneration was in fact paid to him here and not in Nigeria. The second of the Rules applicable to Case V is as follows:

I "2. The tax in respect of income arising from possessions out of the United Kingdom, other than stocks, shares or rents, shall be computed on the full amount of the actual sums annually received in the United Kingdom from remittances payable in the United Kingdom or from property imported, or from money or value arising from property not imported, or from money or value so received on credit or on account in respect of any such remittances, property, money, or value brought or to be brought into the United Kingdom, on an average of the three preceeding years as directed in Case I, without any deduction or abatement other than is therein allowed."

From this rule it follows that, in order to be taxable under Case V, an income arising from possessions out of the United Kingdom must be received in the United

Kingdom either (a) from remittances payable in the United Kingdom, or (b) from property imported into the United Kingdom, or (c) from money or value arising from property not imported, or (d) from money or value received on credit or on account of remittances, property, money or value brought or to be brought into the United Kingdom. The word "remittances" (which recalls the expression "remittances from thence" in the corresponding rule contained in the Act of 1842) clearly refers to money remitted into the United Kingdom from outside. The other branches of the rule all refer to property, money, or value imported or brought into the United Kingdom, and there are no words in the rule which can comprise money arising and payable here. If so, the inference is that money so arising and payable is outside the rule, and so is not taxable under Case V at all.

In my opinion, therefore, the appeal fails on the main point.

Your Lordships were asked, in the event of your holding that the respondent was not taxable under Case V, to send the matter back to the special commissioners with a view to their now assessing the respondent in respect of the same income under Case II of Sched. D. I am far from saying that the respondent could not have been assessed under that Case, or that the court has no jurisdiction when commissioners have proceeded under the wrong Case to remit the matter to them under s. 149 (2) of the Income Tax Act, 1918, with a view to their making a proper assessment; but I do not think that such a course should be taken in the present instance. The revenue authorities have chosen deliberately to assess the respondent under Case V as on income arising from a possession out of the United Kingdom, and have persisted in that course notwithstanding the respondent's objections. The time for assessing him under Case II has now expired and I do not think that it would be right now to require the commissioners to make an assessment under that Case. In my opinion, this appeal should be dismissed with costs.

LORD DUNEDIN. However much it may have been open, either in the original assessment or before the commissioners, to rest the liability on alternative Cases under Sched. D, it is distinctly stated in this case that the present demand was based on Case V alone. It is not, therefore, I think, possible for your Lordships to consider whether, on the facts as set forth an assessment might not be based on some other case. The question for decision is accordingly whether the sum of £2,245 received by the respondent in respect of his salary and commission is, to quote the wording of s. 2 of Sched. D of the Income Tax Act, liable to be charged with a tax in respect of income arising from possessions out of the United Kingdom. Two propositions are here involved: this income must be income from a possession; and the possession must be out of the United Kingdom.

I think it is not doubtful that in the ordinary use language one would not be apt to describe a man who gets a salary and commission on sales as enjoying a possession. But I think none the less that *Colquhoun v. Brooks* (1) has settled the matter. No doubt what was then being considered was a business or trade. But the schedule itself groups employment along with trade; and the arguments which prevailed in *Colquhoun's Case* (1) to determine that the business was a possession are equally applicable to an employment.

On this point, therefore, I prefer the view of WARRINGTON, L.J., to that expressed by the other learned judges of the Court of Appeal. When, however, I come to the second proposition, I find myself unable to affirm that this is income arising from a possession out of the United Kingdom. This income comes from the contract of employment made in the United Kingdom. When I say "made in the United Kingdom" I am not referring to the place where the signing of the contract took place. I am referring to the source of the profit which is the payment which the employers covenanted to make. This was payable and paid in London.

I am fortified in this view by a consideration of the terms of r. 2 of Case V, which is the Rule which would apply if this were a possession out of the United Kingdom. The tax is to be computed

- A** "on the full amount of the actual sums annually received in the United Kingdom from remittances payable in the United Kingdom, or from money or value arising from property not imported, or from money or value so received on credit or on account in respect of any such remittances, property, money, or value brought or to be brought into the United Kingdom, on an average of three years, &c."
- B** It will be seen at once how entirely inappropriate all these expressions are to the case of the respondent's salary and commission paid as aforesaid. I am therefore of opinion that on the sole question stated and argued as to the respondent's liability the Crown fails.
- C** As to the application to remit the Case in order that the assessment may be altered to an assessment founded on some other Case, I have nothing to add to what has been said by the Lord Chancellor.

LORD ATKINSON.—I concur.

LORD SUMNER.—I concur.

- D** **LORD BUCKMASTER.**—Mr. James Arthur Pickles, the respondent in this case, has been found to be a person residing in the United Kingdom. He was engaged by the African Association, Ltd., to serve them in West Africa as district supervising agent at a salary of £500 and commission, and by the terms of his employment it was provided that he should not draw nor claim payment in the colony in respect of commission, but payment thereof should only be made to him through the office of the company in Liverpool. It is also found as a fact by the special commissioners that the whole of his salary was also paid into a banking account in England on which his wife had the right to draw. He was assessed to income tax in the sum of £500, for the year ending April 5, 1920, the basis of the assessment being under Sched. D, Case V, that is, "in respect of income arising from possessions out of the United Kingdom." The amount of this assessment was increased by the
- E**
- F** general commissioners, but amounts are not important for the purposes of this appeal.

The respondent being a person residing in the United Kingdom, it would appear that he was liable to be taxed under Sched. D, sub-head 1 (a) (ii), in respect of annual profits or gains arising from any trade, profession employment or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere; but,

G as pointed out, he was in fact assessed under Case V, sub-head 2. The first question is whether that assessment was rightly made.

Colquhoun v. Brooks (1) has shown that, however inapt the word "possessions" may be in Case V, it must in fact embrace the trade, profession, employment, or vocation mentioned under sub-head 1 (a) (ii), and in that particular case it was plain that this House regarded the provision as a modification of the earlier clauses and intended to limit the amount of tax in cases where the income arose from possessions out of the United Kingdom to the amount of income actually received from those possessions (see *LORD MACNAGHTEN*). The real test that was laid down by *LORD HERSCHELL* and *LORD MACNAGHTEN* was that you were to ascertain what was the source of income, and, if the source of income was a trade, profession, employment, or vocation carried on outside the United Kingdom, only the amount

H

I of income actually received in the United Kingdom would be taxed.

In the present case I do not think that the source of income was the employment of the respondent in West Africa. The source of his income was the money paid by an English company into an English bank in pursuance of an agreement for service made in this country. This view is emphasised by the fact that the Rules themselves provide by r. 2 applicable to Case V, that the tax in respect of income arising from possessions out of the United Kingdom shall be computed on

"the actual sums annually received in the United Kingdom from remittances

payable in the United Kingdom or from imported property or money or value arising from property not imported,"

which points to the fact that the money is to be received here from a source abroad. I therefore think the Court of Appeal and ROWLATT, J., were right in deciding that the tax could not be properly levied under Case V.

It was then urged that, if this be so, since the respondent was resident here and would consequently be liable under the earlier Rule, the matter should be remitted in order that the assessment might be altered in that respect. I am unable to accede to this request. Remission is not a matter of right, but of discretion, a discretion to be carefully exercised in each case, and dependent on the special circumstances in which it stands. The Court of Appeal has decided against remission, and I see no reason to interfere with their action. I desire to add that I am not satisfied that the ground on which ROWLATT, J., based his refusal to remit was well founded.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Withall & Withall.*

[*Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.*]

Re FIELD (DECEASED). SANDERSON v. YOUNG

[CHANCERY DIVISION (P. O. Lawrence, J.), May 12, 13, 1925]

[Reported [1925] Ch. 636; 94 L.J.Ch. 322; 133 L.T. 463;
69 Sol. Jo. 661]

Settlement—Tenant for life—Equitable tenant for life—Entry into receipt of rents and profits of leasehold property—Failure to perform covenants to repair—Liability of estate of deceased tenant for life—Parties to action by personal representatives of tenant for life.

By a deed of appointment, dated April 2, 1878, R., in exercise of a power given to her by the will of J. F., appointed that the trustees of J. F.'s will should, after her decease, stand possessed of certain leasehold houses upon trust after payment of the rents and cost of insurance and the performance and observance of the covenants contained in the leases to pay to Y. or permit her to receive and take the rents and profits of the leasehold premises during her life for her separate use without power of anticipation and after her decease to hold the leasehold houses upon trust, in the events which happened, for the plaintiffs, the children of Y. R. died in 1882. The surviving trustee of the will of J. F. died in 1909, and his executors, although willing to appoint new trustees, declined to intermeddle with and did not act as trustees of the will. Upon the death of the surviving trustee the equitable tenant for life, Y., entered upon the receipt of the rents and profits of the leasehold houses and remained in receipt thereof until her death in 1922, but she did not observe and perform the covenants to repair contained in the leases. The plaintiffs, as equitable owners in possession under the power of appointment exercised by R., sought to recover from the defendants, as the legal personal representatives of Y., and the legal personal representatives of the surviving trustee of the will of J. F., damages from her estate in respect of her failure from 1909 to keep the houses in repair, alleging that under the deed of appointment of April 2, 1878, an

A obligation was laid upon her, when she entered upon the receipt of the rents and profits, to perform and observe the covenants contained in the leases, as she entered with full knowledge of the trusts affecting the rents and profits.

B **Held:** (i) as a person could only take the benefit of a gift if he also accepted the burden cast upon him by the giver, Y., who had no right to collect the rents and by receiving them herself assumed the duties of the trustees, could not retain the rents for her own benefit without fulfilling the primary trusts to perform the covenants in the lease, and, therefore, Y.'s estate was liable, in an amount not exceeding the amount of the rents received by Y. during the time she was in possession, for her non-performance of the covenants during that period; (ii) the legal personal representatives of the last surviving trustee of the will of the testator were not necessary parties to the action, which as **C** against them must be dismissed with costs.

Re Williamses, Andrew v. Williamses (1) (1885), 54 L.T. 105, and *Jay v. Jay* (2), [1924] 1 K.B. 826, applied.

D **Notes.** As to the liability of the estate of a deceased tenant for life of settled land, see 16 HALSBURY'S LAWS (3rd Edn.) 469, 472, as to the liability of the tenant for life see 29 *ibid.* (2nd Edn.) 643-644, and for cases see 40 DIGEST (Repl.) 703-705.

Cases referred to :

(1) *Re Williamses, Andrew v. Williamses* (1885), 54 L.T. 105, C.A.; 40 Digest (Repl.) 702, 1981.

E (2) *Jay v. Jay*, [1924] 1 K.B. 826; 93 L.J.K.B. 280; 130 L.T. 667, D.C.; 40 Digest (Repl.) 701, 1970.

Witness Action.

The facts, which are summarised in the headnote, are set out in the judgment.

F *C. E. E. Jenkins, K.C.*, and *C. Lyttelton Chubb* for the plaintiffs, the children of Louisa Ann Young, the tenant for life under the power of appointment in John Field's will, given to Mary Ann Dyer Routledge, referred to *Re Williamses, Andrew v. Williamses* (1), *Jay v. Jay* (2).

Evidence was called as to the condition of the repair of the houses.

Owen Thompson, K.C., and *Charles Harman*, for the legal personal representatives of the surviving trustee of John Field's will.

G *H. H. Joy, K.C.*, and *H. C. Bischoff*, for the estate of Louisa Ann Young.

H **P. O. LAWRENCE, J.**—In this case the plaintiffs claim damages against their mother's estate for the failure of her to carry out the obligation which they allege she was under to keep certain leasehold houses in substantial repair. By an appointment of April 2, 1878, Mary Ann Dyer Routledge, in exercise of a power conferred upon her by the will of John Field, appointed that the trustees for the time being of John Field's will should, from and after her decease, stand possessed of the leasehold houses in question upon trust, after payment of the respective rents and the costs of insurance, and the performance and observance of all and singular the covenants reserved by and contained in the said leases, to pay to the plaintiff's mother or otherwise permit and empower her to receive and take the rents and profits of the leasehold premises during her life for her separate use without power of anticipation, and from and immediately after her decease then the leasehold houses should be held upon trust for all and every daughter and daughters of Louisa Ann Young, living at her death and attaining the age of twenty-one years or marrying under that age, in equal shares as tenants in common. Mary Ann Dyer Routledge died on Aug. 15, 1882, without having had any issue. Henry John Young, the surviving trustee of the will of John Field, died on March 27, 1909. His executors, although willing to appoint new trustees, declined to intermeddle with the trusts and have not acted as trustees of that will. On the death of Henry John **I**

Young, Louisa Ann Young, the equitable tenant for life, entered into the receipts of the rents and profits of the houses in question and remained in receipt thereof down to the date of her death on Jan. 18, 1922, whereupon her three daughters, the two plaintiffs and Mrs. Mills, became entitled in possession to the leasehold houses. Mrs. Mills, in September, 1923, assigned her interest to her two sisters, the plaintiffs. There is ample evidence to support the plaintiffs' allegation that during the time their mother was in receipt of the rents she failed to perform the repairing covenants to repair contained in the leases of the houses in question, but her legal personal representatives deny that she was under any obligation to perform those covenants.

The only question which now falls to be determined is whether the plaintiffs are right in their contention that she was under any such obligation. The plaintiffs rely upon the principle, recognised by the court in *Re Williamses, Andrew v. Williamses* (1) and *Jay v. Jay* (2), that a court of equity will compel a person who takes the benefit to accept the burden cast upon him by the donor. It has not been contended that the estate of the deceased tenant for life is liable on the ground of waste, as it is well settled, and not disputed, that an equitable tenant for life is not impeachable for waste. The sole ground on which the plaintiffs base their contention is that the instruments under which the deceased tenant for life became entitled to the rents contain a primary trust to apply the rents in performing the repairing covenants in the leases under which the property is held. Junior counsel for the estate of the deceased tenant for life, in his able argument, contended that as, by the will of the testator and by the appointment, the duty of so applying the rents is imposed upon the trustees of the will, and not upon the tenant for life, the tenant for life was under no obligation to apply the rents in performing the covenants and could retain the whole of the rents without any such application. He pointed out that the plaintiffs had the remedy in their own hands by procuring the appointment of new trustees, and insisting on them performing their duty, and argued that the principle invoked by counsel for the plaintiffs is inapplicable in the circumstances of the present case.

The question so raised is one of first impression, as counsel have been unable to find any authority which is directly in point. In my judgment, however, the principle that a person can only take a benefit cum onere is sufficiently wide to cover the facts of the present case. To accede to the contention advanced on behalf of the legal personal representatives of the late tenant for life would, in my judgment, be running counter to principle. The tenant for life, when, in the absence of any trustee, she entered into the receipt of the rents, had full knowledge of the primary trusts affecting them, and, in my opinion, she could not retain them for her own benefit without performing those primary trusts. It seems to me that the tenant for life, who, strictly speaking had no right to collect the rents at all, by entering into the receipt of them herself assumed the duties of the trustees, and became liable to perform the trusts affecting them as a condition precedent to her being entitled to retain the benefits conferred upon her. To hold the contrary would, in my judgment, be to allow her to take the benefit whilst repudiating the burden of the gift.

For these reasons I have come to the conclusion that the plaintiffs are right in their contention and are in substance entitled to the declaration which they have claimed; but the obligation which, in my judgment, was thus imposed upon the tenant for life, was only so imposed during the time that she was in actual receipt of the rents, namely, from March 27, 1909, down to her death on Jan. 18, 1922; and the liability of her estate is limited to the failure by her to repair during the time that she was in possession, and no further. And the liability of her estate is further limited to the amount of the rents which she received during that period. The proper order to make will be a declaration to the effect which I have stated, and then to direct any inquiry as to what damages, on the footing of the declaration, the plaintiffs are entitled in respect of the failure of the late tenant for life to perform

A the repairing covenants in the leases. As to the costs of the action, the legal personal representatives of the late tenant for life have quite properly put in issue the question of the liability of their testatrix, and, having failed on that issue, I think it is right that they should pay the plaintiffs' costs of action down to and including this judgment. The costs of the inquiry will be reserved. It may be that the damages will be purely nominal, in which case the question may arise as to the costs of the inquiry. I reserve the subsequent costs. In my opinion the legal personal representatives of the last surviving trustee of the will of the testator, who, by amendment, were added as defendants, were wholly unnecessary parties, and the action as against them ought to be dismissed with costs.

Solicitors : A. F. V. Wild; Syrett & Sons.

C [Reported by GEOFFREY P. LANGWORTHY, ESQ., Barrister-at-Law.]

ELLIS & CO.'S TRUSTEE v. DIXON-JOHNSON

[HOUSE OF LORDS (Viscount Cave, L.C., Lord Dunedin, Lord Atkinson, Lord Sumner and Lord Buckmaster), February 19, 20, 1925]

[Reported [1925] A.C. 489; 94 L.J.Ch. 221; 133 L.T. 60; 41 T.L.R. 336; 69 Sol. Jo. 395; [1925] B. & C.R. 54]

Bankruptcy—Set-off—Securities for debt held by bankrupt creditor—Wrongful sale of securities by bankrupt—Claim by trustee for debt—Date at which securities to be valued for purposes of set-off.

Judgment—Debt—Securities held by creditor—Creditor, having sold securities, unable to return them—Right of creditor to judgment.

The defendant kept a running account with his stockbrokers on the terms that the stockbrokers should render monthly accounts, carrying forward the balance on each account to the next account, and that the defendant should pay interest on any debit balance. The defendant deposited shares with the stockbrokers as security for any debit balance, which shares were not to be sold without his consent while his account was still open, and were to be returned to him on the closing of his account and the payment by him of any balance due. At all material times the shares could be freely bought and sold on the Stock Exchange. The stockbrokers sold some of the shares in 1921 without the assent of the defendant. In February, 1922, the stockbrokers were adjudicated bankrupt, which automatically closed the defendant's account. In August, 1922, the trustee in bankruptcy of the stockbrokers informed the defendant, by his solicitors, of the sale of the shares, of which the defendant till then had been unaware. In February, 1923, the trustee in bankruptcy rendered to the defendant an account in which credit was given for the price actually received for the shares, and a balance was shown as due from the defendant and later the same month the trustee issued a writ for this balance. The defendant from the beginning claimed the return of his shares, and refused to pay the account until the trustee agreed to return the shares on such payment. Alternatively the defendant claimed to set off against the sum due to the trustee the value of the shares sold as at the date of trial or writ, the market price of these shares being higher in August, 1922, than when they were sold, higher still in February, 1923, and even higher at the date of the trial. Subsequently, pursuant to an order of the trial judge, an account was taken by the

Master of what was due from the defendant to the trustee. The market price of the shares at the date of this account exceeded the sum which the Master found due from the defendant.

Held: a creditor holding securities could not have judgment for his debt if he could not return the securities because he had made away with them improperly; the trustee in bankruptcy had no greater rights than the bankrupts; he must, therefore, give the defendant credit for the value of the shares as at the date of the Master's account, and so the trustee's action failed.

Decision of the Court of Appeal, [1924] 2 Ch. 451, affirmed.

Notes. As to when a right of set-off is available in bankruptcy see 2 HALSBURY'S LAWS (3rd Edn.) 481, for cases see 4 DIGEST 389 et seq. and for Bankruptcy Act, 1914, s. 31, see 2 HALSBURY'S STATUTES (2nd Edn.) 365.

Case referred to :

(1) *Storne v. Thomas* (1870), 5 Ch. App. 219; 39 L.J.Ch. 168; 22 L.T. 359; 18 W.R. 385, L.C.; 43 Digest 839, 2853.

Appeal by the plaintiff trustee in bankruptcy from the decision of the Court of Appeal (WARRINGTON and SARGANT, L.JJ.; POLLOCK, M.R., dissenting), reported [1924] 2 Ch. 451, affirming a decision of LAWRENCE, J., reported [1924] Ch. 342.

The bankrupts were stockbrokers with whom the defendant had many years previously opened a speculative account which was still current at the date of their bankruptcy. As a security for any debit balance which might from time to time be owing by him on this account the defendant had deposited with the bankrupts the indicia of title to a number of investments, consisting of debentures, bonds, and shares of various companies, together with blank transfers to the approximate value of £15,000. Among the shares so pledged were 2,000 fully paid ordinary shares of £1 each in a company called Rubber Plantations Investment Trust, Ltd. (hereinafter referred as the Rubber shares), and 4,600 fully paid ordinary shares of 2s. each in a company called Kinta Kellas Rubber Estates, Ltd. (hereinafter referred to as the Kinta shares). The proportion which the value of the Rubber shares and the Kinta shares bore to the total value of the investments pledged was approximately two-fifteenths. Both the Rubber shares and the Kinta shares were regularly dealt with and could be freely bought and sold on the London Stock Exchange, and whenever prices are hereafter mentioned in connection with these shares, the prices ruling on the London Stock Exchange are referred to. The bargain, as between the defendant and the bankrupts, so far as material, was that the bankrupts should in each month render an account to the defendant, that the balance shown by each account should be carried forward to the next account, that interest at the rate of 1½ per cent. above bank rate should be charged on any debit balance, and that when the account was closed the bankrupts should render a final account, and, on such final account being rendered, the defendant should pay the balance due from him, and thereupon the bankrupts should return to the defendant the investments which he had deposited with them by way of security. In March, 1921, the bankrupts sold the whole of the Rubber shares and 3,600 of the Kinta shares, and in November, 1921, they sold the remaining 1,000 of the Kinta shares. The shares were sold at prices ruling on the Stock Exchange at the time of the sales, namely: 17s. 1½d. for the Rubber shares, and 2s. 3d. for the Kinta shares. The sales were unauthorised, having been effected without the knowledge or assent of the defendant whilst his account was still open. On Feb. 16, 1922, a receiving order was made against the bankrupts, and on the same day they were adjudicated bankrupt. The bankruptcy operated to close the defendant's account. On Feb. 16, 1922, the price of the Rubber shares was 13s. 3d. to 14s. 3d. and the price of the Kinta shares was 2s. to 2s. 3d. On April 27, 1922, the plaintiff, who was then unaware of the fact that the shares in question had been sold, wrote to the defendant informing him (inter alia) that the Rubber shares and the Kinta shares had been pledged by the bankrupts with certain of their creditors. Later on the plaintiff discovered the true

A facts, and thereupon wrote a letter dated Aug. 21, 1922, to the defendant's solicitors informing them that the Rubber shares and the Kinta shares had been sold during the year 1921. On Aug. 22, 1922, the price of the Rubber shares was 13s. 9d. to 14s. 9d., and the price of the Kinta shares was 2s. 4½d. to 2s. 7½d. The defendant, while admitting that his solicitors had full authority to act for him in all matters relating to his account, stated in evidence at the trial of the action that they did not inform him of the sale of the shares until Nov. 10, 1922, at which date the price of the Rubber shares was 21s. to 22s., and the price of the Kinta shares was 2s. 7½d. to 2s. 10½d. The defendant had at least one interview with his solicitors in the interval between Aug. 22, 1922, and Nov. 10, 1922, and they had ample opportunity of communicating the fact of the sale to the defendant directly after they had received the plaintiff's letter of Aug. 2. On Feb. 19, 1923, the plaintiff rendered to the defendant what purported to be a final account in respect of the bankrupts' dealings on behalf of the defendant. In this account the plaintiff gave credit for the proceeds received by the bankrupts in respect of the sale of the Rubber shares and of the Kinta shares as on the dates on which, and at the prices at which, these shares were sold. The balance shown to be due from the defendant on this account is £401 0s. 4d. On Feb. 26, 1923, the writ in this action was issued claiming £429 17s. 1d. (made up of the balance of £401 0s. 4d. together with interest up to date) and also claiming interest until payment. On Feb. 19, 1923, and at the date of the writ, the price of the Rubber shares was 26s. 3d. to 27s. 3d., and the price of Kinta shares was 3s. 3d. to 3s. 6d., and at the date of the trial the price of the Rubber shares was 27s. 7½d. to 28s. 1½d., and the price of the Kinta shares was 2s. 10½d. to 3s. 1½d. The plaintiff expressed his definite intention not to purchase any Rubber shares or Kinta shares to replace those sold by the bankrupts. He had throughout been willing to pay any balance which might be due from him on a proper account being stated, but had always insisted, that on payment of such balance he was entitled to have restored to him 2,000 Rubber shares, and 4,600 Kinta shares. He further claimed that in face of the plaintiff's expressed intention not to restore such shares, the plaintiff was not entitled to sue for the balance of the account at all. Alternatively, the defendant contended that he was entitled to set off against the balance of the account when finally ascertained the value of the 2,000 Rubber shares and of the 4,600 Kinta shares calculated at the mean price ruling on the day of the trial, or, alternatively, on the day when the writ was issued, by way of damages for the breach of the agreement to return the shares. The plaintiff, on the other hand, contended that he was entitled to have an account taken on the footing of the defendant being given credit in such account for the value of the shares, either at the date of the receiving order, or, alternatively, at the date when the shares were sold, or, alternatively, on the day when the defendant first had notice of the sale, and to recover from the defendant the balance which might be found due from him on taking such account without restoring the shares to him.

H In the Court of Appeal it was held by WARRINGTON and SARGANT, L.JJ., affirming the decision of LAWRENCE, J., that the principle that mortgagees were not entitled to sue for the mortgage debt if they had wrongfully parted with the mortgaged property was not inflexible, and that as only a small proportion of the investments pledged had been sold, and as the shares sold had a free market on the Stock Exchange, no injury would result to the defendant if the price of the shares sold was taken as on the date when a proper final account was rendered and set off against any balance found due. It was further held that the same result would ensue if damages were estimated for the breach of the agreement not to sell the Rubber shares, as the value of the shares at the date of the breach would be the measure of damages, and the date of the breach would be the failure to return the shares when a proper final account had been stated. The Court of Appeal accordingly ordered that an account should be taken of what was due from the defendant to the bankrupts' estate, and an inquiry as to the value of the Rubber shares at date of

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the certificate. The account was taken and a balance found to be due to the defendant. A

In his dissenting judgment SIR ERNEST POLLOCK, M.R., expressed the view that the account necessarily closed on Feb. 16, 1922, the date of the receiving order, and that it was at that date that the balance due was to be calculated and paid even if the rendering of the account were delayed to a later date; by the terms of the contract the defendant had to pay when the account was closed, and that contract created the dominant relation between the parties even though the relationship of mortgagor and mortgagees also existed between them, therefore the defendant could set off against the plaintiffs claim damages in respect of the shares improperly sold, but the date on which their value must be calculated must be the date of the receiving order. The plaintiff appealed. B

Owen Thompson, K.C., and E. W. Hansell for the plaintiff. C

C. E. E. Jenkins, K.C., and C. B. Marriott, for the defendant, were not called on to argue.

VISCOUNT CAVE, L.C.—I have always understood the rule in equity to be that, if a creditor holding security sues for his debt, he is under an obligation on payment of the debt to hand over the security, and if, having improperly made away with the security, he is unable to return it to his debtor, he cannot have judgment for the debt. If that rule had been strictly applied on the hearing of this action, the action must have been then and there dismissed. But LAWRENCE, J., took note of the fact that in this case the missing security consisted of shares which could be replaced by purchasing them on the market; and he applied the rule with this variation, that he directed the master, to whom it was remitted to ascertain the amount of the defendant's debt, to ascertain the market value at the date of his certificate of the missing shares, and to set that value off against the debt. Whether this direction so given took precisely the right form, need not now be considered. Speaking generally, it was a reasonable course to take, and if the shares had fallen in price it would have been advantageous to the plaintiff, the trustee in bankruptcy; but, as it turned out, the modification adopted by the learned judge was of no advantage to the plaintiff, as the value of the shares when ascertained in accordance with his direction exceeded the amount of the debt and there was nothing for the plaintiff to recover; and the action has now been dismissed. D E F

It is argued on behalf of the plaintiff that by reason of the bankruptcy of the creditors the rule to which I have referred should not have been applied in this case, but that a balance should have been struck as at the date of the receiving order, and that either the amount realised on the sale of the shares before that date or damages for their sale should have been set off under s. 31 of the Bankruptcy Act against the debt, and judgment given for the balance. I am unable to understand how the bankruptcy can have so modified the rights of the defendant. If immediately before their bankruptcy the brokers had sued the defendant for the balance owing on his account they would have been met and defeated by the equitable rule to which I have referred. The effect of the bankruptcy was to close the account which had been running and to transfer the rights of the bankrupts to the plaintiff, the trustee in their bankruptcy. But the rights of the plaintiff trustee were no larger than had been the rights of the bankrupts, and were subject to the like condition as to the return of the securities. There was no mutual credit within the meaning of s. 31 of the Act, for the right of the defendant was not to a money payment present or future, but to a return of his shares in specie as and when he paid off his debt. This right he used, and was entitled to use, as a weapon of defence only, and no question of a cross-claim or set-off really arose. It is true that in some of the letters written on behalf of the defendant, and even in the defence, a somewhat different position was for a time taken up; but the learned judge at the hearing considered the actual rights of the parties, and any necessary amendment of the pleadings must be taken to have been allowed. G H I

Upon the whole matter I think that the decision of LAWRENCE, J., and of the

A majority of the Court of Appeal was right, and accordingly that this appeal should be dismissed with costs, and I move your Lordships accordingly.

LORD DUNEDIN.—I concur.

LORD ATKINSON.—I concur.

B **LORD SUMNER.**—I concur. I only wish to add one word. In both courts below this transaction has been spoken of as an equitable mortgage. The fact is that both in practice and in a good many decisions, very similar, if not identical, transactions have been spoken of as pledges. I express no opinion on the question which this deposit of security really was, because it appears to me that on either view the inability of the mortgagee, or the pledgee, as the case may be, to return the security against payment of the debt constitutes equally a defence to the debtor under the circumstances.

LORD BUCKMASTER.—In expressing my opinion on this appeal, I cannot divest my mind of the idea that the underlying relationship to be considered is that established between the defendant and the bankrupts by the deposit with them of certain share certificates accompanied by blank transfers as security for the account the defendant had opened with the bankrupts as his stockbrokers. The bankrupts, through G. L. Bevan, a member of the firm, sold the shares without authority and subsequently delivered to the defendant an account purporting to treat them as still unsold. The defendant consequently knew nothing of the wrongful dealing with his property until some time after the receiving order had been made against the bankrupts on Feb. 16, 1922. When information was given to him as to the fact of the sale a correspondence passed, in which it was uncertain at one moment as to what line the defendant would take, but it is admitted that he never adopted the sale. Ultimately the trustee in bankruptcy of the bankrupts, took proceedings and sued the defendant on a specially endorsed writ for the balance of the account as on Feb. 16, 1922, credit being given for the price of the shares on that day. Had all the admitted facts been stated on that endorsement the action would have been demurrable, because the plaintiff was not in a position to hand over securities, and consequently were not able to maintain the action. It is perfectly true that originally such an action was maintainable at law and was restrained in equity, but now whenever the principles of law and of equity are in conflict the principles of equity prevail. No steps were, however, taken to stay the proceedings and the action came on for trial before LAWRENCE, J., when for the first time the rights of the parties were adjusted, not with strict regard to the pleadings in the matter—the pleadings appear to me to have overlooked the most critical point in the case—but on the footing that the defendant was entitled to redeem his securities and that the plaintiff on payment was bound either to hand over to him the securities themselves or to give him credit for their money equivalent as at the date when the account was certified. That is in the result the view taken both by LAWRENCE, J., and by the majority of the Court of Appeal, and, so far as I can understand, it is the view that would be accepted by the plaintiff, unless, as he contends, the Bankruptcy Act has altered the whole relationship.

H Section 7 of the Bankruptcy Act, 1914, on which the plaintiff relies, does not appear to me to touch the matter in the least; it merely provides that

I “no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt.”

A mortgagor is not the creditor of his mortgagee. He has merely the right to redeem, which is wholly unaffected by that section, and I desire to repeat what LORD HATHERLEY, then Lord Chancellor, said in *Stone v. Thomas* (1) (5 Ch. App. at p. 224):

"The jurisdiction of this court [referring to the Court of Chancery] is not ousted unless there is an express enactment in the statute which provides a new jurisdiction."

He was dealing there with an attempt to administer in Chancery the trusts of a deed registered under the Bankruptcy Act, 1861, and he held that there was nothing to render the relief in Chancery more effectual than in bankruptcy, and refused the application. But the principle enunciated is plain, and I can see nothing to oust the jurisdiction of the Court of Chancery to deal with the rights of a mortgagor who seeks redemption of his mortgaged securities by reason of either s. 7 or of the other sections to which our attention has been directed in this appeal. For these reasons I am of opinion that the motion made from the Woolsack should be acceded to.

Appeal dismissed.

Solicitors : *Piesse & Sons ; Vandercom, Stanton & Co.*

[Reported by EDWARD J. M. CHAPLIN, ESQ., Barrister-at-Law.]

DEUCHAR v. GAS LIGHT AND COKE CO.

[HOUSE OF LORDS (Viscount Cave, L.C., Lord Dunedin, Lord Atkinson, Lord Sumner and Lord Buckmaster), June 11, 1925]

[Reported [1925] A.C. 691; 94 L.J.Ch. 382; 133 L.T. 565; 89 J.P. 177; 41 T.L.R. 563; 23 L.G.R. 525]

Corporation—Powers—Express power to convert and manufacture gas residuals—Caustic soda necessary for conversion of residuum—Power to manufacture caustic soda—Implication—Gas Light and Coke Company's Act, 1868 (31 & 32 Vict., c. cvi), ss. 40, 43.

The G.L.C. Co. was incorporated under special statutes to make and supply gas, with power, under their private Act, to convert, manufacture, and deal with all products, refuse or residuum arising or obtained from the making of gas, to make and sell all articles produced from or by means of those several matters, to manufacture residuals and do all such things as the company deemed requisite for those purposes, and to construct, maintain, and use certain works for the manufacture and distillation of products and residuals from the manufacture of gas as the company might require or deem necessary or expedient for efficiently and economically carrying on its undertaking. Naphthalene was one of the residuals arising in the making of gas which could be converted into beta-naphthol, a marketable commodity. The best method of such conversion was by means of an electrolytic process through the use of caustic soda. The company, which had formerly purchased caustic soda for this purpose, erected a factory on their scheduled land and manufactured caustic soda themselves. Such manufacture involved the production of chlorine, which the company were able to use for the working up of other residuals. The company did not manufacture more caustic soda than was required for their own use, and did not sell either caustic soda or chlorine. In an action, claiming a declaration that the manufacture of caustic soda and chlorine and the erection of a factory by the company were ultra vires, and an injunction,

Held: the company, being expressly authorised to work up or deal with their residual products by converting them into a marketable article, had by reason-

A able implication a power to provide by the process of manufacture, instead of by purchase, the necessary materials for that purpose.

Dictum of LORD WATSON in *Baroness Wenlock v. River Dee Co.* (1), (1885), 10 App. Cas. at p. 362, applied.

Decision of the Court of Appeal, [1924] 2 Ch. 426, affirmed.

B **Notes.** All former public legislation relating to the supply of gas was expressly repealed by the Gas Act, 1948, which set up new public corporations responsible for the supply of gas, and impliedly repealed all inconsistent private legislation. This case, however, remains an authority on the construction of statutory powers.

As to the application of the doctrine of ultra vires to statutory corporations see 9 HALSBURY'S LAWS (3rd Edn.) 62-63, as to the doctrine see 6 *ibid.* 414-418, and for cases see 13 DIGEST (Repl.) 269 et seq.

C Cases referred to :

(1) *Baroness Wenlock v. River Dee Co.* (1885), 10 App. Cas. 354; 54 L.J.Q.B. 577; 53 L.T. 62; 49 J.P. 773; 1 T.L.R. 477; 13 Digest (Repl.) 275, 984.

(2) *A.-G. v. Great Eastern Rail. Co.* (1880), 5 App. Cas. 473; 49 L.J.Ch. 545; 42 L.T. 810; 44 J.P. 648; 28 W.R. 769, H.L.; 13 Digest (Repl.) 283, 1033.

D **Appeal** from the decision of the Court of Appeal (POLLOCK, M.R., WARRINGTON and SARGANT, L.JJ.) reported [1924] 2 Ch. 426, affirming a decision of ASTBURY, J., reported [1924] Ch. 422.

The facts, which are summarised in the headnote, appear more fully, together with the relevant sections of the statutes, from their Lordships' judgments.

E The plaintiff shareholder claimed a declaration that the manufacture of caustic soda and chlorine and the erection of a factory by the company were ultra vires, and an injunction.

The Court of Appeal held, affirming the decision of ASTBURY, J., that although the Act of 1868 might give no express power to make anything but gas, the reasonable implication was that the company might manufacture material proper for conversion of residuals and were not bound to purchase it.

F The plaintiff appealed.

Clauson, K.C., and *Dighton Pollock (H. L. Murphy with them)* for the appellant.

Sir John Simon, K.C., *W. A. Greene, K.C.*, and *Andrewes-Uthwatt*, for the respondents, were not called on to argue.

G **VISCOUNT CAVE, L.C.**—Notwithstanding the careful and complete argument which was addressed to your Lordships on behalf of the appellant, I do not feel any doubt as to the correctness of the decision of the Court of Appeal in this case. The respondent company, the Gas Light and Coke Co., is a company formed by statute for the purpose of making and selling gas. In the course of making gas from coal the company necessarily produce a number of residual products. It is obviously undesirable that these residuals should be wasted if they can be so dealt with as to acquire a money value, and it is not disputed that the statutes under which the respondents act authorise them to convert these residuals into a marketable state. Among these residual products is a substance called naphthalene, and naphthalene can profitably be converted into beta-naphthol, a substance which is said to be used in making dyes. That conversion is best effected by the use of caustic soda, and the respondents do convert their naphthalene into beta-naphthol in that way.

I For a time they provided the necessary caustic soda by purchase, but recently they have commenced, presumably for the purposes of economy, to manufacture it themselves. Caustic soda is made out of salt by an electrolytic process, and in the course of that manufacture chlorine is produced by a by-product. It appears from the evidence that the respondents only produce in this way so much caustic soda as is required for the purpose of converting their naphthalene into beta-naphthol, and that they only use the caustic soda produced by themselves for that purpose. Chlorine can be used for converting other residuals, but it does not appear from

the evidence that the chlorine, which is a by-product of the respondents' operations, is used only for that purpose; it appears that at all events some chlorine has been converted into bleaching powder and sold. A

The appellant is the secretary of another company which apparently deals in caustic soda, but being qualified for the purpose of bringing this action by the purchase of shares or stock in the respondent company, he has taken the objection that the respondent company have no power under their statutes to manufacture caustic soda even for use in converting their naphthalene into beta-naphthol and he has brought this action claiming an injunction to restrain them from making caustic soda. The action was dismissed by ASTBURY, J., whose decision has been affirmed by the Court of Appeal. B

There is no dispute as to the legal propositions which are to be applied to this case. It is enough to refer to the rule as laid down by LORD WATSON in *Baroness Wenlock v. River Dee Co.* (1), where he says this (10 App. Cas. at p. 362): C

"Whenever a corporation is created by Act of Parliament, with reference to the purposes of the Act, and solely with a view to carrying these purposes into execution, I am of opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from its provision." D

To that statement I may add a sentence from the speech of LORD SELBORNE in *A.-G. v. Great Eastern Rail. Co.* (2), where he said this (5 App. Cas. at p. 478):

"I agree with JAMES, L.J., that this doctrine (of ultra vires) ought to be reasonably and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorised, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires." E

With those statements of the law in mind I turn to the statutes in this case. The first material section is s. 40 of the Gas Light and Coke Company's Act, 1868, which commences in this way: F

"Subject to the provisions of this Act, the company may make and store and supply gas, and may convert, manufacture, and deal with, sell, and dispose of coke, tar, coal pitch, asphaltum, ammoniacal liquor, oil, and all other products, refuse, or residuum arising, remaining, produced by, or obtained from the making by them of gas, or the materials used therein, and may make and sell all articles produced from or by means of those several matters." G

I stop at that point. Applying that section to the particular facts in this case it appears to me to result in this, that the company may convert and deal with naphthalene; in other words, they may treat naphthalene by converting it into some other marketable product. It is plain that for the purpose of so converting naphthalene in this way you must have caustic soda, and accordingly the provision of caustic soda is incidental to the conversion of naphthalene. The only point is whether that caustic soda must necessarily be provided by the method of purchase or whether it is in the power of the company, as incidental to their power to convert, to make it themselves. If the section stood alone it would appear to me to be reasonably plain on the facts of this case that the manufacture of caustic soda is incidental to the process of the conversion of naphthalene, or, in other words, that the manufacture of caustic soda is a part of the process of conversion, but the statutes do not stop there. Section 43 of the same Act provides: H

"Subject to the provision of this Act, the company from time to time upon the gas lands [those are the lands which are in the possession of the company for the purposes of their undertaking] may continue, make, maintain, alter, and discontinue gasworks, buildings, retorts, gasometers, receivers, cisterns, I

A engines, machinery and apparatus, and may make and store gas, and may manufacture coke and other refuse and products remaining or obtained from making gas, and from materials used in or produced by the making of gas, and may construct, erect, maintain, and provide such works, buildings, machinery, apparatus, and materials, and do all such things as they deem requisite for those purposes."

B I stop there. Applying that section to this particular case it appears to give power to the company to manufacture refuse and products obtained from making gas and to provide apparatus and materials for that purpose. The word "manufacture" occurs there in a somewhat special sense. Plainly the purpose of the legislature cannot be to authorise the company to produce residual products, for a company

C making gas cannot help producing those substances. What is meant there is that the company may work up or deal with residual products by converting them into something else, presumably some marketable article. I think therefore the section properly read does authorise the company to convert its naphthalene into beta-naphthol and to provide the necessary materials for that purpose. Again, on that

D section I see no reason why the materials should not be provided by the process of manufacture, or why they should only be provided by the process of purchase. Then there follows the Company's Act, 1876. Section 5 of that Act provided that the company may take for any purpose of their undertaking certain lands therein described and may erect and maintain works for the manufacture and storage of gas and for the manufacture, conversion and storage of residual products. The word

E "conversion" there is entirely confined to the construction I have put upon it in the sections of the earlier Act. Then s. 64 of the same Act empowers the company to

"purchase, construct, maintain and use all such appliances connected with the manufacture of gas, and all such works for the manufacture or distillation of the products and residuals arising from or out of the manufacture of gas, upon the lands described in the schedule as they may require or deem necessary or expedient for efficiently and economically carrying on their undertaking."

F That section supports the same view; and lastly there is s. 13 of the Company's Act, 1903, which is to this effect:

G "The company may use the lands and hereditaments [referred to in the schedule to that Act] for making maintaining altering or discontinuing or for continuing to make or maintain thereon gasworks buildings retorts gasometers receivers cisterns engines machinery and apparatus and may thereon make and store gas and make coke and manufacture and deal with products refuse and residuals remaining or obtained from making gas or coke or from materials used in or produced by the making of gas or coke."

Then I omit some words, and the section proceeds:

H "And provide on the said lands and hereditaments such works buildings machinery apparatus and materials as the company deems requisite for the aforesaid purposes or any of them."

I If it were, or could be, suggested that the company in this case were engaged in manufacturing caustic soda for the purpose of sale, the result might be very different, but it is quite plain, on the evidence, that they are doing no such thing; they are making caustic soda only for the purpose of using it in the process of converting one of their residuals into a marketable article. As regards the chlorine, that appears to me to be a small matter. Chlorine is not made for the sake of making chlorine; it is a necessary by-product evolved in the process of making caustic soda. Chlorine possibly will be used for converting some residual into something which can be sold, but in any case it must be got rid of, and I do not think the plaintiff has said in his pleading, and it is not the fact that the company in that respect were going beyond their powers. As a summing-up of the case I would like

to adopt the statement which is made by WARRINGTON, L.J., in his judgment, where he says this ([1924] 2 Ch. at p. 427):

"My view in reference to the facts of this case may be thus summed up: The defendant company have express powers to convert naphthalene into beta-naphthol; they have by reasonable implication a power to provide the proper re-agent for that purpose, namely, caustic soda; a proper and reasonable means of providing that substance is to make it, and to do so not being excluded they have by reasonable implication the power to provide the substance by that means."

I entirely agree with this statement. I think that the appeal fails and I move your Lordships that it be dismissed with costs.

LORD DUNEDIN.—I also, since I came into possession of the facts of the case, have not felt any doubts that the decision of the Court of Appeal was right. We were favoured with a very careful and minute analysis of the various statutes which apply to this company. Speaking for myself I do not think the case has much help from or depends upon such analysis. I look at the subsequent statutes as being exegetical of the leading statute of 1868, and especially of s. 40 thereof. That section put into ordinary and non-technical language appears to me very clearly to authorise the company to put the residual products into such a shape as to make them commercially valuable. Then we have to see whether what was done falls within the doctrine of LORD WATSON, which has been quoted by my noble and learned friend the Lord Chancellor. Even that dictum, I think, is only an expansion of the old brocard, *quando aliquid conceditur conceditur et id sine quo res ipsa esse non potest*. One must have a re-agent for dealing with these residual products, and I cannot see that there is really any difference between buying the re-agent and providing it by manufacture in one's own works. Of course, at the same time, I say this, that if a case had been made that under cover of doing something incidental to the proper exploitation of waste products the respondents were really entering the market as producers of some product, not itself a residual product, and thereby really becoming manufacturers of some other article than that which they were allowed to manufacture under their statutes, they might, I think, have been restrained. No such case has been made, and I think that the appeal fails.

LORD ATKINSON.—I concur. I think the judgment of the Court of Appeal was right and for the reasons given in the separate judgments there.

LORD SUMNER.—I concur.

LORD BUCKMASTER.—I concur.

Appeal dismissed.

Solicitors: *Baker, Blaker & Hawes; Parker, Garrett & Co.*

[*Reported by* EDWARD J. M. CHAPLIN, Esq., *Barrister-at-Law.*]



